Frequently asked questions
Discussion paper
Modernising the Environmental Protection Act

General

What is the likely timing of the amendments to the *Environmental Protection Act 1986* (EP Act)?

It is intended that the proposed amendments to the Environmental Protection Act (EP Act) will be considered by Parliament in this term of Government, with the Bill introduced into Parliament in 2020.

How do the proposed amendments ensure Western Australia's environment is protected for future generations?

The amendments will enhance the capacity of the Environmental Protection Act to protect the environment in Western Australia through best-practice approaches.

These amendments provide for accredited environmental practitioners to certify documents under the Act, improving the quality of environmental review documents and delivering good environmental outcomes and more efficient approval processes.

The amendments include provisions to expressly allow for offsets for Ministerial Statements. They will also create a new 'environmental protection covenant', to provide greater flexibility and improve environmental outcomes when dealing with clearing permit applications and the outcomes of the Environmental Protection Authority's (EPA) assessment.

How will the Bill assist in reducing regulatory burden on business?

The proposed amendments will address elements of the Environmental Protection Act which are outdated, unduly restrictive or may impose unnecessary cost burdens on business.

The changes will streamline and improve the efficiency of environmental impact assessment processes and reduce duplication of assessment and approvals.

The proposed amendments will support implementation of bilateral agreements under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The amendments introduce a referral system for clearing, to ensure regulation is targeted and native vegetation with important environmental values is protected.

Greater flexibility will be introduced in dealing with changes to implementation conditions for proposals, where this will not have a significant detrimental effect on the environment.

How will the proposed amendments support the operation of bilateral agreements under the EPBC Act?

Western Australia has a bilateral agreement with the Commonwealth to undertake bilateral assessments under the EPBC Act. The EPBC Act also provides for approvals bilateral agreements.

Implementing bilateral arrangements is important in minimising duplication of environmental approvals and streamlining processes for businesses in Western Australia. The process of developing and reaching a bilateral agreement with the Commonwealth requires negotiation with the State to ensure high environmental standards are maintained.

Amendments to the EP Act will facilitate the State's ability to implement bilateral agreements under our environmental legislation. Amendments will ensure that the Minister for Environment, EPA and the Department of Water and Environmental Regulation (DWER) Chief Executive Officer, in exercising their powers and functions in relation to the assessment of proposals and schemes, clearing permit applications and appeals, may exercise those powers and functions in a manner that is consistent with, and enables the implementation of bilateral agreements under the EPBC Act.

The amendments will also allow the imposition of fees to be lawfully changed for work that is necessary under the EP Act to ensure bilateral agreements are implemented under Part IV processes and under Part V Division 2 for clearing permits.

Cost recovery

Cost recovery has previously been considered for the EPA's assessments but not progressed. Why is it being proposed here?

A head power has been included as part of the proposed amendments to allow fees to be charged for Part IV environmental impact assessment to enable cost recovery. This is in line with the State Government's policy for 'user pays' and the need to reflect the fair and reasonable true cost of the services provided.

To implement the new head power, regulations will be developed in the future in consultation with stakeholders and having regard to cost modelling being undertaken. The cost recovery provisions will not commence until the regulations have been made.

Funds received will be directed to provide better services, which will assist major development and ensure the capacity to protect the environment is improved.

Why are there new powers to require industry to contribute financially to the environmental monitoring programs in industrial hubs across the state?

When there are several large industries co-located in a specific region, there can be a risk to the local environment because of the cumulative emissions from the premises. Monitoring programs are a key mechanism used by the DWER in assessing the environmental impacts in these industry hubs. Information from monitoring programs can inform DWER work under Part V Division 3 of the EP Act, in terms of the licensing of these premises to control their emissions.

Amendments are proposed to the EP Act to enable cost recovery from large industry for important government environmental monitoring programs that assess cumulative industry impacts on human health and the environment.

An example of such a program is Port Hedland Industries Council's air quality monitoring network which monitors dust levels, which will be transferred to the DWER as a State Government environmental monitoring program. Another example is the implementation of the proposed Murujuga Rock Art Monitoring Program for the protection of the ancient rock art.

Specified licence holders under Part V Division 3 of the EP Act will contribute to the costs of the environmental monitoring programs, which reflects the principle of 'polluter pays' under section 4A of the EP Act. The funds collected will only be used for the purposes of environmental monitoring programs.

Environmental impact assessment

Why remove some decision-making authorities from the process of deciding on changes to conditions and not others?

As the decision-making process under section 46(8) may be limited to one or a few conditions, it is not useful for the Minister to consult with those authorities that have no interest in a particular change. This will streamline the assessment process without limiting the relevant issues which will need to be considered.

How is it proposed to make management plans under implementation conditions enforceable?

Often, the implementation conditions set by the Minister require the proponent to prepare and implement a management plan. It is proposed implementation conditions may include a condition requiring the proponent to prepare and implement a management plan. Failing to comply with an implementation condition is a Tier 2 offence. This brings the penalty for failing to comply with management plans into line with similar provisions in licences and clearing permits.

Will the power for other government agencies to monitor and enforce compliance require any increased resources for compliance?

It is intended that this power would only apply with the consent of the public authority and within its existing capacity.

What are the implications of the EPA's capacity to recommend that a planning scheme not be implemented for decision-makers under planning legislation?

It is not proposed to approve schemes under the EP Act. If the Minister for Environment and Minister for Planning reach agreement under the EP Act that a scheme may not be implemented, this decision would apply under the *Planning and Development Act 2005*.

