THIRTY-EIGHTH PARLIAMENT

REPORT FORTY EIGHT

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

APPROVALS AND RELATED REFORMS (NO. 1) (ENVIRONMENT) BILL 2009

Presented by

Hon Adele Farina MLC (Chairman)

April 2010

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:
17 August 2005
Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

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GOVERNMENT RESPONSE

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

GLOSSARY OF TERMS

ACRONYMN	MEANING
1997 HEADS OF AGREEMENT	COAG entered into the Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment in 1997
ADDITIONAL WRITTEN ANSWERS OF APPEALS OF OFFICE OF THE APPEALS CONVENOR	Written answers to questions taken on notice at the hearing of 15 February 2010, dated 22 February 2010
AMENDED JOINT WRITTEN ANSWERS OF DEC AND OEPA	Joint written answers to questions taken on notice and additional questions put to the OEPA by the Committee and amended answers to questions for hearing on 8 February, 2010, dated 15 February 2010
AMENDMENT BILATERAL IGA	Agreement between the Commonwealth of Australia and the State of Western Australia under Section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* amending the Principal Agreement to Environmental Impact Assessment
API	Assessment on Proponent Information
ARC	Commonwealth of Australia Administrative Review Council
ARI	Assessment on Referral Information
BILATERAL IGA	Agreement between the Commonwealth of Australia and the State of Western Australia under Section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* relating to Environmental Impact Assessment, 2002
BILL	Approvals and Related Reforms (No. 1) (Environment) Bill 2009
BOWEN REPORT	Environmental Stakeholder Advisory Group (ESAG) *The Role and Structure of the Environmental Protection Authority* (for the Minister for Environment) September 2009
CCWA	Conservation Council of Western Australia Inc
CEO	Chief Executive Officer
CME	Chamber of Minerals and Energy, Western Australia
CNV REPORT	Expert Committee *Regulation Review: Clearing of Native Vegetation*(for the Minister For Environment) April 2009

ACRONYMN	MEANING
COAG	Council of Australian Governments
COMMITTEE	Legislative Council Standing Committee on Uniform Legislation and Statutes Review
DEC	Department for Environment and Conservation
DEWHA	Commonwealth Department of the Environment, Water, Heritage and the Arts
DEWHA Letter	Letter received from DEWHA dated 18 December 2009 provided by the OEPA by letter dated 30 March 2010 (Appendix 4)
DMP	Department of Mines and Petroleum
DRAFT ADMINISTRATIVE PROCEDURES	Proposed administrative procedures to be adopted by the OEPA and provided to the Committee on 30 March 2010 as published by the OEPA
EDO	Environmental Defender's Office
ENVIRONMENT IGA	Intergovernmental Agreement on the Environment 1992
EP ACT	*Environmental Protection Act 1986*
EPA	Environmental Protection Authority
EPA REPORT	EPA's *Review of the Environmental Impact Assessment Process in Western Australia* March 2009
EPA REPORT AND RECOMMENDATIONS	Report and recommendations given to the Minister for Environment by the EPA once the environmental impact assessment of a proposal or scheme is complete
EPBC ACT	*Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth)
EPBC REGULATIONS	*Environmental Protection and Biodiversity Conservation Regulations 2000* (Cwlth)
ERMP	Environmental Review and Management Programme
ESAG	Environmental Stakeholder Advisory Group
ESAG APPEAL REPORT	Environmental Stakeholder Advisory Group, The Appeals Process (for the Minister for Environment)
FLPs	Fundamental legislative scrutiny principles

ACRONYMN	MEANING
HAWKE REVIEW	Independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), which published its report, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* October 2009
JOINT WRITTEN ANSWERS OF DEC AND OEPA	Joint written answers to questions for the hearing of 8 February 2010, provided by DEC and OEPA
JONES REPORT	Industry Working Group *Review of the Approval Processes in Western Australia* (for the Minister of Minerals and Petroleum) April 2009
KEATING REPORT	Independent Review Committee's *Review of the Project Development Approvals System* 2002
MCMPR	Ministerial Council of Minerals and Petroleum Resources
MCMPR VISION	MCMPR 's *Vision for Australia's Minerals and Petroleum Industry in 2025* and its *Agenda for Achieving the Vision*
MINERALS COUNCIL ENDURING VALUES	Minerals Council of Australia's *Enduring Value - the Australian Minerals Industry Framework for Sustainable Development*
MINISTERIAL TASKFORCE	Ministerial Taskforce on Approvals, Developments and Sustainability 2009
NATIONAL APPROACH IGA	In 1991 the Australian and New Zealand Environment and Conservation Council adopted *A National Approach to Environmental Impact Assessment in Australia*
OEPA	Office of the Environmental Protection Authority
PER	Public Environmental Review
PUEA	Proposal Unlikely to be Environmentally Acceptable
SAT	State Administrative Tribunal
SEA	Strategic environmental assessment
SECTION 45(5) STATEMENT	The statement that the Minister for Environment is required to issue under section 45(5) of the EP Act once agreement has been reached (or a decision made on an appeal in respect of which an agreement could not be reached) in respect of conditions and procedures which will apply to the implementation of a proposal.

