Environmental Protection Act 2020 – key changes relevant to Local Government

Advice to Local Government

January 2021

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1. Overview of this document

This document describes the changes to the *Environmental Protection Act 1986* (EP Act) that were assented to on the 19th November 2020. These changes were included in two separate Bills, one only dealing with cost recovery and the other containing all of the other changes. There are three sections to this document. The first section highlights the key points of WALGA's submission on the draft Bills and the extent to which they have been addressed. The second section is an executive summary of all the changes to the EP Act relevant to Local Government and the third section is a full description of those changes.

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2. Effectiveness of WALGA submission

Below are key points of WALGA's submission on the draft Bills and how the amended EP Act has addressed each point.

(i) WALGA strongly opposed the imposition of cost recovery on Local Governments for environmental assessments on Local Government proposals being assessed by the EPA.

Whilst the Act has introduced head of power to introduce cost recovery, the nature and extent of this will be contained in Regulations yet to be drafted. It is worth noting that the Minister advised at a WALGA forum held during the consultation period for the draft legislation that, in his view, Local Governments would not be subject to cost recovery.

This is a partial win for Local Government, and the new Regulations will need to be reviewed to ensure the Minister's view has been adhered to and Local Governments will be exempt from cost recovery.

(ii) WALGA supported the introduction of a referral process for clearing proposal where clearing which is insignificant should not require a permit.

Section 51DA(3) has been added which allows the CEO of the Department of Water and Environmental Regulation (DWER) to determine that proposed clearing can be considered trivial against specific criteria and would, therefore, not require a clearing permit.

This change is consistent with the WALGA submission.

(iii) WALGA advocated for the State Government to develop a strategic, comprehensive and sustainably funded approach to the protection of native vegetation in Western Australia

This was not addressed in the Act, although it may be addressed in the State Government's Native Vegetation Policy to be released shortly.

This issue may be addressed through another mechanism.

(iv) WALGA supported changing the Part V licencing system from the current system of licencing premises if undertaking an activity which falls under Schedule 1 of the EP Act to licencing the activity itself and the person undertaking that activity.

These changes have been included in the new EP Act.

These changes are consistent with the WALGA submission.

(v) WALGA recommended that the EP Act be changed to require State of the Environment Reporting be carried at least every 5 years.

This change has not been included in the new EP Act.

Whilst this issue was not addressed in the EP Act, WALGA will continue to advocate for this through our representation on both the EPA's and DWER's stakeholder references groups.

(vi) WALGA recommended that a needs based approach to the approval of new landfills and other waste infrastructure be developed and included in the EP Act.

This change has not been included in the new EP Act.

Whilst this issue was not addressed in the EP Act, WALGA will continue to advocate for this approach.

(vii) WALGA argued that the referral of scheme amendments to the EPA should be modified so that (a) 'basic' amendment do not need to be referred; and (b) a streamlined referral approach be adopted for 'standard' and 'complex' scheme amendments that have no likelihood of materially impacting on the environment;

Whilst this matter was not included in changes to the EP Act, they are proposed to be included in review of the Planning and Development (Local Planning Scheme) Regulations 2015. A Phase 2 tranche of legislative changes is being proposed in 2021 which would remove the need for all basic scheme amendments to be sent to the EPA and provide better streamlining of standard and complex applications.

These changes will align with the WALGA submission on the EP Act and the Planning and Development (Local Planning Scheme) Regulations 2015.

(viii) WALGA recommended that statutory timeframes for the resolution of appeals be adopted.

This was not addressed in the Act.

3. Executive summary of changes to the EP Act most relevant to Local Government

It should be noted that whilst the Acts have been assented to, they have not been proclaimed – i.e. they haven't come into force yet, as DWER has advised that it is highly unlikely that the Acts will be proclaimed as a whole: rather, different parts of the Acts will be proclaimed at different times once any necessary administrative processes are in place.

The key changes of interest to Local Government are summarised below with a full description provided in the next section.

