Environmental Defenders Office

REFORM OF THE *ENVIRONMENTAL PROTECTION ACT 1986* (WA)

SUBMISSIONS

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BACKGROUND

The *Environmental Protection Act 1986* (WA) (**EP Act**) came into force over 30 years ago and is in urgent need of reform to adequately respond to modern environmental issues. The Exposure Draft Bill (**draft bill**) and the 'Modernising the *Environmental Protection Act* Discussion Paper' (**discussion paper**) were published by the Department of Water and Environmental Regulation (**DWER**) on 28 October 2019. The draft bill comprises the proposed legislative changes, and the discussion paper outlines the general themes of these changes as well as suggesting further issues for consideration.

As a community legal centre, the Environmental Defenders Office (**EDO**) advocates for access to environmental justice for the WA public. Unfortunately, there are several major aspects of the EP Act which do not deliver on community expectations. The submissions of EDO in relation to the review of the EP Act are outlined below.

NOTE: In this submission, where amendments are suggested the added text is italicised and there is strikethrough on deleted text (unless otherwise indicated).

GREENHOUSE GAS EMISSIONS AND CLIMATE CHANGE

Our office is often approached by members of the public concerned about WA's increasing greenhouse gas emissions and the impacts of climate change on the WA environment. The current legal framework in WA, including the EP Act, does not provide clear avenues for the community to seek climate justice nor an administrative framework for decision-making in the context of climate change. Failing to address climate change fundamentally undermines the entire purpose and object of the EP Act in protecting the environment of WA, making it a key area for reform.

Many Australian states and territories, including Victoria, New South Wales, South Australia and the Australian Capital Territory, have introduced legislation that specifically deals with climate change and greenhouse gas emissions. EDO strongly supports the introduction of specific climate change legislation, such as a Zero Carbon Act for Western Australia as recently proposed by a group of distinguished scientists and academics.

RECOMMENDATION 1: Introduction of new legislation to specifically deal with climate change and greenhouse gas emissions, in the form of a Zero Carbon Act.

In the absence of this legislation, the EP Act is in need of urgent reform to modernise the existing statutory assessment and offence frameworks in order to address and regulate greenhouse gas emissions and respond to climate change. The EP Act currently contains no references to greenhouse gas emissions or climate change. Whether greenhouse gas emissions are included in the definition of "pollution" or "environmental harm", and

therefore can be regulated under Part V of the EP Act, has been the subject of differing views and ongoing debate. EDO is of the view that Greenhouse gas emissions clearly constitute pollution and environmental harm under the EP Act. However, to remove any confusion, the EP Act should be reformed to clarify this.

We acknowledge that it was held by the Supreme Court in *Palos Verdes Estates Pty Ltd v Carbon* [1991] WASC 115 that there were several implied qualifications on the terms in the section 3A definition of "pollution". This includes the dictionary meaning of "pollution" as "to make physically foul, impure or filthy", and alteration of the environment being "to make it harmful or potentially harmful to the health, welfare, safety or property of human beings or harmful or potentially harmful to animals, birds, fish, other aquatic life, plants or vegetation". In our view these limitations were imposed in the specific circumstances of that case and of the EP Act as it then stood and are no longer appropriate. Given there has been substantial changes to the EP Act and there is now a clear drive to modernise particular provisions to better respond to current environmental and regulatory issues such as climate change, we consider that the definition of "pollution" in section 3A should be formally updated and clarified.

RECOMMENDATION 2: Amendment of definition of "pollution" in section 3A to clarify that it includes climate change pollution through insertion of a new paragraph (ba) as follows : "through contribution to climate change" OR "to the detriment of the climate system".

The effective regulation of greenhouse gas emissions and climate change through an updated definition of "pollution" can be further supported if considered necessary by amending other definitions to clarify that these include greenhouse gases. The definitions suggested below are modelled on the definitions of waste and greenhouse gas substance contained in the *Environment Protection Amendment Act 2018* (Vic).

RECOMMENDATION 3: Amendment of definition of "waste" in section 3 to include greenhouse gas substances and inclusion of a definition of "greenhouse gas substance" as follows:

> ***"greenhouse gas substance"*** *means -*
>
> *(a) carbon dioxide, methane, nitrous oxide or sulphur hexafluoride, whether in a gaseous or liquid state; or*
>
> *(b) a hydrofluorocarbon or a perfluorocarbon, whether in a gaseous or liquid state, that is specified in regulations made under the National Greenhouse and Energy Reporting Act 2007 of the Commonwealth.*
>
> …
>
> "**waste"** includes ~~matter –~~
>
> (a) *matter* whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment;
>
> (b) *matter* prescribed to be waste; *and*
>
> *(c) a greenhouse gas substance emitted or discharged into the environment.*

EDO also supports further amendments to address climate change, including new provisions to address climate change mitigation and adaptation and to enable regulations to be made in relation to greenhouse gas emissions. For example, the *Environment Protection Amendment Act 2018* (Vic) provides the Governor in Council with the power to make regulations with respect to the following:

- Regulating or prohibiting the emission or discharge of greenhouse gas substances, including for the purposes of contributing to the State's long-term emissions reduction target and interim emissions reduction targets under the *Climate Change Act 2017* (Vic).

- Prescribing standards for the emission or discharge of greenhouse gas substances, including emission intensity standards and maximum levels of emissions of greenhouse gas substances.
- Prescribing the conditions under which greenhouse gas substances may be emitted or discharged.

RECOMMENDATION 4: Inclusion of dedicated provisions addressing climate change mitigation and adaptation. For example, provisions that provide that strategies, policies or action plans may or must be prepared in relation toclimate change and adaptation.

RECOMMENDATION 5: Amendment of Schedule 2 to include greenhouse gas substances in the matters in respect of which the Governor may make regulations in section 123. In particular allowing the Governor to make regulations that limit, regulate, prohibit or prescribe greenhouse gas emissions or standards and conditions relating to greenhouse gas emissions.

PART I – PRELIMINARY

SECTIONS 3 AND 3A – Definitions

Most of the proposed changes to Part I involve changes to the "Terms used" (i.e. the definitions) to be consistent throughout the EP Act. EDO supports these changes.

In our experience, one significant source of confusion is the meaning of "significant" in the context of proposals. While the Western Australian Environmental Protection Authority (**EPA**) provides an indication of its interpretation and decision-making process in relation to this term, we consider that the level of discretion and ambiguity should be more limited to provide greater clarity and certainty for the community. EDO supports shifting the criteria for significance from the EPA's Environmental Impact Assessment Procedures Manual (**Procedures Manual**) (see p 11) to the body of the EP Act, as mentioned in the discussion paper. We also note our further recommendations as to mandatory criteria for all decision-making under the EP Act, meaning that the determination of significance should also be guided by the object and principles of the Act and the public interest.

RECOMMENDATION 6: Include the criteria for determining significance as a definition in a newsection3B entitled "Criteria for determining significance" that provides: "When considering the significance of potential impacts, the Authority shall have regard to –

(a) the values, sensitivity and quality of the environment which is likely to impacted;
(b) the extent (intensity, duration, magnitude and geographic footprint) of the likely impacts;
(c) the consequences of the likely impacts (or change);
(d) the resilience of the environment to cope with the impacts or change;
(e) cumulative impacts with other existing or foreseeable activities, developments and land uses;
(f) connections and interactions between parts of the environment to inform a holistic view of impacts to the whole environment; and
(g) the level of confidence in the prediction of impacts and the success of proposed mitigation."

SECTION 4A – Object and principles

Section 4A of the EP Act outlines the object of the EP Act as being to "protect the environment of the State", having regard to a number of environmental principles which include the precautionary principle, the principle of intergenerational equity, the principle of the conversation of biological diversity and ecological integrity, principles relating to improvised valuation, pricing and incentive mechanisms (including the polluter pays principle) and the principle of waste minimisation.

Status of object and principles

The discussion paper states that "the second reading speech goes on to clarify that it would be reasonably expected that these principles might be given specific consideration in the development of policies, strategies and broad regulations". However, decision-makers are not expressly required to consider these principles under the EP Act.

The discussion paper refers to the potential amendment of the EP Act to require decisions made under Part II, IV and V to give effect to the objects and principles contained in section 4A. EDO strongly supports an amendment to require decision-makers and regulators to apply and consider the principles of the EP Act in *all* decision-making.

For example, Chapter 2 of the *Environment Protection Amendment Act 2018* (Vic) specifies the principles of environment protection and expressly requires decision-makers to have regard/take into account these principles. We note that the provisions of this legislation will not come into effect until later this year.

RECOMMENDATION 7: Amendment of section 4A to require decision-makers to have regard to, and apply, the object and all principles of the EP Act when making decisions.

Additional principles

The principles in section 4A in our view would benefit from review in comparison to other jurisdictions. The principles in the *Environment Protection Amendment Act 2018* (Vic), for example, include the precautionary principle and the principle of equity and conservation, and various other important principles of good decision-making including the principle of integration of environmental, social and economic considerations, principle of proportionality, principle of primacy of prevention, principle of shared responsibility, principle of polluter pays, principle of waste management hierarchy, principle of evidence-based decision-making and the principle of accountability. These additional principles support better administrative decision-making and environmental outcomes, and therefore EDO supports their inclusion in the EP Act.

RECOMMENDATION 8: Include the following additional principles, as defined in the *Environment Protection Amendment Act 2018* (Vic), in section 4A:

- Principle of proportionality
- Principle of primacy of prevention
- Principle of shared responsibility
- Principle of evidence-based
- Principle of accountability

Environmental focus of principles

In our view the EP Act principles should also be reviewed and strengthened, to ensure the focus is on proactively ensuring protection of the environment, without deference to non-environmental factors. The principle of waste minimisation in particular should be amended as its practical application does not prioritise environmental protection or lead to good environmental outcomes. We consider that the term "practicable" imports commercial considerations and defers to proponent convenience rather than supporting the public interest and the fundamental object of the EP Act. To this end, EDO supports amendment of both the principle of waste minimisation and part of the precautionary principle where the term "practicable" could cause confusion and lead to outcomes that are inconsistent with the purpose of the EP Act.

We note that while practicability may be a consideration in administration of the EP Act, this concept should not qualify the fundamental object and principles and their environmental focus.

RECOMMENDATION 9: Amendment of section 4A to reword:

- the principle of waste minimisation as follows: "All ~~reasonable and practicable~~ *possible* measures should be taken to minimise the generation of waste and its discharge into the environment"; and
- paragraph (a) of the precautionary principle as follows: "careful evaluation to avoid~~, where practicable,~~ serious or irreversible damage to the environment; and".

SECTION 4B –Decision-making criteria

The EP Act currently contains no mandatory criteria that outlines what decision-makers such as the EPA, DWER and the Minister for Environment (**Minister**) must consider in making decisions and discharging their functions. This provides substantial discretion and results in a lack of consistency in decision-making.

The discussion paper refers to the potential inclusion of mandatory statutory criteria for decision-makers to consider when making decisions under the EP Act. EDO strongly supports amendments to include a new section that outlines mandatory criteria for decision-making under the EP Act including determinations of whether proposals have a "significant effect on the environment", recommendations by the EPA as to whether a proposal may be implemented and Ministerial approval of proposals.