ACRONYMN	MEANING
WRITTEN ANSWERS OF THE OFFICE OF THE APPEALS CONVENOR	Written answers to questions for hearing 15 February, 2010, tabled at hearing on 15 February 2010

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 The major provision of the Environmental Protection Bill 2009, clause 5(1), proposes deletion of certain rights of appeal currently conferred by the *Environmental Protection Act 1986* in respect of decisions made by the Environmental Protection Authority in the environmental impact assessment of proposals and schemes.

2 The Committee has recommended deletion of clause 5(1) of the Environmental Protection Bill 2009 and made consequential recommendations in respect of other clauses of the Environmental Protection Bill 2009.

3 In summary, the practical effect of clause 5(1) of the Environmental Protection Bill 2009 is to remove from the *Environmental Protection Act 1986* provision of a right for the public to review critical decisions of the Environmental Protection Authority made prior to the Environmental Protection Authority issuing its report and recommendations. Instead of this legislative right, the Executive suggests reliance on EPA administrative procedures which, it is proposed, will allow for limited opportunity for public comment on the referral of a proposal or scheme. The proposed period for public comment will be prior to the Environmental Protection Authority's decision on whether to assess a proposal or scheme. The Committee has concerns at this transfer of public participation from the legislative (Parliamentary) to the administrative (Executive) realm.

4 The Committee also has concerns with deletion of the right to review critical Environmental Protection Authority decisions, which constitute an important 'check and balance' in respect of the exercise of administrative power.

5 In making its recommendations, the Committee has given careful consideration to the Executive's position that the rights of appeal that it is proposed to delete by clause 5(1) of the Environmental Protection Bill 2009 are "*duplicative and unnecessary*" due to the proposed administrative provision for prior comment in the context of the later right of appeal against the Environmental Protection Authority report and recommendations (which may be made at the conclusion of the environmental impact assessment process) and the Ministerial power to intervene in an assessment (conferred by section 43 of the *Environmental Protection Act 1986*). The position of the Executive is that deletion of the relevant appeals will not derogate from the "*rigour and transparency*" of the environmental impact assessment process and that the proposed administrative opportunity to make comment to the Environmental Protection Authority on a proposal meets community expectations in respect of public participation in the early stages of the assessment process.

6 However, an opportunity to comment on a proposal or scheme prior to the Environmental Protection Authority making a decision should not and cannot be equated with a right of appeal against that decision. The submissions made to the Committee do not support the Executive's position that community expectations in respect of public participation in the relevant decisions have been met.

7 In making its recommendations, the Committee has had regard to the fact that it is not necessary to delete the relevant rights of appeal to implement the proposed administrative changes.

8 The Committee's inquiry was, in some respects, premature. By reason of the uniform scheme in respect of environmental impact assessment, the final content of the proposed administrative changes (and whether they will, in fact, be implemented) is uncertain. The Legislative Council is, therefore, asked to consider the Environmental Protection Bill 2009 at a time when one of the critical circumstances on which it relies is uncertain. Further, at the time of the Committee's hearings, the period that would be allowed for public consultation, and information that would be available to the public for that purpose, was not available to the Committee or the public.

9 The Committee is of the view that provision of early opportunity for public comment has the potential, as the Executive says, to result in a more efficient and streamlined assessment process in respect of some proposals through earlier identification and resolution of issues with consequent reduction in resort to appeal.

10 However, the Committee has found that the practical effect of enactment of clause 5(1) of the Environmental Protection Bill 2009 may simply be to transfer challenge of the Environmental Protection Authority decisions to avenues such as: the appeal on the Environmental Protection Authority report and recommendations (which occurs later in the process); use of section 43 of the *Environmental Protection Act 1986* to make submissions for intervention by the Minister for Environment; or appeals to the courts, which may result in greater uncertainty, lengthier approval times and more cost.

11 The evidence presented to the Committee, and submissions of community stakeholders, raise serious questions as to whether the practical effect of enactment of clause 5(1) of the Environmental Protection Bill 2009 will be an unintended reduction in the rigour and transparency of environmental impact assessment under the *Environmental Protection Act 1986*.