Will there be a right of appeal in respect to a recommendation of the EPA that a scheme not be implemented?

The right of appeal that currently exists against the report and recommendations of the EPA would remain.

Given the amendments to the EP Act are meant to be about streamlining and improving the efficiency of approvals, why include a provision for the EPA to require further information to decide whether to assess a scheme where this may delay the approval process?

This amendment is not about delaying the process, but seeks to ensure adequate information is available for the EPA to make an informed decision about whether a scheme should be assessed. Having adequate information provides the EPA with the confidence it needs to determine whether or not a scheme warrants assessment.

Clearing of native vegetation

There have been criticisms of the process for regulating the clearing of native vegetation. Does the Exposure draft Bill address these?

A new referral system is proposed to provide a robust method to determine whether the clearing should be subject to a permit against the specified criteria, with the decision published. This will prevent the system being 'tied up' in an administrative process that does not result in clear environmental benefits.

Environmentally sensitive areas are another issue that has been raised. Does the Bill change these at all?

The Bill improves the process for declaring and updating environmentally sensitive areas, by enabling environmentally sensitive areas to be prescribed by regulation. This ensures these can be more readily maintained, while maintaining accountability through the scrutiny of Parliament.

Environmental regulation

What are the advantages of the amendments to the regulation of emissions over the existing approach?

It is more flexible because licences are not restricted to a premises, a licence can authorise works (removing the requirement for a separate approval), and any person can hold a licence.

It is simpler and more certain both for what is regulated and for the scope of defences. It also targets activities and emissions that present a real risk of harm to the environment and it reduces unnecessary regulatory burden as trivial changes to emissions will not be captured.

Will the move to activity-based licensing under the new EP Act allow DWER to licence a mobile plant?

Yes. The new regulatory approach will allow the licensing of mobile plants, which could not be effectively regulated under the current EP Act provisions. This will ensure better environmental outcomes.

Will the new EP Act allow the licensing of activities on multiple premises under one licence?

Yes. If required, an activity may be licensed over multiple premises where there is an administrative efficiency to do so. This will reduce the administrative burden on companies while not jeopardising the environmental outcomes.

If the new EP Act removes the requirement for a separate works approvals, what will be the status of my current works approval?

Under transitional provisions, existing works approvals will remain in force for the term of the approvals and will be subject to the provisions under the existing EP Act and not the new EP Act. However, works approvals may be amended to conform with the provisions of the new EP Act.

Will licences cover both the construction and operation phases of prescribed activities or will I need to apply for a licence for the construction followed by a submission of an application to amend the licence to allow for the operation?

Licences can authorise the construction phase (controlled works) and the operations phase. Alternatively, proponents can apply for a licence just for controlled works and then at a later date apply to amend their licence to also allow for operations. This provides the industry with a more flexible approach to regulation.

What advantages does this new regulatory approach in Part V offer over the existing regulatory approach?

Previously there was a lack of clarity on whether activities and emissions were authorised if they were not specifically included in approvals.

The new licences will make it clearer what they authorise and will be able to cover all phases of the construction and operations, reducing delays and the regulatory burden.

Will changing the licence holder from the occupier to any person create difficulties for government or industry in complying with a licence?

The operator will be able to select the person with day-to-day control of the operation to be the licence holder and this person may not be the occupier of the land. The normal rules applying to accessory liability and other criminal code provisions would continue to apply. This approach already applies effectively for the regulation of clearing, and for proponents of proposals assessed under Part IV of the EP Act.

Compliance and enforcement

Why is the introduction of injunction powers to address a broader range of environmental issues necessary?

The existing compliance mechanisms under the EP Act have shortcomings when there is a need to act urgently to prevent pollution or environmental harm from occurring.

Currently, an environmental protection notice provides powers to require an investigation or to undertake specific abatement actions, and a stop work order can require an industry to cease operations in the event that an environmental protection notice is not complied with. However, where there is non-compliance with these measures, enforcement action can take a significant period of time and the CEO has no further powers to intervene to prevent further environmental impacts.

An injunction already exists for clearing of native vegetation and the proposed amendments will bring industry regulation in line with clearing. It is intended for these powers to be a ‘last resort’ where other actions to achieve compliance have failed. By way of comparison, there has only been one case where an injunction has been sought and granted under the current section 51S.

Why is there a need for new forceful entry powers for compliance and enforcement?

Section 89 under the EP Act provides inspectors with the power to enter premises for specified purposes, including determining whether there has been compliance with, or contravention of, any requirement under the EP Act. However, difficulties are encountered where premises are locked, as DWER authorised officers do not have the power to enter locked premises, even in the presence of a police officer.

Without quick access, this could potentially result in a pollution incident and loss of evidence, and limit the ability of the DWER to implement an appropriate management response.

This new enforcement power is intended to be used only in limited circumstances, and where substantial damage is likely to result, and the prior approval of the CEO is required.

There has been concern by stakeholders over a long period that a person convicted of an offence under the EP Act receives a criminal record where the severity of the offence does not warrant this. Do the proposed amendments address this problem?

The modified penalty regime allows for a penalty notice to be given in the event of an offence where certain criteria are met. The amendments expand the modified penalty regime to non-intentional Tier 1 offences (including unlawful clearing). Currently, only certain Tier 2 offices are eligible. The alleged offender would still be able to elect whether to accept or reject a modified penalty notice. Payment of a penalty does not result in any criminal record.