Object and Principles of EP Act

The object and principles of the EP Act contained in section 4A of the EP Act should be included in this criteria. This require decision-makers to apply the object and principles in decision-making and ensure that any delegation of responsibility under the EP Act to other regulatory bodies and processes is required to prioritise the protection of the environment and exercise functions in accordance with the object and principles of the EP Act.

Climate Change

Climate change and greenhouse gas emissions should also be included in the mandatory criteria. For example, section 17(2) of Victoria's *Climate Change Act 2017* requires decision-makers to have regard to the potential impacts of climate change and the contribution to the State's greenhouse gas emissions of relevant to the decision or action. The relevant considerations for this include:

(a) potential biophysical impacts; and

(b) potential long and short term economic, environmental, health and other social impacts; and

(c) potential beneficial and detrimental impacts; and

(d) potential direct and indirect impacts; and

(e) potential cumulative impacts.

It also outlines relevant considerations in having regard to the potential contribution to the State's greenhouse gas emissions as including:

(a) potential short-term and long-term greenhouse gas emissions; and

(b) potential direct and indirect greenhouse gas emissions; and

(c) potential increases and decreases in greenhouse gas emissions; and

(d) potential cumulative impacts of greenhouse gas emissions.

Cumulative Impacts

Cumulative impacts should also be included in the list of mandatory criteria for decision-making (addressed in detail below). For example, Queensland's *Environmental Protection Act 1994* includes in mandatory criteria for decision-making "the cumulative impacts of all releases authorised or directed under this Act, including releases under other temporary emissions licences that have been issued or applied for".

Decision-makers such as the EPA, DWER and the Minister generally assess the impacts of proposals in WA in isolation, not in the context of other related proposals Further, the greenhouse gas emissions of individual proposals are generally considered, not the cumulative impact of these emissions in the context of other proposals or their contribution to global greenhouse gas emissions and harm caused by climate change. For example, Woodside's "Burrup Hub Vision" comprises various different proposals that are interconnected. Despite this, the EPA has allowed each proposal to be referred and assessed separately, with referral documentation and reports in relation to each proposal failing to recognise or address the cumulative impact or emissions of all the proposals on WA's environment. Our clients have expressed concern that the separation of the components of the "Burrup Hub" project is inappropriate and fails to take into account the connection and relationship between the proposals or the total overall, aggregated and cumulative impact of the expansion project. However, in recognition that the decision has already been made to assess the proposals separately, we made submissions that the assessments of each proposal should, at the very least, include the emissions from existing and future proposals comprising the Burrup Hub project and their cumulative impacts and contribution to global greenhouse gas emissions.

The discussion paper refers to the potential amendment ofsection 38A to make it mandatory for the EPA to explicitly consider and report on the cumulative impacts of every proposal it receivesand include of "broader powers for strategic assessments to allow cumulative impacts to be more fully considered and regionally important environmental values protected".

EDO strongly supports amendments to expressly require consideration of cumulative impacts for *all* decision-making. The importance of cumulative impacts is widely recognised. For example, the WA Government's Environmental Offsets Guidelines state that:

> *In determining the significance of an impact, it is important to consider the impacts in the regional context. In isolation, a project may not be considered to have a significant impact. However, when considered along with other projects, activities and threats in the region, the cumulative impacts may be significant.*[1]

The consideration of cumulative impacts in environmental impact assessment is also supported by the International Association for Impact Assessment's best practice principles, which state "the effects on climate change of any single proposal may appear insignificant, but may not be when added to numerous other past, current and future projects".[2] Further, the New South Wales Land and Environment Court emphasised the importance of cumulative impacts of emissions from projects being considered in EIA in *Gray v Minister for Planning* [2006] NSWLEC 720 at [122], stating that:

> *"one important consideration [in environmental impact assessment] must be the assessment of cumulative impacts of proposed activities on the environment".*

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[1] WA Environmental Offsets Guidelines, p 9. http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/WA%20Environmental%20Offsets%20Guideline%20August%202014.pdf

[2] https://www.iaia.org/uploads/pdf/SP8.pdf p 2.

RECOMMENDATION 10: Addition of a new section in the EP Act that outlines mandatory criteria for decision-making that requires regard to be had to the following matters -

(a) the object and principles of this Act;

(b) potential contribution to the State's greenhouse gas emissions and impacts of climate change relevant to the decision or action; and

(c) cumulative impacts (*of all releases authorised or directed under this Act, including releases under other temporary emissions licences that have been issued or applied for*);

SECTION 4C - Right to reasons

There is currently no express statutory right to request the reasons for a decision or exercise of power under the EP Act. In our experience, the public expects and is entitled to reasons for decision-making that affects their interests – be it directly, for proponents or neighbours, or indirectly, for those concerned about environmental impacts and decisions affecting the environment as a public asset.

A right to reasons provides greater transparency and accountability, in turn supporting better decision-making and greater public confidence in the administration of the EP Act. As a community legal centre, we also consider a right to reasons to be fundamental for access to justice. Without knowing the reasons for a decision, it is very difficult for a member of the public to understand the basis for a decision and in particular how community views and submissions have been taken into account.

EDO considers that a reformed EP Act should require all decision-makers under the EP Act to provide written reasons where requested. This section may be modelled on, for example, section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

RECOMMENDATION 11: Addition of a new section 4C, entitled "Right to reasons", in the EP Act which provides:

"(1) In this section –

decision to which this section applies means a decision, conduct or exercise of power under a provision of this Act;

statement of reasons means a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision.

(2) Any person may request a statement of reasons in relation to a decision to which this section applies –

(a) within 28 days of the decision; and

(b) by providing written notice of the request to the person or public authority who made the decision.

(3) Within 28 days after receiving a request under subsection (2), the person or public authority must prepare and publish the statement of reasons."

PART II – ENVIRONMENTAL PROTECTION AUTHORITY

The draft bill proposes the following changes to Part II:

(a) allowing the Chairman of the EPA to perform its duties on a part-time as well as full-time basis; and

(b) providing for the use of modern technology such as telephone or other means of instantaneous communication such as teleconference during meetings; and

(c) allowing for decisions to be made without a meeting.

The discussion paper raises three issues for further consideration with respect to the EPA's role:

1. Requiring the EPA to prepare and publish its policies on environmental impact assessment and environmental protection in a manner consistent with the objects and principles of the EP Act, and ensuring that the published policies are mandatory considerations for the EPA – EDO supports this amendment (see above inclusion of published policies in mandatory criteria for decision-making in section 4B).

2. Including eligibility criteria for the appointment of EPA Board members;

EDO does not oppose the above proposed amendments.

While EDO does not oppose the potential of removing duplication between the EP Act and the *Heritage Act 2018* (WA) given the EPA is not the best entity to assess heritage or culture, as highlighted in the discussion paper, we emphasise that caution needs to be exercised to ensure that this amendment does not create loopholes that result in impacts on environmental values or heritage values being omitted or overlooked during assessment.

SECTION 18, 19 AND 20 - Delegations

The agenda of regulatory efficiency has resulted in the deferral and delegation of responsibility for the EP Act to other regulators or decision-making bodies such as the Department of Mines, Industry Regulation and Safety (**DMIRS**).

The discussion paper discusses the potential to clearly control any delegation of decision-making to non-environmental agencies or officers, to ensure these powers are exercised to protect the environment. EDO supports this amendment and considers that a qualification on the power of delegation is required to the effect that it cannot be exercised to give power to a person or agency that does not have environmental protection as its objective. This could be beneficial for ensuring decision-making is in the public interest and consistent with the purposes of the EP Act. In this regard we note Recommendation 10 above as to a general provision expressly requiring consideration of the object and principles of the EP Act in the exercise of statutory power under the Act (which would apply to decision-makers acting under a delegation).

RECOMMENDATION 12: If Recommendation 10 is not adopted, a new section 17A, entitled "Limits on delegation" should be inserted to provide: "Notwithstanding anything in sections 18, 19 and 20, powers and duties under the Act shall not be delegated to any person or public authority that does not have as its purpose or object the protection of the environment."

PART III – ENVIRONMENTAL PROTECTION POLICIES

The process for the creation of an environmental protection policy (**EPP**) by the EPA is long and compliated. This process, as noted by the 2016 *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessment under the Environmental Protection Act 1986 (WA)* by P D Quinlan SC, E M Heenan andS U Govinnage, requires 11 steps to be undertaken before an EPP has the 'has the force

of law as if it were enacted under the EP Act' (at [3.74]). This process was described as 'a lengthy, tortuous process involving all stakeholders, public and private…' by President McLure in *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [56]. It is no wonder, therefore, that very only four EPPs have been enacted in the past 28 years – with the last EPP being enacted over 8 years ago. This, along with the extended period of time between EPP enactments, demonstrates the issues with the EPP creation process.

The court in *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 found that due to the statutory-based EPPs, all other non-statutory policies created by the EPA are not mandatory relevant considerations. The result of this case that the only policies that are mandatory relevant considerations for the EPA are EPPs. The EPA does not, therefore, have to consider any of the other policies, guidelines or principles it has developed when undertaking environmental assessments, such as factor guidelines and technical guidance.

The discussion paper states that no changes are proposed at this time to Part III . However, it highlights the following issues for further consideration in relation to EPPs:

1. Amending section 33 of the EP Act to require public input into the EPA's advice to the Minister on the revocation of existing EPPs;

2. Requiring parliamentary approval of the Minister's decision to validate decisions relating to revocation of EPPs;

3. Revising Part III to facilitate the broader adoption of EPPs.

EDO recognises the importance of EPPs in the environmental assessment process. We strongly support a review of the effectiveness of EPPs against the object of the EP Act and potential reforms. In particular, EDO's position is that the process for enacting EPPs should be less time-consuming and complicated in order to facilitate greater adoption and application of these policies.

RECOMMENDATION 13: Part III be reviewed for its current effectiveness against the object of the EP Act. In particular, Part III should be amended to shorten and simplify the EPP process to ensure the development and formalisation of these important tools is more practical.

In the interim, the current EPPs should be preserved, in recognition of their significance and statutory status.

RECOMMENDATION 14: The process for revoking an EPP as set out in section 33(2) should be amended as follows: "The Minister may, ~~having obtained and considered~~ *with* the advice of the Authority *and approval* of Parliament in the matter, by order revoke an approval given under section 31(d)."

PART IV – ENVIRONMENTAL IMPACT ASSESSMENT

DIVISION 1 – REFERRAL AND ASSESSMENT OF PROPOSALS

SECTION 38 - Scope of public referrals

The draft bill and discussion paper do not mention the scope of section 38 as a matter for reform. In our view, however, section 38 is of particular importance for the community where environmental concerns arise. There are few opportunities for members of the public to initiate statutory environmental protection processes, the power to lodge referrals under section 38(1) being one of these.

We recognise that the environmental impact assessment process is not suited for every environmental matter and the efficient use of government resources necessitates some filtering of concerns that members of the public may wish to raise. The limitation of public referrals to "significant" proposals appears to be designed

for such a purpose – to ensure trivial or vexatious claims do not take up valuable resources that should be deployed in the broader public interest. However, we consider that the current section 38(1) is failing to deliver good environmental outcomes and efficient administration of the EP Act.

In our experience as a community legal centre, there are very few, if any, members of the public seeking to refer trivial or vexatious matters under section 38. We consider that the problem is overstated and unnecessarily prohibitive of already limited public participation in the processes EP Act. In our view, removing the word "significant" from section 38(1) would not create more work for the EPA. In fact, from our experience of the EPA's careful approach to delineating between significant and non-significant proposals at the referral stage (which appears to often involve legal advice), mean that removing this word could reduce work required. We note that the EPA has the power to decide not to assess a referred proposal which be exercisable in relation to any referrals it considers to not disclose sufficient environmental impacts to warrant assessment.