12 The Environmental Protection Bill 2009 has raised the following fundamental legislative scrutiny principles directed at the Parliament's interest in the legislative framework governing the exercise of administrative power:

- *Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?*; and

- *Does the Bill allow delegation of administrative power only in appropriate cases and to appropriate persons? … The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.*

13 The Committee's findings and recommendations are set out below.

FINDINGS AND RECOMMENDATIONS

14 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

Page 27

Finding 1: The Committee finds that in order for the EPA's environmental impact assessment processes to be accredited for the purposes of the EPBC Act, formal execution of a replacement bilateral agreement between the State and the Commonwealth is required.

Page 29

Finding 2: The Committee finds that the final content of the EPA's new administrative procedures are unknown and dependent on negotiations with the Commonwealth for a replacement bilateral agreement.

Page 29

Finding 3: The Committee finds that there is no certainty that a replacement bilateral agreement will be entered into with the Commonwealth or that the proposed Draft Administrative Procedures will be adopted by the EPA.

Page 29

Finding 4: The Committee finds that in the absence of the replacement bilateral agreement and EPA proposed administrative procedures being finalised, the Legislative Council should not consider the Bill.

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Finding 5: The Committee finds that the Bill ratifies or gives effect to the National Approach IGA, Environment IGA and the 1997 Heads of Agreement, imposing an ongoing obligation on the State to improve consistency in internal and intergovernmental regulation of environmental impact assessment with a view to streamlining approval processes for development (Standing Order 230A(1)(a)).

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Finding 6: The Committee finds that the Bill is intended to give effect to/implement the various COAG and Ministerial Council Intergovernmental Agreements set out in this Chapter of its Report (Standing Order 230A(1)(a)).

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Finding 7: The Committee finds that the percentage of proposals referred to the EPA that have been assessed by it over the past six years varies between 19% and 37%. On average, the EPA assesses some 28% of the proposals referred to it.

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Finding 8: The Committee finds that the right of appeal conferred by section 100(1)(b) of the EP Act against the decision of the EPA as to the recorded level of assessment of a proposal is used to challenge not only the level designated in accordance with gazetted administrative procedures of the EPA but also the 'scoping' of the assessment and length of any period for public comment.

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Recommendation 1: The Committee recommends that the Minister for Environment identify the provision of the EP Act (or other legislation) conferring power on the Minister to remit a proposal to the EPA for "*reconsideration*" as to:

- **whether it should assess the proposal notwithstanding its recommendation that the proposal be dealt with pursuant to Part V, Division 2 of the EP Act; and**
- **the level of assessment of a proposal.**

Page 69

Finding 9: The Committee finds that proponents do utilise the current right, conferred by section 100(1)(b) of the EP Act, to appeal against the decision of the EPA as to level of assessment.

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Finding 10: The Committee finds that in the event the Minister for Environment determines an appeal against level of assessment by referring a proposal back to the EPA for a fresh decision, the EPA may impose a lower level of assessment, a higher level of assessment or the same level as previously imposed.

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Finding 11: The Committee finds that where the EPA has set a non-public level of assessment on the basis that a proposal is unlikely to be environmentally acceptable, proponents may seek imposition of a higher level of (public) assessment.

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Recommendation 2: The Committee recommends that the Minister for Environment clarify for the Legislative Council:

- **that "*strategic environmental assessment*" is a "*level of assessment*" for the purposes of section 100(1)(b) of the *EP Act*;**
- **if not, the relationship between designating a proposal referred to the EPA pursuant to section 38 of the *EP Act* as one that will be subject to "*strategic environmental assessment*" and section 39(1)(b) of the *EP Act*;**
- **whether the SEA level of assessment falls within the accredited assessment processes of the Bilateral IGA (and has been accredited by the Commonwealth government).**

Page 82

Finding 12: The Committee finds that there is uncertainty amongst stakeholders as to what constitutes:

- **a strategic proposal as distinct from a strategic assessment of a scheme; and**
- **a strategic proposal as distinct from a proposal,**

and, where a scheme has been subject to strategic assessment, what constitutes:

- **a proposal under the assessed scheme as distinct from a proposal that requires referral to the EPA under section 38 of the EP Act; and**
- **a proposal under the assessed scheme as distinct from a derived proposal**.

Page 82

Finding 13: The Committee finds that the appeals against the EPA's:

- **decision as to level of assessment of a strategic proposal (if such an appeal does exist);**
- **instructions as to the scope and content of an environmental review of a scheme; and**
- **declaration that a proposal is a derived proposal,**

provide a critical mechanism for public and proponent comment, and Ministerial review, of the validity of the distinctions drawn by the EPA between schemes, strategic proposals, proposals under an assessed scheme and derived proposals in the circumstances of uncertainty set out in Finding 12.