- Changes were made to the process of establishing bilateral agreements between the State and Commonwealth to allow the WA EPA to carry out assessments and the WA Minister for the Environment to give final approvals under the EPBC Act;
- Introducing user pays state-wide environmental monitoring programmes, where the industries producing emission affecting a whole region or the state will be required to pay for the monitoring of those emissions;
- Introducing environmental protection covenants (EPC) as legally enforceable instruments;
- Various changes have been made to assessments of proposals through Part IV of the EP Act (assessment by the EPA), notably -
    - The Minster can now require re-assessment of any proposals, including those where the Minister had previously considered under appeal as not requiring assessment,
    - Formalising a recent decision of the Supreme Court that final approval of a project by the Minister is not constrained by any appeals outcome on the EPA report,
    - The EPA can take into account the capacity of other decision making agencies to deal with environmental issues, including in decisions to assess or not assess a proposal and in its report on an assessed proposal,
    - Clarifying what matters can be included in environmental conditions, notably offsets,
    - Local Governments and other agencies that make minor decisions on an assessed proposal will no longer be consulted when the Minister sets final environmental conditions on a proposals,
    - Another agency could be asked to monitor certain environmental conditions if it has specific and relevant expertise,
    - Cost recovery for EPA assessments has been introduced, although the Minister noted in a webinar for Local Government during the consultation period in 2020 that it is his view that Local Governments would be excluded from this, and
    - Modifying the process for how changes to assessed proposals and conditions are dealt with;
- Two changes to assessment of Schemes by the EPA -
    - Schemes can now be found to be environmentally unacceptable after an EPA assessment, and
    - The referral '28 day clock' can be stopped if the EPA doesn't have enough information to make a decision to assess or not assess a referred scheme;
- Changes to the Clearing permit process
    - The process for declaring environmentally sensitive areas will now be through Regulations,

- The CEO of DWER now has the capacity to consider a referral for clearing to be trivial and not needing a permit,
- The types of conditions that can be set on permits related to offsets is expanded,
- A new streamlined process for amending existing permits is introduced,
- Clarifying that clearing in an environmentally sensitive area to control an existing fire does not need a permit,
- Some changes made to exemptions in Schedule 6 related to fire mitigation, although clarity is being sought from DWER on how they are to apply – WALGA will provide separate advice on this; and

- Changes to licencing of premises and activities -
  - Combining works approval and licencing into a single type of licence,
  - Introducing the term 'controlled works' which are those works requiring a licence,
  - Introducing the term 'prescribed activity' in place of 'prescribed premises' where the activity creating the emission is licenced and not the entire premise – this is particularly relevant for Local Government that already have prescribed premises and for activities like transfer stations,
  - Allowing licences to be allocated to a person or business responsible for the activity rather than the owner of the premise, and
  - Introducing an 'opting in' option for operators to request to have a licence even if their activity wouldn't normally require one,
  - The CEO of DWER can now have regard to any development approval or planning instrument considered relevant, which would include any refusals for development a Local Government has made,
  - Increasing the powers of inspectors to enter premises in certain circumstances; and
- Expanding measures that can be imposed on a Vegetation Conservation notice.

4. Details of changes to the EP Act most relevant to Local Government

4.1 Bilateral agreements for assessment and approvals with the Commonwealth

Amendments have been made to how a bilateral agreement can be agreed to (between the State and Commonwealth) to allow the WA Environmental Protection Authority (EPA) and the WA Minister for the Environment to carry out assessments (EPA) and approvals (the Minister) under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). In general, this would be done as a single assessment and approval where the WA EP Act and the EPBC Act require an assessment of the same proposal. A bilateral can cover projects, schemes and clearing permits. This is covered in a new Part VIIIA of the EP Act.

4.2 State and region wide environmental monitoring programmes

The EP Act has a new Part VIIIB which allows for the creation of region wide or State-wide environmental monitoring programmes as a legally enforceable instrument which would allow monitoring of specific emissions from a variety of sources. It allows a State agency to be responsible for that environmental monitoring programs and enable cost recovery from all industries and activities that produce the emissions being monitored. It also allows for a special fund or special purpose account to be set up to manage funds from industry for monitoring purposes.