RECOMMENDATION 15: Deletion of the word "significant" from section 38(1) to remove the two-tier system of subject matter that may be referred.

RECOMMENDATION 16: In the alternative, there are more appropriate means to prevent use of referrals for private or trivial issues, for example through inserting a new section 38AC, entitled "Authority may terminate trivial or vexatious referral" to provide that: "The Authority may decide to terminate a referral if it considers the likely environmental impacts of the propsal to be insignificant". We note that this decision should be published and therefore would also require insertion of a new section 39(1)(ad) to include: "any decision made under section 38AC".

SECTION 38AA - Amendment of referrals

The reforms give proponents the ability to amend a proposal after it has been referred to the EPA through a new section 38AA. EDO supports this change as it clarifies that initial referral documentation, particularly where it is lodged by a third party, is not the final determination of the scope of a proposal. However, as discussed further below, there must be a record of such a decision to ensure transparency and accountability.

RECOMMENDATION 17: If a new section 38AB is inserted, there should be a new section 39(1)(ab) to include: "any written notice received and any decision made under section 38AA".

SECTIONS 38A & 38AB - Termination of referrals

We oppose the insertion of section 38AB to allow what is effectively a secret proponent veto on public referrals. We do, however, support an amendment to provide for termination of referrals where a proponent will no longer proceed with the proposal. In such circumstances, under the current EP Act, the referred proposal simply ceases to be a "proposal", with its status in terms of sections 38(5j) and 39A unclear.

We do not consider that simply providing for automatic extinguishment of referrals by a proponent's own motion is a useful solution. In recognition that a referral has been made (and therefore a person, be it a proponent or third party, has considered that there may be impacts on the environment sufficient to warrant assessment by the EPA), its progress through the detailed processes of Part IV should only be terminated if those impacts are sufficiently certain not to occur. Automatic termination of a referral on the basis that a proponent "does not wish to proceed" is not in this way proportionate. There should be a more absolute standard imposed to ensure this provision cannot be used as a proponent veto.

We also consider that the EPA, rather than a proponent, should be able to exercise control in withdrawing the referral and have the ability to consider whether the proponent will in fact not proceed as well as if a proposal

does in fact exist (e.g. if the proponent does not wish to proceed but another party does). This is the format proposed in the draft bill for termination of assessment under section 40A in similar circumstances.

RECOMMENDATION 18: The wording of a new section 38AB(1) should be amended to provide: "At any time before the Authority has decided whether or not to assess a proposal referred to it under section 38, if the proponent provides written notice to the Authority that it will not proceed with the proposal the Authority may, after consulting the referrer, declare the referral to have been withdrawn."

Any amendment should also ensure transparency over a termination/withdrawal process. As currently proposed, section 38AB would allow for a situation in which a member of the public lodges a referral and is never notified that the referral has been withdrawn. This is problematic in principle, as well as posing the practical issue that the proponent could reconsider and later form a new intention to proceed with the proposal without any way for the member of the public to know that the proposal once again exists and is capable of being referred. To ensure public confidence and the integrity of public referrals, a decision to withdraw a referral should be required to be published.

RECOMMENDATION 19: If a new section 38AB is inserted, there should be a new section 39(1)(ac) to include: "any written notice received and any decision made under section 38AB".

SECTIONS 38A & 39A - Processing referrals

The EPA has expressed a view that the timeframe in section 39A is subject to a further indefinite period in which a decision on whether a purported section 38 referral is valid may be made.

From a legal perspective, it is unclear on which provisions of the EP Act this view is based. The wording of section 39A(3) is unambiguous, and in our view clearly requires a decision on assessment to be made "within 28 days after the referral of the proposal", being the date the referral is made. A referral is not transmogrified from invalid to valid upon receipt of legal advice to confirm its validity, and this part of the EP Act (the preliminary referrals stage) is not built to accommodate such a level of bureaucratic caution. There are very few provisions of the EP Act which set a time limit on decision-making and these should be treated as deliberate and clear expressions of Parliament's intention.

The only exception to the timeframe is clearly and expressly set out in section 38A, which provides that the period does not begin to run where the EPA has made a request for further information on the grounds that it does not have sufficient information about a referred proposal to make a section 39A decision (noting that section 38A makes no mention of information sought in order to make a decision as to whether that proposal's referral was technically valid). There is a clear rationale to this limited exception, being to ensure the decision on assessment is made on an informed basis, which is also reflected in section 39A(2). There is no intention evident in the EP Act that the section 39A time limit should be subjugated to any other process. We consider that the addition of words to section 39A(3) as recommended below may assist to clarify that the 28 day limit should not be open to arbitrary and indefinite extension depending solely on internal government processes.

From a practical perspective, such an interpretation can prevent the proper operation of Part IV of the EP Act. Firstly, the power to refer significant proposals under section 38(1) is one of the very few avenues for the public to initiate environmental protection under the EP Act (noting that a decision to assess a referred proposal stays implementation of proposals and decisions allowing implementation, through sections 41A and 41 respectively). Secondly, fine distinctions as to the nature of environmental impacts (i.e. whether they are within a legal definition of "significant") are not apt for the referral stage of Part IV but rather are properly to be identified and considered in detail where a proposal proceeds to assessment, a stage which is not subject to any time limit. The efficient administration of the EP Act, and the public interest in the protection of the environment, is hindered by misinterpretation of the referral process and section 39A in particular.

We note in particular the Exmouth Gulf Shipping proposal which was referred under section 38(1) on 20 November 2018 by one of our clients. A request under section 38A was not made until 28 May 2019 (with information received on 2 August 2019) and the referral was not advertised until 9 September 2019. The implementation of this proposal had actually concluded before the EPA had even concluded the public comments period. In this stark example the advertisement of the referral was made almost nine months after it was lodged, during which the environmental impacts of the proposal proceeded without assessment, monitoring, regulation or enforcement. This clearly demonstrates the practical need for reform in this area of the EP Act.

RECOMMENDATION 20: the wording of section 39A(3) should be amended as follows (added words italicised): "Within 28 days after the referral of the proposal *is received* the Authority is to give written notice of whether or not it is going to assess the proposal …".

SECTIONS 39A & 44 – Other decision-making processes

We oppose the amendment to insert section 39A(3) and section 44(2AA) to allow the EPA to defer regulatory responsibility to and take into account other statutory decision-making processes "that can mitigate the potential impacts of the proposal on the environment". We hold concerns that such amendment will fundamentally alter the nature and scheme of the EP Act and Part IV in particular.

In deciding whether to assess a proposal, assessing a proposal, producing a section 44 report and making recommendations to the Minister, the EPA performs a specific and important function in the process set out in Part IV. This function is to provide independent assessment and advice on the environmental impact of a proposal.

In our view the amendment does not have any "efficiency" benefits as the EPA can already take into account the role of other statutory decision-making authorities in a manner consistent with its function. In assessing and coming to a conclusion as to whether the impacts of a proposal are consistent with the EPA's objectives, the EPA must make findings, to a degree of sufficient certainty, that unacceptable impacts will not occur. The mere existence of other processes, however, provides no such evidence – it is only the end results of those processes (i.e. specific regulatory controls imposed) which can usefully assist in determining likely environmental impacts. For the EPA to substitute an assessment of environmental impacts to a survey of other statutory frameworks would fundamentally alter the nature and utility of the section 44 report in the EP Act.

In this way, the concept of "duplication" ignores the specific and differentiated statutory regimes in which other decision-making processes operate. By section 15, the EPA is tasked with using its best endeavours to protect the environment and prevent pollution and environmental harm. Other decision-makers and statutes have entirely different objectives and functions. While the discharge of these functions through imposition of particular controls may affect environmental outcomes which the EPA should consider, it is integral to the efficient and effective operation of the EP Act that the section 44 report can be considered a comprehensive discharge of the EPA's specific statutory functions. We also emphasise that the EP Act prevails over other legislation as these processes and functions are of fundamental importance.

Further, the purpose of the EPA's environmental impact assessment is not only to inform government decisions as to potential regulatory controls through Part IV. It has important transparency and accountability functions in informing the WA public (including proponents) as to the environmental impacts of proposals and the EPA's scientific opinion on their acceptability. The independence and scientific focus of the EPA supports legitimacy of and confidence in the statutory framework. Information asymmetry is already an inherent problem in access to environmental justice, and we therefore consider that the proposed amendment runs counter to the public interest and should not proceed.

RECOMMENDATION 21: The proposed amendments to insert section 39A(3) and section 44(2AA) should not proceed.

SECTION 39B – Strategic assessments

The draft bill includes references to "strategic assessments" and proposes changes to the provisions relating to strategic proposals to ensure consistency between the EP Act and other legislation in other jurisdictions. EDO does not oppose this amendment.

While we consider that the fundamental purpose of strategic assessments is the assessment of cumulative impacts, EDO supports clarification that strategic assessments should allow cumulative impacts to be more fully considered and regionally important environmental values protected, as mentioned in the discussion paper. We note in this regard the EPA's function in section 16(e) of providing strategic advice to the Minister which may be apt for such a task. We also refer to Recommendation 10 above as to the requirement to consider cumulative impacts.

SECTION 40 – Assessing referred proposals

The draft bill proposes an amendment to section 40 to add subsection (1A) that requires the EPA to assess proposals that are significant amendments of an approved proposal in the context of the approved proposal. This includes a requirement for the EPA to have regard to the cumulative impacts that the implementation of the existing approved proposal and the amendment might have on the environment. EDO supports this amendment to require the EPA to consider cumulative impacts but submits that the requirement to consider cumulative impacts should not be restricted to significant amendments but should extend to all proposals. In this regard we refer to Recommendation 10 above.

SECTION 40A - Termination of assessment

The draft bill proposes to insert a new subsection (aa) in section 40A(1) to allow the EPA to terminate an assessment of a proposal with which the proponent does not intend to proceed. EDO opposes this change for the same reasons as to the EPA's important function, with particular regard to the importance of the EPA's report as a public record of the comprehensive scientific assessment of a proposal (noting that many other statutory processes do not have this level of transparency and therefore the full extent of environmental impacts and mitigation would not be known). However, as outlined above in relation to the proposed section 38AB, there should be a greater level of certainty that the proposal, and its environmental impacts that were considered sufficiently significant to warrant assessment, will not occur.

RECOMMENDATION 22: The wording of a new section 40A(1)(aa) should be amended to provide: "At any time before the Authority has decided whether or not to assess a proposal referred to it under section 38, the Authority may decide that the referral be withdrawn if the proponent provides written notice to the Authority that the proponent ~~does not wish to~~ *will not* proceed with the proposal."

SECTION 43 – Direction by Minister

EDO supports the proposed amendment to insert a new section 43(3A) to clarify that the Minister's direction power is not restricted by an earlier appeal decision.

SECTION 43A – Changes to proposals during assessment

The draft bill proposes that all changes to a proposal during assessment should fall within the "minor changes" process under section 43A, rather than requiring a fresh referral of a new "revised" proposal. More specifically, it removes the requirement for the EPA to consider that the change is unlikely to significantly increase any impact the proposal may have on the environment before approving changes during assessment.