Page 86

Finding 14: The Committee finds that in order to give effect to the stated intent of the Executive, the Bill requires amendment to provide for:

- **deletion of section 100(2) of the EP Act; and**
- **consequential amendments to sections 100(3a)(d), 101(1) - line 1, 101(1)(dc), 101(2) and 101(3).**

Page 90

Finding 15: The Committee finds that the CEO makes a decision on whether a clearing permit is required independent of any recommendation of the EPA that a proposal is to be dealt with under Part V, Division 2, of the EP Act.

Page 95

Recommendation 3: The Committee recommends that the Minister for Environment identify for the Legislative Council the type of mining tenements and petroleum titles that are referred to the EPA for assessment under Part IV of the EP Act and those that undergo environmental impact assessment by the DMP.

Page 96

Recommendation 4: The Committee recommends that the Minister for Environment:

- **identify for the Legislative Council the type of mining tenements and petroleum titles in respect of which applications for permits to clear native vegetation are dealt with by the DMP pursuant to a Memorandum of Understanding between that Department and the Department of Conservation and Environment; and**

- **confirm if clause 5(1)(a) of the Bill will have the effect that there will be no appeal against the EPA's decision not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 where, in fact, the decision on the clearing permit application will be made by the DMP.**

Page 101

Recommendation 5: The Committee recommends that the Minister for Environment provide the Legislative Council with an explanation as to why deletion of the right to appeal against the EPA's decision not to assess a proposal does not include the circumstance where the EPA makes a recommendation that the proposal be dealt with under Part 5, Division 3 (*Prescribed premises, works approvals and licences*) of the EP Act.

Page 111

Finding 16: The Committee finds that the practical effect of clauses 5(1)(a), (b) and (d) of the Bill will be, in the event the proposed administrative changes are implemented in their current terms, to move the governing framework for public participation in the following decisions from legislative provision of a right to require a review of the decision that has been made by the EPA to an administrative opportunity to make comment to the EPA on the decision that it will make. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (clause 5(1)(a) of the Bill);**

- **as to the recorded level of assessment of a proposal (clause 5(1)(b) of the Bill); and**

- **to declare that a proposal is a derived proposal (clause 5(1)(d) of the Bill).**

Page 123

Finding 17: The Committee finds that the Parliament is asked to consider enactment of the Bill at a time when the administrative changes said to render some of the appeals deleted by the Bill unnecessary (whether in tandem with other factors or not) have not yet been put in place and may not be implemented in their current terms.

Page 124

Recommendation 6: The Committee recommends that consideration of the Bill be deferred until:

- **a replacement bilateral intergovernmental agreement has been entered into between the State and the Commonwealth; and**
- **the EPA's proposed administrative procedures have been gazetted pursuant to section 122 of the EP Act,**

in order that the Bill can be considered in its final context.

Page 124

Recommendation 7: The Committee recommends that the Minister for Environment advise the Legislative Council whether the EPA's proposed administrative procedures made pursuant to section 122 of the EP Act will apply to any mining proposal assessed by the DMP.

Page 125

Finding 18: The Committee finds that enactment of the Bill is not necessary to give effect to the proposed administrative reforms to the EPA's assessment of proposals and schemes.

Page 136

Finding 19: The Committee finds that, on the evidence made available to it, at least 50% of the time taken to resolve appeals under Part IV of the EP Act is due to proponent delay.

Page 138

Finding 20: The Committee finds that, on the basis of the information provided to it, it is unable to conclude that deletion of the rights of appeal against the EPA's:

- **decision not to assess a proposal but record a recommendation that the proposal be dealt with under Part V, Division 2, of the EP Act (clause 5(1)(a) of the Bill);**
- **decision on recorded level of assessment (clause 5(1)(b) of the Bill);**
- **instructions as to the environmental review of a scheme (clause 5(1)(b) of the Bill); or**
- **declaration that a proposal is a derived proposal (clause 5(1)(d) of the Bill),**

from the EP Act will have the practical effect of significant reduction in the time taken to assess any significant number of proposals.