4.3 Environmental protection covenants

The Act allows for the creation of environmental protection covenants (EPC) as a legally enforceable instrument through the introduction of a new Part VB of the EP Act. This Part covers the process of establishing an EPC for approval and registration, the process for amending an existing EPC, duties for land owners, enforcement, and revoking of an EPC. These were previously only possible under the *Soil and Land Conservation Act 1945*. EPC would be more flexible than those under the other Act, for example, an EPC could be applied either in perpetuity or for a specified period, could contain positive or negative obligations, and could be readily amended. The Act also introduces appeal rights against a decision to establish an EPC (101B).

4.4 Assessments under Part IV of the Act - proposals

Additional Powers of the Minister to require re-assessment of a proposal

Changes have been made to allow the Minister to instruct the EPA to assess or re-assess a proposal at any time if new information comes to the attention of the Minister. Previously, this was only possible if the proposal had significantly changed. Section 3A is added under Section 43 which allows the Minister to refer a proposal to the EPA even if it had been previously referred, the EPA determined that it should not be assessed and the Minister had dismissed any appeals requesting that it should be assessed. In short, the Minster now has complete discretion to require the EPA to assess or reassess any proposal at any time.

The final approval for a proposal is not constrained by an appeals outcome

Previously, the EP Act required that the Minister should give a final approval to a proposal assessed by the EPA consistent with any appeals on the EPA's report – S45 (6) (a) (ii). This appears to not allow the Minister to approve a proposal that the EPA found to be environmentally unacceptable and the Minister agreed that is was environmentally unacceptable through appeals on the EPA Report. However, in recent times, the Minister had, through consultations with other Ministers, approve two proposals that the Minister found to be environmentally unacceptable through appeals. The Conservation Council referred one of these cases to the Supreme Court, and the Court found that the Minister was not bound by an appeal determination when consulting with a fellow Minister/s on the final approval. The Act has now deleted S45 (6) (a) (ii) which means the Minister is no longer constrained by his/her appeals determination on the EPA Report in consulting with other Ministers on any final approval.

Consideration of other decision-making processes by the EPA as part of an assessment

The existing Administrative Procedures related to EPA assessments of proposals sets out in more detail how the EPA assessment process is to be carried out. Whilst these are gazetted by Parliament, they do not have the weight and force of Legislation and provide the EPA with some flexibility in their application. Within these Procedures are two clauses that give the EPA the opportunity to take into account the processes and policies of other decision making agencies. This first involves the decision of the EPA to assess or not assess a proposal, and the second involves advice in the EPA assessment report on what are the relevant factors and what conditions should apply to a proposal. These have now been elevated to be included as clauses in the Act.

38G (4) allows the EPA to not assess a proposal it might otherwise assess if it considers that another decision making process can mitigate potential impacts through its decision making.

Similarly, Section 44 has a new clause (2AA) that allows the EPA in its assessment report to consider a factor not to be relevant and require a condition to be set to address the impacts that it might otherwise do if another decision making process can mitigate potential impacts through its decision making.

Matters that can be included as environmental conditions

The Act now provides greater clarity as to what matters an environmental condition of an approval can include: notably offsets, contributing money to carry out offsets, arranging environmental protection covenants on land the proponent doesn't own, and arranging for audits of conditions at the proponent's expense (45A(1).

Reducing the number of agencies that need to be consulted in any final approval

The Act introduces the term 'key decision-making authority' (44a) which is a decision-making authority (DMA) who makes a significant decision – i.e. that would cause the proposal to proceed or not. Only a key DMA will be consulted by the Minister in finalising the environmental conditions for a proposal. Any agency that makes a minor decision will not be consulted: for example, if a proposal needs a planning or building approval for a building as part of a larger proposal, the Local Government would not be consulted even though it would technically be a DMA. Section 45 (2) gives the power to the Minister to determine which agencies are key DMA's and need to be consulted.

Other agencies monitoring environmental conditions

The Act allows the Minister to give another regulatory agency that has regulatory expertise in a particular environmental matter the power to monitor and enforce compliance with certain environmental conditions. It is unlikely that this would include a Local Government, but does not rule it out.

Cost recovery for assessments by the EPA

A head power has been included in the EP Act to allow a fee, charge or levy to be imposed on a proponent for proposal subject to an EPA assessment to enable cost recovery of that assessment (48AA). Details of this would be prescribed through Regulations to be developed in consultation with stakeholders. The Minister advised at a WALGA forum during the consultation period for the draft legislation that, in his view, Local Governments would not be subject to cost recovery.