EDO opposes this amendment as it is an unnecessary widening of the EPA's discretion and reduces opportunities for the public to properly participate in the assessment of the proposal.

RECOMMENDATION 23: The amendment of s 43A should not proceed.

SECTION 44 – Report by Authority on assessment

The discussion paper discusses the potential of amending section 44(3) to clarify that the government may not request or direct the EPA to alter the content of any of its reports prior to publication. EDO supports this amendment which strengthens the requirements relating to the EPA's independence.

The potential of introducing a confidential peer review process to assess environmental review documents prepared by proponents, similar to the process used for academic publications, with costs recovered, is also highlighted in the discussion paper. EDO supports this amendment, to ensure proponent-prepared documents are subject to the necessary scrutiny and verification by independent third parties.

DIVISION 2 – IMPLEMENTATION OF PROPOSALS

SECTION 45 - Implementation decisions for proposals

Prohibition on implementation of environmentally unacceptable proposals

In our view, proposals that are found to be environmentally unacceptable (and unable to be made environmentally acceptable with conditions) should not be able to be authorised for implementation under Part IV. The EPA's report and recommendations follow a detailed process of scientific scrutiny and public participation. Where a finding of environmental unacceptability is made, this is open to appeal under section 100(1)(d) giving proponents, decision-making authorities and other third parties recourse to overturn such a finding. Where that finding of environmental unacceptability is upheld, it should not then merely be one consideration in unlimited government discretion. That the EPA's independent expert findings could be outweighed by economic, social or political considerations that have not been properly tested runs counter to the entire purpose of the EP Act. EDO supports amendments to stipulate that a finding of environmental unacceptability should prevent implementation being authorised.

RECOMMENDATION 24: A new section 44A, entitled "Certain proposals not to be implemented", should be added to provide that: "Notwithstanding anything in section 45, the Minister shall publish a statement that the proposal may not be implemented where the report published under section 44(3)(a) in relation to the proposal includes a finding that the proposal cannot be made environmentally acceptable". The proposed section 45(1A) should also be amended to provide (added words italicised): "*Subject to section 44A*, this section applies after the Minister has caused a report (the ***report***) to be published under section 44(3)(a)."

We also note that the community expects for some classes of proposals or activities that environmental approvals should not be available. To reflect the public interest and the purpose and object of the EP Act, EDO supports the addition of clear limits on particular subject matter that may be authorised for implementation. In our experience, there is particularly significant public concern as to the following issues which could be included as circumstances in which implementation is prohibited:

- new fossil fuel developments, or any proposals with net positive greenhouse gas emissions;
- extinction of flora or fauna species; and
- nuclear activities, including uranium exploration and mining.

RECOMMENDATION 25: Consideration should be given to new statutory provisions or regulations that specify certain subject matter for which implementation is prohibited.

Mandatory and prohibited considerations

The current section 45 provides for the Minister and other relevant decision-making authorities to decide whether a proposal may be implemented. There are no express criteria for this decision to guide or otherwise qualify this broad discretion. EDO considers that there should be greater transparency and accountability in the decision-making process given that the result may authorise significant environmental impacts. In our view, the community expectation that these decisions are made on a robust evaluation of independent scientific and expert evidence as to the environmental, economic and social impacts of a proposal could be better supported by more specific provisions setting out both mandatory and prohibited considerations.

In this regard we note our recommendations above at Recommendation 10 for overarching criteria for all EP Act decision-making. Further express criteria for the implementation decision, such as those included in the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) may also assist with better administrative decision-making and public confidence in the framework of Part IV.

RECOMMENDATION 26: Consideration should be given to including new provisions in section 45 which stipulate criteria that are mandatory considerations and prohibited considerations for the decision as to whether a proposal may be implemented and the conditions and procedures to which implementation will be subject.

Key decision-makers

The draft bill provides for the Minister to only be required to consult and attempt to reach agreement with those whom the Minister determines to be "key" decision-makers. EDO does not oppose this amendment.

Appeal outcomes

The draft bill amends the process and requirements relating to the approval of implementation of proposals by changing the requirement for the Minister and other decision-making authorities to "have regard to" the outcome of an appeal (for example, against the content and recommendations of the EPA report), rather than a requirement that the implementation decision be "in accordance with" the appeal decision.

This amendment is intended to confirm the decision in *Conservation Council of WA Inc v Dawson* [2019] WASCA 102, regarding the Yeelirrie uranium mine, to the effect that an appeal decision which affirms an EPA recommendation that a proposal is environmentally unacceptable is not then binding for the final implementation decision. EDO does not oppose this amendment, although we note that a situation in which the EPA and the Minister agree that a proposal is environmentally unacceptable should not result in the approval of the proposal. This could be the subject of further amendments, such as a provision prohibiting a decision to allow implementation in such circumstances, as detailed above and in Recommendation 25.

SECTION 45(5B) - Conditions

The EP Act provides considerable discretion to the Minister in deciding what implementation conditions to impose on approvals of proposals, with no reference to an objective standard. This has resulted in conditions that are uncertain and imprecise, making compliance, accountability and enforcement more difficult.

The draft bill proposes the addition of section 45(5B) which specifies some types of implementation conditions that the Minister may impose, with subsection (5A) confirming that this list does not prevent any other implementation condition from being imposed. While EDO supports this amendment, more needs to be done to address current issues with uncertain and imprecise conditions such as future preparation and implementation of "management plans".

In our experience the "management plan" has become a means to defer proper consideration of environmental impacts and means for mitigation beyond the detailed processes of Part IV assessment. There are particular concerns for transparency and adequate scrutiny where these plans are not required to be published or subject to community consultation, or are left other decision-makers to approve. Compounding these problems is the uncertain enforceability of the terms of the management plan (given that these terms are not directly included as conditions). EDO considers that amendments are necessary to provide certainty as to what is required for compliance with conditions, to support more reliable environmental outcomes and in turn public confidence in the framework.

RECOMMENDATION 27: The proposed section 45(5B)(h) to provide that conditions may be imposed to require the proponent to (added words italicised): "prepare, implement and adhere to environmental management systems, environmental management plans and environmental improvement plans, *including publishing those plans and systems for comment, and subject to the approval of those plans and systems by the Minister before implementation commences*;"

SECTION 45C - Changed proposals and revised proposals

We support an amendment of section 45C(2), however we consider that it will require different wording. The proposed amendment to change "the effect of the original proposal" to "the effect of the proposal as originally approved" does not clarify what the Minister is required to consider as the baseline against which the amendment and its effect is measured. After *Re Minister for the Environment; Ex parte Elwood* [2007] WASCA 137, it is clear that the Minister is required to identify what activities comprise the proposal without the change, and the effect of those activities on the environment, in order to establish such a baseline. The distinction between activities comprising a proposal and the effect of those activities is important and in our experience has not been understood by decision-makers exercising the power in section 45C(1). This should be the focus of the amendment.

We further consider that the extent of discretion in section 45C(2) is not necessary for efficient administration and may lead to significant environmental effects being authorised without proper opportunities for independent scientific assessment and public participation. The WA community should be assured that such effects will not occur – if such circumstances do not exist then the proper course of action should be an assessment through Part IV of the EP Act and not through section 45C(1).

RECOMMENDATION 28: The wording of section 45C(2) should be amended as follows: "The Minister must not give approval under subsection (1) if the ~~Minister considers the~~ ~~change or changes to~~ *amendment of* the approved proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the ~~original~~ proposal *without amendment*."

We note that the decision under section 45C(1) is not open to appeal and in our experience has not been adequately publicised. This means it is especially important that there be transparency through a public record of the decision and the Minister's reasons.

RECOMMENDATION 29: There should be a new subsection (3) which provides: "The Minister shall keep a public record of each decision made under subsection (1) and the reasons for the decision."

False and misleading information

We note the proposed insertion of subsection (1A) to provide that information may be requested from proponents in relation to an application to amend an approved proposal. The discussion paper states that this amendment is intended to bring that information within the offence in section 112 for providing false or misleading information.

EDO agrees that the provision of false or misleading information in the course of the section 45C decision-making process is problematic. However, we do not support the proposed amendment to merely change the basis on which this information is provided in one specific circumstance. The offence for providing false and misleading information should in our view apply to all EP Act processes – indeed it is difficult to see how any provision of false or misleading information in connection with the EP Act should be allowed.

RECOMMENDATION 30: Section 112 should be reworded to provide that: "It is an offence to knowingly provide information in connection with the EP Act that is false or misleading in a material particular".

SECTION 46 - Change of conditions

The draft bill proposes the addition of section 46C(1A) to expand the scope of the minor changes the Minister can make to implementation conditions without the need for an inquiry by the EPA under section 46, if the change is requested by the proponent, and the Minister considers the changes will not have a significant detrimental effect on the environment. EDO opposes this amendment, as it is an unnecessary widening of the Minister's discretion. In particular, it removes the EPA and public's oversight and scrutiny of such changes, and provides no objective criteria that must be considered by the Minister in determining the environmental effects of a proposal. EDO recommends that the scope of the Minister's power under section 46 not be extended, and that aside from the minor changes noted in section 46(1), changes to proposals should continue to be referred to the EPA for inquiry.

Where an EPA inquiry is required, the draft bill proposes to only require the Minister to consult with the relevant decision-making authorities affected by the change (rather than all decision-making authorities that were consulted in the original decision). EDO does not oppose this change.

The discussion paper also discusses the potential of amending section 46 to allow the Minister to revoke environmental approvals if new scientific evidence about the potential for significant environmental harm becomes available. EDO supports this amendment.

SECTION 47A - Revocation of approval

The draft bill introduces a process through a new section 47A to allow the Minister to revoke an approval upon satisfactory completion of a proposal, or if a proposal is not substantially commenced by a specified commencement date. EDO supports this amendment.

SECTION 48AA - Cost recovery

The draft bill proposes amendment to add a "head power" to Part IV that allows for the development of regulations for a fee to be paid by proponents to enable the government to recover costs of Part IV environmental impact assessment (similar to that currently applicable to other assessments under the EP Act such as licences and clearing permits).

EDO does not oppose this amendment. However, we emphasise that caution should be exercised to ensure that this amendment does not create an expectation that approval will be obtained.

DIVISION 3 – ASSESSMENT OF SCHEMES

Current processes for assessing environmental impacts of planning schemes (including scheme amendments) are unduly complex and fragmented, leading to poor environmental outcomes and inadequate public participation. The discussion paper also highlights the following issues for consideration in relation to assessment of schemes:

- review of section 48A of the EP Act, together with an amendment of the regulations requiring the EPA to seek public comment on the content of its assessment of planning schemes;
- removal of the current separation applied to planning schemes in the EP Act so that they are subject to Part IV in the same way as other significant proposals.

SECTION 48A – Decisions whether to assess schemes

Under section 48A of the EP Act, the EPA must decide whether or not to assess planning schemes (and scheme amendments) referred to it.

Unlike decisions not to assess significant proposals, decisions by the EPA not to assess a scheme is not subject to appeal. In EDO's experience, the EPA decides not to assess the vast majority of schemes, with the community having no opportunity to appeal such decisions. EDO has therefore received numerous complaints from clients about the insufficient opportunities for public participation provided in the scheme assessment process under the EP Act.