Page 142

Finding 21: The Committee finds that while there will be a seven day opportunity for comment on notice of referral of a proposal, which will occur prior to EPA decisions on:

- **whether to assess a proposal;**
- **the level of assessment;**
- **the scope and content of an assessment of a proposal;**
- **whether a proposal should be declared a derived proposal; and**
- **possibly, whether a proposal should be assessed as a strategic proposal,**

as currently drafted, the Draft Administrative Procedures in respect of consultation have the practical effect that:

- **less information than that available through the appeals proposed to be deleted by the Bill may be available to third parties regarding a particular proposal; and**
- **there will be less time to consider the information that is made available.**

Page 151

Finding 22: The Committee finds that in the event the Bill is enacted, stakeholders are likely to utilise alternate avenues for challenging the decisions in respect of the appeals deleted by the Bill, resulting in increased use of:

- **the later appeal right against the EPA report and recommendations in respect of proposals and schemes;**
- **section 43 of the EP Act; and**
- **judicial review.**

Page 152

Finding 23: The Committee finds that in the circumstance set out in Finding 22, the practical effect of enactment of clause 5(1) of the Bill may not be to transfer public participation in the environmental impact assessment process to an earlier stage of that process, but to transfer public participation to avenues such as the appeal on the EPA report and recommendations (which occurs later in the process); use of section 43 of the EP Act; or appeals to the courts, which may result in greater uncertainty, lengthier approval times and more cost.

Page 152

Finding 24: The Committee finds that the practical effect of greater utilisation of the right of appeal against the EPA report and recommendations, section 43 submissions to the Minister and appeal to the courts as a consequence of enactment of clause 5(1) of the Bill may be to create greater uncertainty and lead to increased costs and delay

Page 152

Recommendation 8: The Committee recommends that the Minister for Environment provide the Legislative Council with the Executive's remedy in respect of the greater uncertainty and increased costs that may result from stakeholders increased recourse to the right of appeal against the EPA report and recommendations, section 43 submissions to the Minister and appeal to the courts as a consequence of enactment clause 5(1) of the Bill.

Page 165

Finding 25: The Committee finds that the third party rights of appeal against the decisions of the EPA made under Part IV of the EP Act are integral to the transparency and accountability of the framework legislative scheme underpinning the industry self-management philosophy of that Act.

Page 173

Finding 26: The Committee finds that each of the following decisions made under Part IV of the EP Act, currently subject to a right of appeal that clause 5(1) of the Bill proposes to delete, is a decision that affects the interests of persons and is of the nature generally regarded, as a matter of administrative law, as requiring appropriate merit review. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (clause 5(1)(d) of the Bill).**

Page 178

Finding 27: The Committee finds that that the rights of appeal that it is proposed to delete by enactment of clauses 5(1)(b), (c) and (d) of the Bill:

- **have not been found to be unnecessary in any recent review of environmental impact assessment/approval processes;**
- **have been found to be necessary in certain reviews; and**
- **are considered to be necessary by community stakeholders.**

Page 186

Finding 28: The Committee finds that the following rights of appeal that it is proposed to delete by enactment of the Bill confer on third parties, decision-making authorities and responsible authorities a right to challenge a decision of the EPA in circumstances that may not give rise to a right to challenge that decision through judicial review. The rights of appeal are those against the EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (section 100(1)(a) of the EP Act amended by clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (section 100(1)(b) of the EP Act to be deleted by clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (section 100(1)(c) of the EP Act to be deleted by clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (section 100(1)(f) of the EP Act to be deleted by clause 5(1)(d) of the Bill).**

Page 186

Finding 29: The Committee finds that the merits review process available by way of the appeals that it is proposed to delete by enactment of the Bill (see Finding 28 for those appeals) provides (by reason of sections 101(1)(b) and (1)(c), 101(2a) to (2c) and 101(1)(dc) of the EP Act) the remedy of substitution of a better, correct or preferable decision, which remedy is not available by way of judicial review.

Page 188

Finding 30: The Committee finds that a legally enforceable right to merits review is dependent on legislative provision.

Page 195

Finding 31: The Committee finds that the Draft Administrative Procedures provide for:

- **a lesser contribution to a "*better decision*" being made and no contribution to "*correct*" or "*preferable*" decision; and**
- **less transparency and accountability in decision-making,**

than the rights of appeal that it is proposed to delete by enactment of clause 5(1) of the Bill and that the Draft Administrative Procedures do not provide a mechanism for resolution of conflicts and disputes arising during the assessment process, which is provided by the relevant appeals.

