

Article Information

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Proposed changes to Environmental Protection Act 1986 (WA) to streamline project approvals process

The WA State Government has proposed reforms to the environmental impact assessment process under the Environmental Protection Act 1986 (WA) (EP Act) to streamline the WA project approvals process and introduce greater transparency in decision-making.

On 15 August 2024, the State Government tabled the Environmental Protection Amendment Bill 2024 (WA) (**EP Bill**) to amend the EP Act. Among other things, the Bill proposes to reform the environmental impact assessment process under Part IV of the EP Act following the Vogel-McFerran review and commitments by the WA Government last year to improve the environmental approvals process.

Proposed Amendments

The key proposed changes to the EP Act associated with the environmental impact assessment regime are to:

1. Increase transparency of communications between the Minister for Environment (**Minister**) and the independent Environmental Protection Authority (**EPA**) by requiring an expectation statement to be issued by the Minister to the EPA and publication of directions by the Minister to the EPA;
2. Enable parallel decision making on projects so that other decision-makers can issue project approvals before the environmental impact assessment process is complete, provide for the exchange of information between the EPA and other decision-makers, and other associated changes to streamline the approvals process; and
3. Restructure the EPA membership and strengthen processes to address member conflicts of interest.

Transparent communication between Minister and EPA

Ministerial Statement of Expectation

Under the proposed changes to the EP Act, the Minister would be required to issue an expectation statement to the EPA, which sets out the Minister's expectations on matters relating to the EPA's functions. The EPA's functions include conducting environmental impact assessments.

The Minister would have discretion to determine which matters are to be covered by the expectation statement. In its media statement published on 14 August 2024, the WA Government explained that the expectation statement would help the EPA "better understand the Government's priorities - including the green energy transition, housing delivery, job creation and protection of WA's unique environment." The expectation statement must be reviewed and reissued to the EPA at least every 4 years, presumably as priorities and governments change.

The EPA must have regard to the expectation statement when it is performing its functions. However, the EPA remains an independent statutory body, which is required to have regard to other matters under the EP Act when performing its functions too.

The Minister must table a copy of the expectation statement before each House of Parliament and the EPA must publish the expectation statement.

Ministerial directions on assessment reports

The EP Act already enables the Minister to direct the EPA to prepare assessment reports within a specified period or before a specified date. The proposed changes would require the Minister to give reasons to the EPA for the direction and to publish those reasons.

Parallel decision-making processes

Other decision-making affecting a proposal under Part IV of the EP Act

Currently under section 41 of the EP Act, other decision-making authorities cannot make any decision about a proposal that could have the effect of causing or allowing the proposal to be implemented before the environmental assessment process is complete. Under the EP Act, decision-making authorities include public authorities under a statute and decision makers under a State Agreement.

Current exceptions to the prohibition are:

- a decision to cause or allow minor or preliminary work with the EPA's consent; and
- a decision made under the *Aboriginal Heritage Act 1972* (WA) (**AH Act**).

The EP Bill would limit the prohibition (and the exceptions) to any "restricted decision," which would be prescribed as a class of decision under regulations. The EP Bill provides that the classes of decisions may be described by reference to the written law under which the decision is made, State Agreements, the public authority or any characteristic relating to the proposal in relation which the decision is made.

This means that under the proposed changes, permits and consents associated with a proposal may be granted before the environmental impact assessment process is complete, provided that they are not a prescribed "restricted decision," or, if a restricted decision, the restricted decision relates to minor or preliminary work or a decision under the AH Act.

Section 41A of the EP Act would continue to provide that a person commits an offence if the EPA has decided to assess a proposal and the person does anything to implement the proposal before a Ministerial Statement is published at the end of the environmental impact assessment process (or the Minister decides that the proposal may not be implemented). Therefore, even if a decision-making authority has granted an approval or permit under the proposed changes, a person cannot do anything to implement the proposal until the environmental impact assessment process is complete.

Increased penalties

To ensure that the importance of the environmental impact assessment process is maintained while allowing some parallel decision-making, the EP Bill would double the penalties associated with a breach of section 41A of the EP Act. This means that the proposed penalties would be:

- for an individual who does anything to implement a proposal before the environmental impact assessment process is complete, up to \$125,000, with a maximum daily penalty of \$25,000; and
- for a body corporate who does anything to implement a proposal before the environmental impact assessment process is complete, up to \$250,000, with a maximum daily penalty of \$ 50,000.

Exchange of information

The EP Bill specifically contemplates that the EPA and decision-making authorities may need to exchange information to ensure that the parallel decision-making processes operate effectively. Under the EP Bill, regulations may:

- require the EPA to report to decision-making authorities on matters relating to the referral, assessment or implementation of a proposal;
- require a decision-making authority to report to the EPA or other decision-making authorities on matters relating to the decision-maker's decisions or activities in respect of a proposal that is referred, assessed or implemented; and
- relate to the timing, form or content of the above reports.

Decision of EPA not to assess a proposal

The EP Act currently provides that any person that disagrees with a decision of the EPA not to assess a proposal (other than a decision that the referral is better addressed under the Part V permitting processes) may appeal that decision to the Minister. The EP Bill proposes to remove that right to appeal.

However, the EP Bill would require the EPA to publish a summary of the decision not assess a proposal referred to it. Therefore, a person who would previously have appealed the decision not to assess a referred proposal to the Minister, would need to consider the merits of seeking judicial review of that decision based on the published summary.

Impacts for Permitting under Part V of the EP Act

The EP Bill proposes changes to Part V to reflect the parallel decision making principles, including:

- The CEO of the Department of Water and Environmental Regulation (**CEO**) would not be expressly prohibited from making a native vegetation clearing decision that is part of a proposal, or otherwise connected with the proposal so that the clearing would not need to be done if the implementation of the proposal did not proceed. However, the CEO could not make a decision that was contrary to a Ministerial Statement already in effect.
- The CEO would not be expressly prohibited from granting, or amending, a works approval or a licence unless it were contrary to a Ministerial Statement already in effect.

Under the proposed changes, the CEO would also have the power to amend clearing permits, works approvals and licences to ensure that they are consistent with a Ministerial Statement granted after the environmental impact assessment process is complete. Such amendments could not be appealed.

As discussed above, if the Minister decides that a referred proposal must not be implemented or a person does anything to implement the proposal before a Ministerial Statement is published, a person relying on a granted clearing permit, works approval or licence to undertake works associated with the referred proposal would risk committing an offence under section 41A of the EP Act.

Membership of the EPA

Under the proposed changes, the membership of the EPA could be expanded from 5 members to up to 9 members, but the maximum membership term is reduced to 3 years.

Before recommending a person for membership to the EPA, the Minister would need to be satisfied that the person has a suitable level of:

- Interest in and experience of matters affecting the environment generally; and
- Knowledge, skills, experience or qualifications in at least one of:
 - environmental science
 - natural resource and biodiversity management
 - waste management and pollution control
 - industry, commerce or economic development
 - public administration, governance, regulation or law
 - regional areas and issues

The EP Bill also strengthens the provisions relating to members' conflicts of interest by requiring disclosures of conflicts to be made prior to a meeting, where possible, and stating that where there is a conflict, the member cannot be present at any EPA meeting for any consideration, discussion or vote on the matter.