RECOMMENDATION 31: Amend section 100 of the EP Act to provide for a right of appeal against EPA decisions not to assess schemes in the same way as significant proposals, by inserting a new section 100(1)(b) as follows: "a recorded decision of the Authority that a scheme is not to be assessed; or …"

SECTIONS 48D AND 48F – Implementation and conditions on schemes

The draft bill provides for amendments that provide that a scheme will not be approved under the *Planning and Development Act 2005* (WA) unless a specific decision to be reached by the Minister for Environment and the Minister for Planning as to whether the scheme may be implemented under the EP Act, rather than merely the conditions that should be imposed. It also allows for an extension of time on decisions as to whether a scheme should be assessed or whether it is capable of being made environmentally acceptable where the EPA has sought additional information in order to make that decision. EDO supports these amendments as they ensure that planning schemes are subject to a similar assessment and approval process as proposals.

SECTION 48I – Assessment of proposals under assessed schemes

The draft bill does not propose any changes to section 48I. EDO supports an amendment of section 48I to clarify that the responsible authority (local government) must refer proposals under assessed schemes to the EPA or refuse to approve implementation of such proposals where environmental issues raised by the proposal were not assessed in the assessment of the scheme under Division 4 of the EP Act.

RECOMMENDATION 32: Amend section 48I(1) as follows: "Despite section 38, when a proposal under an assessed scheme that appears likely, if implemented, to have a significant effect on the environment comes to the notice of the responsible authority in respect of the assessed scheme, that responsible authority shall determine, *on the basis of the information then available to it,* whether or not …"

PART V – ENVIRONMENTAL REGULATION

DIVISION 1 – POLLUTION AND ENVIRONMENTAL HARM OFFENCES

The draft bill does not propose changes to the key offences in Division 1 of Part V relating to pollution, unreasonable emissions, serious or material environmental harm, and dumping waste. However, it removes section 51 which provides that occupiers commit an offence if they do not comply with any prescribed standard for emissions and take all reasonable and practicable measures to prevent or minimise emissions. The draft bill also creates a new offence for carrying out a prescribed activity without a licence.

EDO considers that the offence provisions would benefit from review - in particular, to expressly clarify greenhouse gas emissions are included in the definitions of "pollution" or "environmental harm" and are therefore offences (as well as being subject to regulation through licencing as discussed below) under Part V of the EP Act.We refer to our discussion above as to the necessary changes to the definition of "pollution" to ensure offending conduct is properly captured in regulatory decision-making.

Further, EDO opposes the removal of the duty on occupiers relating to emissions and is of the view that this duty should still apply to persons who carry out a prescribed activity.

General environmental duty

The EP Act offences should be further amended to include a general environmental duty, modelled on section 25 of the *Environmental Protection Amendment Act 2018* (Vic). Section 25 states that 'a person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as is reasonably practicable'. Failure to comply with this duty should constitute an offence under the EP Act. In EDO's view, such a duty would ensure Western Australian citizens and businesses prevent or minimise the risks their actions have on the environment and human health.

RECOMMENDATION 33: Insertion of a new section in Part V, entitled "General environmental duty" to provide:

> (1) A person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable.
>
> (2) A person commits an offence if the person contravenes subsection (1) in the course of conducting a business or an undertaking.

DIVISION 2 - CLEARING OF NATIVE VEGETATION

The existing provisions in the EP Act are not effective in protecting native vegetation from clearing activities. Substantial amounts of land continues to be cleared in WA, without adequate processes for recording or monitoring this clearing. The discussion paper states that the draft bill "simplifies and improves the provisions for clearing of native vegetation by focusing on environmental outcomes rather than administrative processes". In particular, the draft bill provides for environmentally sensitive areas to be prescribed in regulations, introduces a new referral process to allow the CEO of DWER to decide whether a clearing permit is required, and proposes changes to allow the use of remotely sensed images as prima facie evidence of vegetation on land and its condition.

EDO acknowledges that DWER is currently seeking feedback on the "Native Vegetation in Western Australia- Issues Paper" (**Native Vegetation Issues Paper**) published on 15 November 2019, which includes better regulation and development of a State native vegetation policy as key initiatives for improving

vegetation management. Given many of the reforms required to improve the regulation of clearing of native vegetation relate to the *Environmental Protection Act 1986* (WA), we highlight key areas in Appendix A to this submission.

However, we emphasise that the proposed amendments of existing clearing provisions in the draft bill should informed by, and not occur before completion of, the consultation process. Our further comments on these proposed amendments are provided below.

SECTION 51B - Declaration of environmentally sensitive areas

The draft bill proposes the declaration of environmentally sensitive areas (**ESAs**) in regulations rather than in notices declared by the Minister. The discussion paper states that this amendment will ensure ESAs remain current and relevant, that there is an efficient and effective process for prescribing ESA and that they are subject to a transparent process. EDO does not oppose this amendment.

SECTION 51DA - Referral of proposed clearing to CEO

The draft bill proposes to introduce a new referral process in Section 51DA that allows proposed clearing that is not covered by a clearing exemption to be referred to the CEO of DWER for a decision on whether a clearing permit is required, rather than requiring all clearing that is not subject to an exemption or prescribed to be subject to an application for a clearing permit. The CEO must have regard to specified criteria set out in the EP Act.

EDO strongly opposes the proposed introduction of a new referral system as it substantially broadens the CEO's discretion in the absence of a proper and comprehensive review of the clearing provisions and assessment of the state of native vegetation in WA. Further, the decision of the CEO is not subject to appeal. In EDO's view, substantial amendments to the regulation of clearing are not appropriate prior to the completion of Native Vegetation Issues Paper consultation process.

DIVISION 3 – PRESCRIBED PREMISES, WORKS APPROVALS AND LICENCES

The draft bill proposes substantial changes to the licence process to provide certainty about what Division 3 of the EP Act regulates, and to replace 'complex and clumsy' provisions. This includes requiring the regulation of "prescribed activities" rather than "prescribed premises", introducing voluntary licences, and regulating controlled works.

Prescribed activities

EDO supports the move to "prescribed activities", however we note that the current categories in Schedule 1 of the EP Regulations will require some changes. This includes providing new categories for gas extraction activities (i.e. shale gas and hydraulic fracturing operations) and significant greenhouse gas emissions (i.e. any activity with total scope 1, 2 and 3 emissions over 25,000 Mtpa).

EDO also supports the proposed amendments to expressly require a licence for prescribed activities and controlled work through ss 53A and 53B. This, along with the proposed new section 74A(2), clarifies that only those activities and emissions specifically included in the licence are authorised. That is, the amendment displaces the general position that an authorisation of an activity includes immunity for anything necessary for that activity when conducted with reasonable care (see: *Allen v Gulf Oil Ltd* [1981] AC 1001 at 1011). EDO considers that this displacement could be further clarified. This is addressed in further detail below.

Scope of licence

We consider that the current section 56 already means that emissions are not authorised by a licence unless expressly regulated by licence conditions. However, EDO supports the proposed new section 74A(2) stipulating that a licence will only authorise or provide a defence for the emissions that are expressly regulated by the licence, as is intended in these reforms.

We remain concerned that constraining this reform to only the defences subdivision may not fully address the current situation in which the scope of licences is construed as limited to the Part V offences. In our view, this creates an inefficiency in which the regulator is required to determine whether an activity or emission is likely to constitute an offence.

We consider that better administration and environmental outcomes would be supported by clarifying that a licence may cover all matters associated with the carrying out of prescribed activities and controlled work. In this regard, we note the proposed section 53(4). We consider it would be prudent and proportionate for licences, especially under the proposed reform by which they are no longer a mere defence but an a priori requirement for particular activities, to be able to cover emissions and impacts related to those activities without requiring determination of whether an offence is likely. This ensures for proponents that those emissions and impacts are covered by the defence, as well as providing the regulator with flexibility and control in relation to the enforcement and administration of Part V.

In our view some change to the wording of section 53(4) is necessary to clarify that licences may deal with and regulate all matters associated with the carrying out of prescribed activities and controlled work. We also note that the CEO's powers are by nature limited to the purposes of the EP Act and the terms of Part V, making extraneous words to this effect unnecessary.

RECOMMENDATION 34: The proposed section 53(4) should be reworded as follows: "A licence dealing with the carrying out of work or activity may ~~prohibit, authorise,~~ control or regulate any act, omission, emission or impact on the environment related to the work or activity ~~to an extent, and in a manner, considered by the CEO to be necessary or convenient for the purposes of this Act relating to the prevention, control, abatement or mitigation of pollution or environmental harm~~."

Requirement to condition emissions

EDO remains concerned that the above provisions are merely permissive of the CEO imposing conditions that limit emissions, rather than directly requiring their assessment and regulation in the licensing process. The proposed changes may still allow for a situation in which a prescribed activity (e.g. gas processing) could be argued to necessarily involve emissions (e.g. of CO_2) and therefore a licence authorising that activity impliedly authorises an indefinite amount of CO_2 emissions unless a limit is imposed (see: *Macquarie Generation v Hodgson* [2011] NSWCA 424).

In our experience, the community expects that emissions will be regulated wherever they occur in connection with an activity deemed to require a licence. It would in our view assist with public confidence in the Part V framework and lead to better environmental outcomes and regulatory oversight if there was greater clarity that such emissions are the proper subject matter for licences. While the proposed section 74A(2) goes some way to this objective, we consider a further provision is necessary (in addition to the recommendation above in relation to section 53(4)) to directly require licence authorisation for emissions as is proposed for prescribed activities and controlled work.

RECOMMENDATION 35: A new section 53BA "Licence for emissions" should be inserted in the same terms as ss 53A and 53B, to provide:

(1) A person who causes or allows an emission in connection with a prescribed activity or controlled work commits an offence unless –

(a) the emission is specified as an authorised emission in a licence; and

… [mirror of remaining subsections in ss 53A and 53B].

Licensing greenhouse gas emissions

EDO also considers that more needs to be done to reform licences to effectively address and regulate greenhouse gas emissions and climate change. EDO supports at a minimum any activity with total scope 1, 2 and 3 greenhouse gas emissions over 25,000 tpa being included as a "prescribed activity". Further recommendations as to the reform of Part V offences are provided above.

RECOMMENDATION 36: Add as a "prescribed activity": "Any activity directly or indirectly resulting in greenhouse gas emissions"; with the corresponding threshold: "25 000 tonnes or more per year".

Controlled work

EDO does not oppose the contemplated amendment of existing licences to incorporate "controlled work" (rather than requiring a separate works approval or licence).

EDO emphasises that the public comment period and public appeal rights for such amendments, as is proposed to be maintained through sections 53E(4) and 102(3) respectively, are especially important. The public comment period enables issues to be brought to the attention of the regulator and proponent prior to decision-making and ensures decisions can be made on an informed basis, as well as providing an opportunity to identify and ventilate community concerns. EDO emphasises that these benefits can avert unnecessary appeals – the curtailment of public comment periods is likely to increase the frequency of appeals and the administrative burden.

RECOMMENDATION 37: The changes to replace works approvals with controlled work should only proceed if sections 53E(4) and 102(3) are retained.

Decision-making

The proposed amendments include sections 54(2) and 55(4) which expressly set out mandatory relevant considerations for the CEO in determining an application for a licence or amendment of a licence. EDO supports this amendment.

As discussed above, EDO considers that decision-making under the EP Act would be best supported by amendment of section 4A to set out required principles and objectives for consideration and application. EDO also supports the inclusion of particular factors relevant to licencing decisions as mandatory relevant considerations for the CEO in dealing with such applications.