Page 196

Finding 32: The Committee finds that as the public comment occurs prior to the following decisions of the EPA, the opportunity to make public comment does not constitute a "*review*" of those decisions. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (review deleted by clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (review deleted by clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (review deleted by clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (review deleted by clause 5(1)(d) of the Bill).**

Page 202

Finding 33: The Committee finds that the right of appeal at the conclusion of the EPA assessment process, being against the EPA report and recommendations, is problematic as an appropriate review of the EPA's decisions on level of assessment of a proposal, the scope of the environmental impact of a proposal and whether a proposal should be declared a derived proposal as:

- **government departments and stakeholders agree that early identification and resolution of issues is important;**
- **reliance on an appeal at that stage to raise issues that arise early in the environmental impact assessment process creates greater uncertainty for proponents;**
- **there is difficulty in identifying omission at that stage and remedying identified omission may cause delay and expense and may be less likely to occur by reason of the matters in the bullet points below;**
- **by the time of completion of the environmental impact assessment process the proposal has become more developed and is less flexible, with the consequence that there is less scope to implement environmental improvements;**
- **appeal at the stage of EPA report and recommendations is likely to have significant adverse financial implications for a proponent (even in the event the appeal is not successful).**

Page 206

Finding 34: The Committee finds that the powers conferred on the Minister by section 43 of the EP Act do not confer any rights on a proponent, decision-maker or third party to request or require the Minister to respond to a view that the relevant EPA decision is incorrect. Ministerial intervention under section 43 of the EP Act is a matter for Ministerial discretion.

Page 206

Finding 35: The Committee finds that there is no formal process for Ministerial intervention under section 43 of the EP Act and the exercise of Ministerial discretion under section 43 is not as transparent a process as that required under the EP Act in respect of appeals made under section 100(1) of the EP Act.

Page 206

Finding 36: The Committee finds that section 43 of the EP Act is a provision directed at the inherently political nature of environmental impact assessment. It allows the Minister to intervene on the ground of public interest in a proposal rather than merit *per se*.

Page 207

Finding 37: The Committee finds that section 43 of the EP Act does not provide for review of the following EPA decisions, which are the subject of the rights of appeal it is proposed to delete by clause 5(1) of the Bill. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (review deleted by clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (review deleted by clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (review deleted by clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (review deleted by clause 5(1)(d) of the Bill).**

Page 211

Finding 38: The Committee finds that the proposed administrative procedures said to render the appeal rights conferred by sections 100(1)(b), (c) and (f) of the EP Act unnecessary - in providing for public comment prior to the relevant decision being made - may be altered or withdrawn by the EPA without the input, or agreement, of the Parliament or the Minister.

Page 211

Finding 39: The Committee finds that the replacement of statutory appeal rights with administrative opportunity for comment removes an element of legislative certainty, and an important check and balance, from the framework of the environmental impact assessment process.

Page 211

Recommendation 9: The Committee recommends that the Minister for Environment provide the Legislative Council with the Executive's explanation as to why it is appropriate for prescription of the:

- **period for public comment; and**
- **information to be made available to the public,**

in respect of the environmental impact assessment of a proposal to be by way of administrative procedure, rather than in regulation.

Page 212

Recommendation 10: The Committee recommends that, subject to the response of the Minister for Environment to Recommendation 9, in the event clause 5(1) of the Bill is passed by the Legislative Council, the Legislative Council seek an assurance from the Minister for Environment that the Executive will exercise the powers conferred on the Governor by section 123 of the EP Act to make regulations prescribing guidelines for the environment impact assessment processes of the EPA, which guidelines will include:

- **appropriate minimum periods for public consultation;**
- **measures to ensure sufficient information is made available prior to the period for public consultation for that consultation to be meaningful; and**
- **appropriate transparency and accountability for EPA treatment of public comment in its decision making.**

Page 217

Finding 40: The Committee finds that the rights of appeal conferred by sections 102(1) (applicant), (3) and (4) (both third party) of the EP Act in respect of the CEO's decision to grant a clearing permit, or the conditions imposed on grant of a clearing permit, is a narrower right of appeal than that conferred by section 100(1)(a) of the EP Act.

Page 218

Finding 41: The Committee finds that if enacted, clause 5(1)(a) of the Bill will delete the current right to appeal against the EPA decision not to assess a proposal:

- **on grounds unrelated to the issue of a permit to clear native vegetation; and**
- **on the ground that the proposal should be subject to Part IV assessment, rather than being dealt with under Part V, Division 2,**

in the event the EPA makes a recommendation that a proposal be dealt with under Part V, Division 2, and that there is no equivalent appeal process available under Part V, Division 2.

Page 220

Finding 42: The Committee finds that in the event clause 5(1)(a) of the Bill is enacted, the decision of the EPA not to assess a proposal, when there is a recorded recommendation that the proposal be dealt with under Part V, Division 2, of the EP Act, will not be subject to appropriate review.