Changes to how the EPA assesses significant changes to existing proposals

The Act has a new section that allows the EPA to assess and report on a significant amendment to a proposal whilst keeping the existing conditions in place (S44AA).

The definition of a proposal has been changed to include a significant amendment to a proposal (37B(1)) which means a significant Amendment to proposal will be subject to the same procedures, appeals etc. as an assessment of a new proposal.

Changes to approved proposals and conditions

The proponent is required to seek approval from the Minister for any changes to conditions or proposal after approval has been given. Changes have been made to this process.

If the Minister determines that the requested changes are minor, then the Minister can make those changes without referral to the EPA, but is required to publicly advertise that those changes have been made. If the Minister determines that the proposed changes are significant then he/she is prevented from making those changes (45C.(3). In these cases, the proponent has the option of referring those proposed changes to the EPA as a significant amendment of an approved proposal (45C.(7)) – see above.

If the Minister determines that the proposed changes are significant but decides to not refuse that request outright, the Minister can either (45C.(8)):

- Determine that, in consultation with the relevant DMA, the requested change is a significant amendment and should be referred to the EPA by the relevant DMA as a significant proposal; or
- Request the EPA inquire into this proposed change under Section 46(1) EPA reports produced under this section are not subject to appeal.

4.5 Assessments under Part IV of the Act - schemes

Assessment of Schemes that are found to be environmentally unacceptable by the EPA

The previous EP Act allowed the EPA to determine that a proposed planning scheme is environmentally unacceptable at the referral stage but not following an EPA assessment. The Act now allows the EPA to find a scheme environmentally unacceptable after its assessment (48D(1)).

Stopping the clock when schemes are referred

The previous Act required the EPA to make a decision on whether to assess or not assess a scheme within 28 days, but with no provisions to 'stop the clock' should the EPA not have enough information to make this decision. This is inconsistent with the stop the clock provisions for proposals referred to the EPA. The Act has a new provision that allows the 28 day clock to stop for referred schemes if the EPA requires more information (48BA).

4.6 Part V clearing permitting process

Environmentally sensitive areas

The Act has a modified process for declaring an environmentally sensitive area (ESAs) by prescribing them in Regulations, which is a more flexible process and make any changes easier (51B(1) modified).

Trivial clearing not requiring a permit

An important change is introduced in the referral process for clearing application which allows the CEO of DWER to determine that a proposed clearing can be considered trivial against specific criteria and would, therefore, not require a clearing permit (51DA(3)). The area to cleared must

- Be relatively small given how much vegetation remains in that region,
- Be a relatively small portion of the remainder of that ecological community,
- Not have significant environmental values within the area,
- The state of scientific knowledge of the vegetation in the region is good, and
- The clearing doesn't raise any issues that require conditions to be set to manage or mitigate any impacts (51DA(4).

The CEO must inform the referrer and the public of any decision that a permit is not required, and there are no appeals against such a decision. However, if the CEO determines that an application does not require a permit, the referrer can still request the CEO to treat the application as requiring a permit ((51DA(8)).

This new provision would, in some cases, streamline the clearing permit process for Local Government activities.

Conditions for clearing

A change has been introduced for conditions set on clearing permits. The Act now allows for both direct and indirect offsets (51H(1)), contributing money to establish or maintain vegetation on other

land, giving an environmental undertaking, or setting an environmental protection covenant on other land (51I).

Amending an existing clearing permit

The Act sets out a formal process for amending an existing clearing permit, which mirrors the process for new clearing permit applications (51KA).

Vegetation conservation notices

The EP Act now allows the CEO to impose specific measures to Vegetation Conservation Notices, notably monitoring, record keeping and reporting.

Clearing in response imminent danger

The Act now allows for clearing in an environmentally sensitive area to control an existing fire without the need for a permit.