Public records

EDO notes that the proposed amendments to the current requirements for the CEO to keep and public records of works approvals and licences maintain the same level of publication for the proposed new licensing framework.

In our experience, members of the community expect to have access to data provided in relation to licence compliance, including monitoring data and compliance reports. These are held by the regulator but can be difficult for an ordinary member of the public to access – sometimes even requiring a Freedom of Information request or question in Parliament in order to access information and documents to which the public already has a right. EDO considers that, to avoid the complexities and administrative burden of dealing with these requests on a piecemeal basis, it would be efficient and supportive of public confidence in the EP Act to require that this information be published. Exceptions for commercially sensitive information can be provided for in regulations where necessary.

RECOMMENDATION 38: In the proposed new section 64(1), add a new subsection (b) (and renumber the current subsection (b) as subsection (c)) to include: "data and reports required by licence conditions to be provided to the CEO".

DIVISION 5 - DEFENCES

The draft bill narrows the defence provided by a licence, providing at section 74A that a licence does not authorise an emission unless the emission is expressly specified as an authorised emission in the licence. EDO supports this change.

However, EDO has some concerns with the changes proposed to the defences in the EP Act. In our view, increasing the number of defences is not an acceptable change to legislation with the purpose of providing for continued environment protection. If a person commits an offence under the EP Act, a defence should not be easily and readily available. Defences should be tightly controlled to ensure that when an offence has been committed, the offender will be appropriately penalised. The community expects that offenders should be held accountable, particularly when it involves environmental destruction.

SECTION 74B – Authorisation

EDO supports the removal of section 74B, which undermines the primacy of the EP Act and runs counter to the detailed framework of environmental impact assessment, licensing and enforcement. In our view, allowing other legislation to authorise environmental harm cannot be considered consistent with the objects of the Act or the aims of regulatory effectiveness.

RECOMMENDATION 39: Section 74B should be removed.

SECTION 74C - Due diligence

The proposed section 74C(2) and section 74C(3) state that the due diligence defence is applicable to persons charged with offences relating to contravening licence or clearing permit conditions. EDO opposes the widening of the due diligence defence. It is important to ensure that the conditions imposed on licences or clearing permits are adhered to in order to limit the negative impact actions have on the environment.

RECOMMENDATION 40: The proposed section 74C(2) and section 74C(3) should not proceed.

SECTION 74D - Lack of knowledge

EDO strongly opposes the proposed addition of section 74D, providing for a lack of knowledge defence, as it is contrary to established principles of law and create a significant loophole which will lead to difficulties with enforcement. However, we accept that there may be some confusion arising from the proposed changes to the

way licences operate in Part V. We therefore recommend that a lack of knowledge defence should be dealt with administratively by, for example, staging when different sections come into effect.

Alternatively, we recommend that a sunset provision is added to section 74D to allow for this period of change, and to ensure that this defence is not used beyond this time period.

RECOMMENDATION 41: Restriction of the operation of the defence in Section 74D to a limited timeframe of no more than two years.

Applicability of the Criminal Code

It is currently ambiguous whether the defences contained in the *Criminal Code Compilation Act 1913* (WA) and not already provided for in the EP Act (for example, the defence of accident or necessity), such as the defence of compulsion, apply to the offences under the EP Act. EDO recommends amendments to clarify the applicability of these defences to the EP Act with the addition of a section similar to section 7 of the EPBC Act.

RECOMMENDATION 42: Inclusion of a new section in Part V, clarifying the applicability of the *Criminal Code* in the context of existing defences in the EP Act.

PART VA - FINANCIAL ASSURANCES

The discussion paper also highlights the potential for financial assurances to be imposed on all approvals under the EP Act. EDO supports amendments to require financial assurances, for example security bonds and securities, to be imposed on *all* approvals under the EP Act. In our view this requirement is necessary to protect against environmental impacts as well as government and taxpayers bearing financial risks of those impacts.

PART VB - ENVIRONMENTAL PROTECTION COVENANTS

Currently, a condition can be imposed on a clearing permit under the EP Act requiring the permit holder to enter into a conservation covenant under the *Soil and Land Conservation Act 1945* or the *Biodiversity Conservation Act 2016*. As the discussion paper recognises, there are currently issues with both enforceability and scope of these covenants. Firstly the CEO of DWER has no control over whether a covenant or agreement is entered into, and secondly a conservation covenant made under other legislation must only be consistent with the object of that legislation, rather than the environmental objects of the EP Act. Further, substantial discretion is provided to the landowners in entering and implementing these covenants, with implementation ultimately being dependent on whether sufficient incentives are available.

The draft bill proposes the inclusion of a new Part VB that enables the CEO of DWER to enter into environmental protection covenants.

EDO supports the inclusion of a new Part VB providing for environmental protection covenants and making them enforceable and binding, yet still flexible. In particular, we support the amendments to provide the CEO of DWER with the power to enter into covenants with the landowner and provisions that subject these covenants to appeal in the same manner as other conditions imposed under the EP Act.

PART VI – ENFORCEMENT

EDO supports the following changes proposed in the draft bill:

- extension of the time period that the proponent may be required to cease the implementation of a proposal (24 hours to 28 days);
- amendments to allow the CEO to require the proponent to undertake work or provide the CEO with reports and information (the latter already being included in the current EP Act), to determine if the proponent is complying with conditions; and
- amendments to allow another public authority, as well as the current provision for other decision-makers, to monitor the implementation of conditions and exercise its powers to enforce non-compliance, where those conditions relate to requirements of that public authority.

SECTION 89 AND 89A - Entry powers of inspectors

The draft bill proposed changes to Part VI to provide inspectors with stronger powers to enter premises for a specified purpose or to determine if an offence is being committed, as well as powers to require sources of information, answers, and the use of electronic statements. EDO supports the amendments to the EP Act that provide for stronger powers for investigators in determining whether an offence against the EP Act has been committed.

PART VIA – LEGAL PROCEEDINGS AND PENALTIES

DIVISION 1 – PRESCRIBED OFFENCES AND MODIFIED PENALTIES

The draft bill proposes changes to the system for modified penalties in Part VIA Division 1 to:

(a) apply to more offences (in particular, specified non-intentional Tier 1 offences in addition to Tier 2 offences); and

(b) require the CEO to consider each of the listed criteria rather than requiring each criterion has been met.

EDO does not oppose these amendments but emphasises that caution should be used to ensure that the modified penalty system is not used as a defacto "pay to pollute" system.

The draft bill also proposes changes to the timeframe for the issue of infringement notices by inspectors or police officers from 35 days to 12 months from the date of the alleged offence, and includes profits from commission of offences in the definition of 'monetary benefits' the court can order an offender to pay (potentially increasing the penalty the offender would have to pay). EDO supports these amendments.

DIVISION 5 - INJUNCTIONS

The draft bill inserts a new Part VIA Division 5 that enables the CEO of DWER to apply for an injunction to prevent a person from engaging in improper conduct, meaning a contravention of particular provisions of the EP Act including offences such as clearing or pollution without authorisation.

EDO supports the inclusion of Part VIA Division 5 providing the CEO with the power to apply for injunctions, though we note that for this provision to be effective in practice, it must be coupled with reforms that ensure better enforcement of the provisions of EP Act. This should include provisions providing for third party enforcement, as discussed further below, to both reduce the burden on the CEO in applying for conduct injunctions and ensure that the CEO does apply for injunctions when relevant.

THIRD PARTY ENFORCEMENT

The current system of enforcement under the EP Act precludes third parties from initiating proceedings for breach of the provisions of the EP Act and environmental offences, despite these offences concerning injury to the environment and natural resources of WA which are public assets. As a community legal centre we often experience and witness the frustration of clients, with evidence to establish an arguable case and who are prepared to undertake enforcement proceedings (including bearing the costs risks of litigation) in the public interest, in being unable to bring court proceedings where proponents have breached the EP Act or committed an offence and decision-making authorities responsible for compliance and enforcement, such as DWER, fail or refuse to act.

The EPBC Act and environmental protection legislation in New South Wales, Victoria and South Australia contain provisions that provide for third party enforcement with either open standing or expanded standing for particular proceedings. The experience of these jurisdictions indicates that the "floodgates" arguments against third party enforcement are unfounded. In EDO's view, there are many benefits associated with the inclusion of a third party enforcement provision in the EP Act that provides an avenue for citizens and corporations to commence court proceedings for breaches. These include:

- Sharing the regulatory burden - removing the burden on the CEO of DWER to bring enforcement action.
- Access to justice - providing greater access to justice for the community.
- Public participation - providing a pathway for the public to participate in environmental law litigation and other matters.
- Accountability - ensuring that regulators and decision-makers discharge their functions according to legislative requirements, as well as holding them accountable. In addition, providing an important safeguard in the event that a regulator or decision-making authority fails to act.
- Transparency – ensuring actions and decisions of regulators, decision-making authorities and proponents are transparent

EDO recommends that a provision providing for third party enforcement should be included in the reformed EP Act. In particular, provisions should be included that enable eligible third parties to trigger investigations by regulators into compliance with conditions (in implementation decisions, licences and clearing permits) and commission of offences under the EP Act, and to commence judicial review where adequate action is not taken or there is non-compliance. Such a provision would also provide the public with the opportunity to pursue court proceedings for a breach of the EP Act, such as for pollution or environmental harm offences. We note that there are existing limitations on the use of this avenue due to standard court processes for striking out such claims, as well as the inherent expenses and costs of litigation, and therefore the concern of "opening the floodgates" (as is often raised) is overstated.

RECOMMENDATION 43: Inclusion of a third party enforcement provision in the EP Act modelled on section 9.45 of the *Environmental Planning and Assessment Act 1979* (NSW):

> (1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach
>
> (2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

(3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of legal costs and expenses incurred by the person bringing the proceedings.

If it is still considered necessary to impose further restrictions on such proceedings, we consider that an appropriate limit can be in the form of stipulated criteria for standing.

RECOMMENDATION 44: Alternatively, inclusion of a provision in the EP Act providing expanded standing modelled on section 475 and 487 of the EPBC Act:

(1) A person has standing to bring a proceeding to Court for an order to remedy or restrain a breach of this Act if:

(a) the person is an Australian citizen or ordinarily resident in Western Australia; and

(b) at any time in the two years immediately before the breach, the person engaged in a series of activities in Western Australia for protection or conservation of, or research into, the environment.

PART VII – APPEALS

WA does not have an independent merits review system for environmental appeals like other Australian jurisdictions, instead providing the power to decide merits appeals to the Minister. The current system compromises public confidence, lacks transparency and without clear bases for review or a system of precedent, can be unpredictable and confusing for both the public and practitioners. Further, merits review under the current Part VII is available for very few decisions, limiting the opportunities for the community to hold decision-makers to account in the public interest.

The discussion paper also highlights the potential for restructuring Part VII to allow for a simpler and more modern framework for appeals. In EDO's view, the reform process for the EP Act should include a comprehensive review of the current appeals process for decisions made under the EP Act, with broad public consultation.

Determination of appeals

The institutional framework for appeals requires review. Our view is that an independent court or tribunal process is necessary for appeals. Such a process could be achieved through the establishment of an environmental court or by modifying the jurisdiction of existing courts and tribunals. The jurisdiction of the State Administrative Tribunal (**SAT**) could be extended to include merits review of administrative decisions and conduct under the EP Act.