Page 221

Recommendation 11: The Committee recommends that subclause 5(1)(a) of the Bill be deleted from the Bill. This may be effected in the following manner.

Page 3, lines 13-17 - To delete the lines.

Page 226

Finding 43: The Committee finds that the EPA's proposal to reduce the number of levels of assessment of a proposal stipulated in its gazetted administrative procedures does not impact on the necessity for section 100(1)(b) of the EP Act.

Page 227

Finding 44: The Committee finds that the EPA decision as to the recorded level of assessment of a proposal will not be subject to appropriate review in the event of enactment of clause 5(1)(b) of the Bill.

Page 228

Recommendation 12: The Committee recommends that subclause 5(1)(b) of the Bill be amended to delete the reference to section 100(1)(b) of the EP Act. This can be effected in the following.

Page 3, line 19 - To delete "(b) and"

Page 228

Recommendation 13: The Committee recommends that references to section 100(1)(b) of the EP Act be deleted from clauses 5(2) and 6(1) of the Bill. This can be effected in the following manner.

Page 4, line 2 - To delete "(b),"

Page 4, line 15 - To delete "or (b)"

Page 4, line 20 - To delete ", (b)"

Page 5, line 1- To delete ", (b)"

Page 5, lines 7-11 - To delete the lines

Page 234

Finding 45: The Committee finds that the content of any EPA instructions set out in the public record under section 48B(1) of the EP Act in respect of the scope and content of the environmental review of a scheme will not be subject to appropriate review in the event of enactment of clause 5(1)(b) of the Bill.

Page 235

Recommendation 14: The Committee recommends that subclause 5(1)(b) of the Bill be amended to delete the reference to section 100(1)(c) of the EP Act. This can be effected in the following.

In the event Recommendation 12 is adopted

Page 3, line 19 - To delete the line

In the event Recommendation 12 is not adopted

Page 3, line 19 - To delete "and (c)"

Page 236

Recommendation 15: The Committee recommends that references to section 100(1)(c) of the EP Act be deleted from clauses 5(2), 6(2) and 6(3) of the Bill. This can be effected in the following manner.

Page 4, line 2 - To delete "(c),"

Page 5, line 6 - To delete the line

Page 5, line 8 to 15 - to delete the lines

Page 5, lines 21 to 30 - to delete the lines

Page 242

Finding 46: The Committee finds that the EPA decision to declare a proposal a derived proposal will not be subject to appropriate review in the event of enactment of clause 5(1)(d) of the Bill.

Page 242

Recommendation 16: The Committee recommends that that subclause 5(1)(d) of the Bill be deleted from the Bill. This recommendation may be effected in the following manner:

Page 3, line 24 - To delete the line

Page 243

Recommendation 17: The Committee recommends that the following consequential amendments be made to the Bill on deletion of subclause 5(1)(d). This can be effected in the following manner

Page 3, lines 3-10 - To delete the lines

Page 3, lines 25-27 - To delete the lines

Page 4, line 2 - To delete "or (f)"

Page 4, line 20 - To delete "or (f)"

Page 4, lines 26 to 30 - To delete the lines

Page 244

Recommendation 18: The Committee recommends that, in the event the Legislative Council passes clause 5(1)(d) of the Bill it amend the Bill to provide for deletion of section 100(2) of the EP Act and consequential amendments to sections 100(3a)(d), 101(1), 101(1)(dc), 101(2) and 101(3). This can be effected in the following manner

Page 4, line 10 - To insert

(3) In section 100 delete paragraph (2)

(4) In section 100(3a) delete paragraph (d)

Page 4, 14 - To insert after line 14

(aa) delete ", (2)"

Page 4, lines 26 to 30 - To delete the lines and to insert

(d) delete (dc)

Page 5, line 10 - To delete "or (2)"

Page 244

Recommendation 19: The Committee recommends that the Legislative Council give effect to the deletion of clauses 4 to 8 of the Bill in the following manner

Page 3,lines 1 to 28 - To delete the lines

Page 4, lines 1 to 30 - To delete the lines

Page 5, lines 1 to 30 - To delete the lines

Page 247

Finding 47: The Committee finds that clauses 9(1) and (2) of the Bill do not raise any issues under the fundamental legislative scrutiny principles.

Page 251

Finding 48: The Committee finds that clauses 9(3) and 10 of the Bill raise no issues under the fundamental legislative scrutiny principles.

Page 259

Recommendation 20: The Committee recommends that the Minister for Environment advise the Legislative Council whether it is proposed that the process for applying for EPA consent to minor or preliminary works under section 41A(3) of the *Environmental Protection Act 1986* will remain a purely administrative process.