Clearing for fire mitigation purposes

Schedule 6 sets out clearing for which a clearing permit is not required, and the Act now provides some (but not complete) clarity as to whether clearing required under the *Bush Fires Act* (BF Act), requires a permit. The Schedule 6 references to the BF Act are amended to include

> *"(f) to comply with a notice given under section 33(1),*
>
> *(g) as authorised under section 36(b)"*

Section 33 (1) of the BF Act gives the power to Local Governments to require land owners to carry out fire mitigation measures "for preventing the outbreak of a bush fire, or for preventing the spread or extension of a bush fire which may occur."

Section 36(b) of the BF Act allows Local Governments to uses it resources to control and extinguish fires, with 36(b) specifically providing a Local Government expend resources to "clear a street, road or reserve vested in it or under its control, of bush, and other inflammable material, for the purpose of preventing the occurrence or spread of a fire".

It is recommended that caution is used in interpreting these changes for two reasons. First, the *Biodiversity Conservation Act 2016* (BC Act) and the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) still apply where there are threatened ecological communities (TECs) or threatened species present. Many local government reserves, especially in the Swan Coastal Plain and the Wheatbelt, have TECs present.

Second, there is some uncertainty as to the purpose of referring to these two sections in Schedule 6 and clarity is being sought from DWER on this. WALGA will provide separate advice on this issue.

4.7 Part V Licencing

A single licence type

The Act introduces a single licence type that combines works approval and licencing into one instrument. Part V Division 3 is now called 'Licences'.

The Act goes into detail about the processes involved for applying for a licence, amending an existing licence, revoking an existing licence and transferring ownership of an existing licence.

Controlled work

The Act introduces the term 'controlled works' which are 'works' requiring a licence. Works cover construction, installation or alternations to buildings, structures and plant equipment. Controlled works are those that's generate significant emissions.

Prescribed activity

The Act introduces the term 'prescribed activities' to replace 'prescribed premises' which are those actions/activities which could cause pollution. Prescribed activities will be set out and defined in a Regulation, and will require a licence. This is a change of the regulatory process from a focus on the premise that produces an emission to the activity that could cause an environmental impact.

This change also allows a licence to be granted to another person other than the occupier of the land who owns the premise or the land that the premise is on. Instead, a specific person or sub-contractor who is responsible for the activity will have to get a licence.

Local Governments should ensure that any activities that they are undertaking, which are identified under Schedule 1 of the EP Act and exceed the design capacity listed, have the appropriate licence (e.g. Transfer stations). These amendment to the Act also mean that there is another avenue for enforcement actions against activities like small scale illegal landfilling and skip bin operations. These types of operation have been difficult to address in the past, DWER had to prove environmental harm through a prosecution.

Note: If Local Governments have submitted works approvals/licence amendments (prior to the Act change), the Act changes allows for these to progress. All works approvals and licences which were in place prior to the Acts commencement also continue.

Opting in for a licence

The Act now allows a person who carries out an activity that does not meet the threshold to require a licence to opt in and get a licence. Proponents could opt into a licence if they wanted to add some security for their operations and have a defence against a possible litigation related to alleged pollution provided they act consistent with the licence.

CEO can consider other matters in issuing licences

The CEO can now have regard to "any development approval or planning instrument that the CEO considers relevant". This is an important clarification, as it addresses the situation where the CEO could approve a Licence for something which has been refused a Local Governments planning approval. The CEO can also now take into account "any other matter the CEO considers relevant" in the decision to grant a licence. WALGA has been advocating that in granting licences it is important that the CEO can refuse a license application if a proposed facility will undermine Waste Avoidance and Resource Recovery Strategy outcomes and targets.

Expanded powers of inspectors

The Act introduces expanded powers for inspectors to enter premises where a breach of conditions is suspected, as well as some other measures including the power to compel people to answer questions.

4.8 Other changes

Some changes are made to compliance and enforcement including increased fines.

Minor changes are made to modernise the Act – for example, removing gender specific language (e.g. chairman) and recognising modern technology (e.g. allowing EPA members to attend meetings on-line).

The Act includes a Head Power to establish certified environmental practitioners, with the details of the programme to be covered by a Regulation.

Better clarity is provided as to what is a strategic proposal, including alignment of the definition with that in the EPBC Act.

Some minor administrative changes are made to the Appeals process.

END