RECOMMENDATION 45: Create an independent, specialist tribunal to conduct merits review of environmental decision-making, or direct appeals to the SAT. At a minimum the SAT should replace the Appeals Convenor and appeals committees in Part VII of the EP Act.

Scope of appeals

Third party appeals are critical to support public participation in environmental decision-making and to ensure public accountability, and lead to better environmental outcomes and decisions that better reflect the principles of EP Act, including the principle of inter-generational equity. On that basis, EDO recommends amendments to extend the opportunities for third party appeals

RECOMMENDATION: Amendments to Part VII to allow third party appeals against the following decisions:

Part IV

- Level of assessment of proposals
- Not to assess schemes
- Whether to implement proposals (not only conditions)
- Changes to proposals
- Changes to conditions

Part V

- Whether to grant licences (not only amendment and conditions)

PART VIIB - ENVIRONMENTAL MONITORING PROGRAMMES

The draft bill inserts a new Part VIIB that provides for environmental monitoring programmes to be established by regulations to monitor the impact of prescribed activities on the environment, including pollution or environmental harm resulting from the activities. It also requires proponents to pay a levy and provide financial assurances in relation to payment of the levy. Money from levies and assurances is to be put an established "Environmental Monitoring Account" administered by the CEO of DWER and spent for purposes including determining whether an environmental monitoring programme is needed and the development of such programmes.

EDO supports this reform as a reflection of the polluter pays principle, ensuring that the government and community are not made to bear the cost of monitoring a proponent's impacts on the environment.

RECOMMENDATION 46: Inclusion of a provision that requires data obtained under environmental monitoring programmes to be made publically available, in real time where possible.

PART IXA - BILATERAL AGREEMENTS WITH THE COMMONWEALTH

There are concerns that approval processes at the state level are less objective and independent than Commonwealth approval processes, and are not subject to the same high level of scrutiny and environmental standards as the EPBC Act.There are many examples where the States have signalled that they would have progressed with major developments but for the Commonwealth government rejecting the proposal for having unacceptable environmental impacts. For example, the Tasmanian Dam and Traveston Dam in Queensland, and Nobbys' headland development in New South Wales.

The draft bill proposes a new Part IXA relating to bilateral agreements that enables the EPA, Minister and the CEO of DWER, to promote the implementation of a bilateral agreement, or to take into account any guidelines or policies established under a bilateral agreement, as opposed to this task being the responsibility of the EPA only.

EDO does not oppose the assessment bilateral agreement as it helps to streamline the environmental assessment process, provided it is subject to clear requirements that ensure the level of environmental protection and rigour of the Commonwealth assessment process is not reduced. EDO does not support the approval bilateral agreement, however, as keeping the two approval processes separate allows for greater checks and balances by the Commonwealth government.

SCHEDULE 1 - PENALTIES

The draft bill proposes to increase the penalties for:

(a) implementing a proposal if the Minister has notified the proponent that the proposal may not be implemented; and

(b) providing false and misleading information.

EDO supports these changes and recommend further updates to all penalties attached to the offence provisions of the EP Act to ensure they are consistent with penalties in other jurisdictions. Penalties must be sufficient to remove incentives for individuals and corporations to breach the EP Act. We also support amendments to include civil penalties for contravention of certain provisions of the EP Act, similar to those that apply under the EPBC Act.

OTHER ISSUES

Offsets

The EP Act currently only refers to environmental offsets in the context of clearing of native vegetation. It provides no statutory framework for environmental offsets (biodiversity or carbon offsets). Instead, offsets are included in conditions imposed under Part IV and V of the EP Act and regulated through policy instruments including the Government of Western Australia's WA Environmental Offsets Policy 2011 and Guidelines (**Offsets Policy and Guidelines**) which are not binding on proponents or decision-makers.

In relation to environmental offsets, the draft bill only proposes reforms to clarify that implementation conditions imposed under Part IV can require proponents to take environmental protection, abatement or restoration measures to offset impacts of the implementation of the proposal. While EDO supports this amendment as a positive development, in our view further reform of the EP Act is required to adequately address and regulate biodiversity and carbon offsets.

In our view, specific legislation should be introduced in WA that provides a clear and detailed legislative framework for biodiversity and carbon offsets, minimises the use of offsets and makes explicit the circumstances under which they can be applied. For example, Queensland's *Environmental Offsets Act 2014* (Qld) coordinates the delivery of environmental offsets and is accompanied by the Environmental Offsets Regulation 2014 and the Environmental Offsets Policy.

RECOMMENDATION 47: Introduction of specific offsets legislation that provides a statutory framework for biodiversity and carbon offsets in WA.

In the absence of such legislation, the EP Act should be amended to contain provisions that regulate biodiversity and carbon offsets. These provisions could be modelled on the existing Offsets Policy and Guidelines and definitions contained in this document. For example, environmental offset is defined as "an offsite action or actions to address significant residual environmental impacts of a development or activity". Victoria's *Climate Change Act* also defines an eligible offset in the context of greenhouse gas emissions as "a prescribed unit of greenhouse gas emissions issued under a prescribed regulatory, accreditation or certification scheme".

The discussion paper discusses the potential amendment of the Offsets Policy and Guidelines to regulate and minimise the use of offsets and make explicit the circumstances under which they can be applied. Given these documents are currently not binding on proponents or decision-makers and only relate to biodiversity offsets, not carbon offsets, it is EDO's view that their amendment is not sufficient.

RECOMMENDATION 48: Inclusion of specific provisions in the EP Act that provide a statutory framework for environmental offsets in WA including:

1. Definition of "eligible or environmental offset" that is based on the current definition in the Offsets Policy and Guidelines ("an offsite action or actions to address significant residual environmental impacts of a development or activity") and includes both biodiversity and carbon offsets.

2. Definition of "significant residual impact" that is based on the "residual impact significance model" in the Offsets Guidelines or definition in Queensland *Environmental Offsets Act 2014* as meaning "an adverse impact, whether direct or indirect, of a prescribed activity on all or part of a prescribed environmental matter that—
   (a) remains, or will or is likely to remain, (whether temporarily or permanently) despite on-site mitigation measures for the prescribed activity; and
   (b) is, or will or is likely to be, significant."

3. Principles applying to environmental offsets such as:
   - Environmental offsets will only be considered after avoidance and mitigation options have been pursued.
   - Environmental offsets are not appropriate for all projects.
   - Environmental offsets will be cost-effective, as well as relevant and proportionate to the significance of the environmental value being impacted.
   - Environmental offsets will be based on sound environmental information and knowledge.
   - Environmental offsets will be applied within a framework of adaptive management.

4. Criteria applying to environmental offsets such as:
   - When offsets are required;
   - Types of offsets that are appropriate/eligible;
   - Quantification of offsets;
   - Timing of offsets including commencement and duration; and
   - Registration of offsets in the Environmental Offsets Register.

5. Definition and recognition of emission offset programs and agreements. This could be modelled on the definitions in Tasmania's *Climate Change (State Action) Act* and South Australia's *Climate Change and Greenhouse Emissions Reduction Act* - "programs designed to recognise or achieve reductions in greenhouse gas emissions, or the removal of such emissions, taking into account any criteria prescribed by the regulations".

6. Amendment of Schedule 2 to include eligible offsets and offset programs in the matters in respect of which the Governor may make regulations in section 123. For example, this power could enable the Governor to make regulations that prescribe criteria for determining eligible offsets and emissions offset programs.[3]

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[3] For example, Tasmania's *Climate Change (State Action) Act* and South Australia *Climate Change and Greenhouse Emissions Reduction Act* enable emissions offset regulations to be made that –

(a) provide for the recognition, facilitation or promotion/support of emissions offset programs; and
(b) prescribe ways/methods of identifying or determining the types, and extent, of offsets that may form part of recognised emissions offset programs; and
(c) prescribe criteria allowing for the recognition of emissions offset programs capable of delivering multiple benefits (such as the removal of greenhouse gases from the atmosphere, biodiversity enhancement and economic development); and
(d) establish a scheme for the registration of emissions offset programs.

At the very least, the EP Act should be amended to make the Offsets Policy and Guideline binding on proponents and decision-makers. For example, Part 6A.2 of the Australian Capital Territory's *Planning and Development Act 2007* (ACT) makes the ACT's Environmental Offsets Policy a statutory policy.

RECOMMENDATION 49: Inclusion of a provision in the EP Act, entitled "Initial offsets policy" that provides for offsets policies to be made, modelled on section 111F of the *Planning and Development Act 2007* (ACT), as follows:

(1) The Minister may make an initial offsets policy.
(2) The initial offsets policy is a notifiable instrument.

This section should be accompanied by other provisions that provide for monitoring of the effectiveness and review of the offsets policy.

Bioregional Planning Provisions

There is no reference to bioregional plans in the draft bill or discussion paper. Bioregional plans can support strategic and long-term landscape scale planning and are provided for in Division 2 of the EPBC Act. While provisions relating to bioregional planning are likely more appropriately addressed by reforms to the BC Act, in EDO's view the EP Act should also be amended to make bioregional plans mandatory considerations for decision-making under the EP Act, where such plans are relevant.

RECOMMENDATION 50: There should be a review, including public consultation, as to the provision for bioregional planning in the EP Act and other legislation.

Publication Regulations

We note that the draft bill makes repeated reference to the "publication regulations", which are not mentioned in the discussion paper. We presume that there is an intention to prescribe requirements for publication under the EP Act. While EDO supports such a move, we emphasise that greater flexibility in the requirements for publication should not be used to curtail opportunities for public participation.

EDO also considers that future "publication regulations" should ensure maximum accessibility for all members of the public, including regional and remote communities that are often affected by decision-making under the EP Act.

APPENDIX A: REFORM OF EXISTING CLEARING PROVISIONS

Other than the referral system set out in the proposed new section 51DA, no changes are proposed in the draft bill to existing provisions and processes that apply to clearing where a permit is required (presumably because DWER is currently seeking feedback on the Native Vegetation Issues Paper). However, the discussion paper highlights the potential for clearing provisions to be moved to a standalone part of the EP Act, or in the alternative, the development of purpose-specific native vegetation legislation. The discussion paper also notes that key areas of reform should include exemptions, principles and definitions applying to clearing. In this Appendix we set out the key areas for reform of clearing provisions, including initial recommendations. We note that this should be considered preliminary in light of the current consultation, to which EDO will be making comprehensive submissions in due course.

EDO supports the development of a new comprehensive framework for the clearing of native vegetation or, at least, reform of the existing clearing provisions in Part V of the EP Act and and the supporting *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) (**Clearing Regulations**) to prevent continued degradation of native vegetation assets and to ensure ecological connectivity across the State, particularly in highly-cleared areas such as the Wheatbelt, Perth and Bunbury metropolitan areas, and importantly, in the south-west. While Part V Division 2 is intended to protect habitat and biodiversity from clearing, it often fails to do so. This part of the EP Act tends to react to clearing that is harmful to habitat and biodiversity rather than proactively ensuring that it does not occur in the first place.

Particular areas of reform should include:

- Reconsidering the placement of clearing provisions in the EP Act;
- Including definitions of key terms relating to clearing;
- Amending clearing exemptions to ensure they are strictly limited and sufficiently defined;
- Amending the clearing principles to require their application by decision-makers to and include consideration of landscape scale conservation and cumulative impacts of clearing;
- Removing the delegation of clearing decisions to other decision-making agencies;
- Imposing time limits for processing clearing permit applications;
- Providing processes for investigation of unlawful/illegal clearing and enabling third parties to trigger investigations and prosecutions;
- Improving clearing permit conditions;
- Requiring DWER to regularly report and publish clearing data.

A. PLACEMENT OF CLEARING PROVISIONS

First and foremost, the placement of the clearing provisions in Part V of the EP Act should be reconsidered. This would help to address the current lack of integration between Part V Division 2 and other key provisions of the Act such as the provisions set out in Part IV. Alternatively to amendments to the EP Act, a purpose-specific native vegetation Act could be developed to regulate the clearing of native vegetation.In the absence of such legislation being introduced, in our view the clearing provisions should be moved to:

a) Part IV of the EP Act, meaning that an application for a clearing permit would require environmental impact assessment and approval by the EPA (rather than DWER). This would ensure that any impacts to habitat and biodiversity are considered and assessed at the highest level prior to any decision being made; OR

b) a standalone portion of the EP Act to ensure that the specific protection of native vegetation and biodiversity conservation is the focus of regulation (rather than "pollution and environmental harm").

For this recommendation, we suggest that any clearing permit application that is determined to be "at variance with" the clearing principles should be referred by DWER to the EPA for assessment under Part IV. This would ensure a second layer of protection for applications relating to native vegetation that is particularly vulnerable.

RECOMMENDATION: Amendments to move existing clearing provisions in Part V, Division 2 to:

a) Part IV of the EP Act; or

b) A new Part of the EP Act.

B. DEFINITIONS OF KEY TERMS

A significant problem in Part V Division 2 is a lack of clear definitions for key terms. For example, section 51O subsection (3) provides:

> *"[the] CEO may make a decision that is seriously at variance with the clearing principles if… in the CEO's opinion there is a good reason for doing so."*

The Act fails to provide a definition for key terms in the provision including, "seriously at variance with" or "a good reason". The effect of this failure is that it allows for overly discretionary and inconsistent decision-making as each decision-maker is obliged to subjectively interpret and apply the meaning to the best of his/her ability. While, the EP Act does not provide for a particular assessment process to be carried out by the CEO in determining whether a clearing permit should be granted, it is evident in clearing permit decision reports that a somewhat established process is followed by the CEO in accordance with relevant guidelines - *A Guide to the Assessment of Applications to Clear Native Vegetation under Part V Division 2 of the Environmental Protection Act 1986*.[4] In assessing a clearing permit application, DWER officers are required to determine whether the proposed clearing is "at variance with" the clearing principles. Specifically, DWER officers decide whether the proposed clearing "is at variance with", "may be at variance with", "is not at variance with", "is likely to be at variance", or "is seriously at variance with" each clearing principle set out in Schedule 5, despite the fact that the EP Act does not define those terms.

It is unclear how the decision-maker ultimately decides whether the proposed clearing is or is not at variance with the clearing principles. While the guidelines give some examples of clearing that is or is not likely to be at variance with the clearing principles, they do not detail how a decision-maker ultimately calculates the results and determines whether the clearing permit should be granted or refused. For example, if the clearing is determined to be at variance with six principles and not at variance with the remaining four principles, should the clearing permit be granted or refused? Significant discretion is left to the decision-maker with little in the way of legally binding regulations or policy to direct them in undertaking the assessment and making the ultimate decision.

It is therefore EDO's view that the relevant guidelines should set out a clear and uncompromising procedure for applying the law and determining whether a clearing permit is required. In particular, we consider it imperative for publicly accessible guidelines to specify how a decision-maker makes a decision to grant or refuse a clearing permit.

RECOMMENDATION: Amendment of section 51A to include definition of key terms including "is at variance with", "may be at variance with", "is not at variance with", "is likely to be at variance", or "is seriously at variance with".

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[4] Department of Environmental Regulation, *A Guide to the Assessment of Applications to Clear Native Vegetation under Part V Division 2 of the Environmental Protection Act 1986* (December 2014).

Amendments are also required to the definition of clearing in section 51A to clarify that this includes mechanical mowing. This may also require amendments to include a definition of mechanical mowing.

RECOMMENDATION: Amendment of section 51A to include "mechanical mowing" in the definition of "clearing".

C. SCHEDULE 6 - CLEARING EXEMPTIONS

Schedule 6 of the EP Act outlines clearing for which a clearing permit is not required (**clearing exemptions**). In total, Schedule 6 and the Clearing Regulations provide for 40 clearing exemptions. This means that there are at least 40 opportunities for proponents to clear native vegetation without being required to apply to DWER for a clearing permit. In EDO's view, the vast number of exemptions is inappropriate. Further, given that exemptions can be read and applied by any person proposing to clear land, it is concerning that the language used in Schedule 6 and the Clearing Regulations is extremely broad. For example, in Clause 5 of the Clearing Regulations terms such as "reasonable" and "no wider than necessary" are used, and are not defined. The exemptions therefore give substantial discretion to the person wishing to clear native vegetation.

The draft bill proposes changes to Schedule 6 to clarify when a clearing permit is not required for clearing that is done "in order to give effect to a requirement to clear under a written law". In particular, it replaces the reference to "written law" with "prescribed enactment" and specifically lists the legislation to which this exemption applies in a new Schedule to the *Environmental Protection Regulations 1987*. EDO supports this amendment to provide further clarity and certainty in relation to the applicability of this particular exemption, however more amendments are required to ensure the other exemptions are sufficiently limited and defined.

Additionally, the EP Act provides for no direct oversight of clearing undertaken under an exemption by DWER or any other regulatory body. Any person may determine at their own discretion whether or not clearing is exempt and if so, how they might go about it. Specifically, there is no requirement to notify DWER or any other regulatory body that clearing is being undertaken pursuant to a clearing exemption. Consequently, this type of clearing is not recorded or monitored. Not only does this mean there is a lack of transparency to DWER, other regulatory bodies and the public, it also poses serious problems from an ecological perspective. If there is no system or register recording all land that has been cleared in WA, DWER and other regulatory bodies will not be in a position to accurately determine the cumulative impacts, in addition to the impacts that proposed clearing may have on important wildlife corridors.

In EDO's view, the clearing exemptions should be revised to ensure they are strictly limited and sufficiently defined. Further, proponents should not have the discretion to determine whether or not clearing falls under an exemption, and following from this, regardless of whether or not clearing is deemed (by a regulatory body or otherwise) to be exempt, they must be required to report and record the clearing in a centralised system. Decision-makers will then be in a position to refer to the centralised system prior to making a decision to grant or refuse a permit. We therefore consider that there should still be a requirement for clearing proponents to refer to DWER or another regulatory environmental body or apply for a clearing permit for all proposed clearing, regardless of whether it considers the clearing is likely to be exempt.

RECOMMENDATION:

1. Amendment of Schedule 6 and the Clearing Regulations following a comprehensive review to ensure that exemptions are strictly limited and sufficiently defined;

2. Inclusion of a new section in Division 2 thatrequires proponents to notify the CEO or another regulatory body of the intention to clear native vegetation of a kind set out in Schedule 6 and the amount of vegetation they intend to clear; and report on the amount of clearing of native vegetation of a kind set out in Schedule 6 undertaken.

D. SCHEDULE 5 - CLEARING PRINCIPLES

Schedule 5 of the EP Act outlines the principles for clearing native vegetation (**clearing principles**). Under section 51O, the CEO is merely required to "have regard" to the clearing principles. We find it concerning that while the clearing principles underpin the whole of Part V Division 2, decision-makers are only required to have regard, and not apply, them and they are in no way enforceable.

EDO's view is that decision-makers like the CEO should be expressly required to apply the clearing principles in assessing whether a clearing permit is required. Further, the EP Act should provide further guidance on how these principles are to be applied and when a clearing permit is required (for example, refusal is required where a certain threshold of "variance" is met).

RECOMMENDATION: Amendment of Section 51O to require decision-makers to apply the clearing principles in making decisions in relation to clearing. For example, inclusion of the following text in italics:

> (2) In considering a clearing matter the CEO shall have regard to and *apply* the clearing principles so far as they are relevant to the matter under consideration…

The draft bill proposes to change to the definition of "threatened ecological community" in the clearing principles, in order to provide consistency between the definitions in the EP Act, *Biodiversity Conservation Act 2016* (WA) (**BC Act**) and EPBC Act. While EDO supports this amendment, we note that the clearing principles do not account for certain factors that are vital to ensuring the survival of ecological communities. We consider that Schedule 5 should provide for two further clearing principles for consideration in the assessment process, specifically:

a) a principle that requires decision-makers to consider landscape scale conservation. The International Union for Conservation of Nature (IUCN) accepts that in order to mitigate and reverse biodiversity loss and habitat fragmentation, it is necessary to conserve native vegetation at a landscape scale.[5] Worldwide, this is commonly done through wildlife corridor initiatives that seek to conserve, restore and protect habitat (such as Gondwana Link in the south-west of Western Australia). Including such a principle would require decision makers to determine whether the clearing is likely to cause impacts to a wildlife corridor.

b) a principle that requires decision-makers to consider the cumulative impacts of the proposed clearing, rather than only considering the direct impacts to the particular land and surrounding areas.

RECOMMENDATION: Amendment of Schedule 5 to include principles relating to landscape scale conservationand cumulative impacts.

E. CLEARING PERMIT CONDITIONS

Conditions imposed/attached to clearing permits under section 51H are often ineffective. While an section 51J of the EP Act provides that it is an offence to contravene a clearing permit condition, in our experience, conditions are rarely enforced as there is no requirement for an environmental government agency to ensure compliance. Accordingly, in our view, third parties should be provided with the opportunity to enforce clearing permit conditions (addressed above).

We are also concerned by the way clearing permit conditions are drafted. In particular, EDO is concerned with the way that offsets are conditioned in clearing permits. Offset conditions generally provide no certainty that appropriate vegetation will be secured or managed to successfully offset the clearing or monitoring or

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enforcement of this requirement. We therefore recommend the introduction of a provision enabling conditions precedent to be imposed on clearing permits that require land to be purchased and confirmed to be appropriate land for offsetting purposes by an environmental government agency prior to clearing occurring.

Further, we recommend that clearing permit conditions should require proponents to publicly report information on the clearing of native vegetation that has occurred.

F. REPORTING AND PUBLISHING CLEARING DATA

The government has a duty to publish information, facilitate public access and use of that information and maintain appropriately resourced infrastructure to provide and manage this information in accordance with its obligations under the Aarhus Convention.[6] Most information relating to Part V Division 2 can be found on the DWER website. However it is concerning that section 51Q(2) requires the CEO "to publish from time to time in a prescribed manner prescribed particulars of the record". While the draft bill proposes an amendment to remove the words "from time to time" and insert "must publish", there is still no regulation that prescribes when a CEO must publish particulars in relation to clearing.

EDO acknowledges that one of the key initiatives in the Native Vegetation Issues Paper is better information and exploring how to improve statewide monitoring of the extent and condition of native vegetation in WA. We support this initiative and recommend an amendment to the EP Act to require the CEO of DWER to monitor, *regularly* report and make publicly available information/data on the clearing of native vegetation. As addressed above, amendments should be introduced to require proponents to report on all clearing undertaken (even where clearing is subject to a clearing exemption). For example, a state-wide register could be established for clearing of native vegetation in WA.

[6] See The Australian Panel of Experts on Environmental Law Technical Paper 8 'Democracy and the Environment' at page 15.