Page 260

Recommendation 21: The Committee recommends that the Minister for Environment confirm for the Legislative Council:

- **whether it is intended to extend the ambit of "*minor or preliminary work*" used in section 41A(3) of the EP Act to include work that would permit decisions "*incidental or of minor significance to the Minister for Environment's decision after consultation*"; and**
- **if so, the additional works encompassed by the extension.**

CHAPTER 1
INTRODUCTION

INTRODUCTION

1.1 This Report sets out the Standing Committee on Uniform Legislation and Statutes Review's (**Committee**) inquiry into the Approvals and Related Reforms (No. 1) (Environment) Bill 2009 (**Bill**), which proposes amendments to the *Environmental Protection Act 1986* (**EP Act**).

1.2 In its main provision, clause 5(1), the Bill proposes the deletion of certain rights of appeal in respect of the environmental impact assessment of proposals and schemes, as well as certain third party rights of appeal in respect of permits to clear native vegetation, works approvals and licences.

1.3 This Chapter explains the structure of the report and gives an overview of the Bill and its purpose.

1.4 Chapter 2 sets out the referral and inquiry process.

1.5 Chapter 3 sets out the materials establishing the uniform nature of the Bill and provides information (in addition to the usual information included in all of the Committee's reports) in respect of uniform legislative structures, the Committee's use of the Fundamental Legislative Scrutiny Principles when scrutinising Bills and its findings in respect of the application of Standing Order 230A to the Bill.

1.6 While the generic information contained in Chapter 3 has formed part of previous reports by this Committee and its predecessors, it is hoped that reiteration of this information will clarify the Bills to which Standing Order 230A applies.

1.7 Chapter 4 provides the context for the Bill. It looks at the relevant provisions of the EP Act and the proposed administrative changes that are said to render certain appeal rights unnecessary. This Chapter presents some of the evidence, and makes findings, as to the practical effect of the Bill to inform later discussion.

1.8 Chapter 5 draws on Chapter 4 in describing the practical effect of the Bill and makes further findings in respect of its practical effect.

1.9 Along with the practical effect of the Bill, the main question arising in the inquiry was that summarised in Fundamental Legislative Scrutiny Principle 1:

> *Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?*

1.10 The Executive's policy position, as stated in the Second Reading Speech, implicitly acknowledges this principle:

> *The right to challenge decision making is fundamental to the transparency and accountability of decision making under the EP act. The government is committed to transparent decision making and the public's "right to know" whilst facilitating an administratively more efficient appeal regime.*[1]

1.11 Chapter 6 sets out the principles of administrative law in respect of appropriate review of administrative decision-making, identifies the relevant decisions as those appropriately subject to merits review and contains the Committee's findings as to whether:

- administrative opportunity for comment prior to a decision being made;
- the remaining right of appeal against the EPA's report and recommendations in respect of the environmental impact assessment of a proposal or scheme;
- the process for Ministerial intervention provided for in section 43 of the EP Act; and/or
- the opportunity for judicial review,

constitute "*appropriate*" review of the relevant decisions.

1.12 Chapter 6 also addresses Fundamental Legislative Scrutiny Principle 3: *does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? … The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.*

1.13 Chapters 7 to 9 apply the Committee's findings in Chapters 3, 4, 5 and 6 to specific clauses of the Bill in the context of the evidence and circumstances specific to each clause. These Chapters also raise the issues specific to the particular clause addressed in the individual Chapter.

APPROVALS AND RELATED REFORMS (NO.1) (ENVIRONMENT) BILL 2009 - OVERVIEW

1.14 The Bill amends the EP Act by deleting certain appeals to the Minister for Environment in respect of:

[1] Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, pp9406-07.

1.14.1 the environmental impact assessment of schemes, being an appeal against the decision of the EPA as to the scope and content of a directed environmental review (clause 5(1));

1.14.2 the environmental impact assessment of proposals, being:

- an appeal against the EPA's decision not to assess in the event it makes a recommendation that the proposal be dealt with under Part V, Division 2, of the EP Act (which contains provisions relating to the clearing of native vegetation);
- an appeal against the EPA's decision as to the level of assessment; and
- an appeal against the EPA's declaration, pursuant to section 39B of the EP Act, that a proposal is a derived proposal (all clause 5(1)); and

1.14.3 certain decisions of the Chief Executive Officer (**CEO**) of the Department for Environment and Conservation (**DEC**) in respect of permits to clear native vegetation (clause 9(3)) and works approvals and licences (both clause 10).

1.15 The Bill also reduces the time for lodging certain appeals against the CEO's decision in respect of permits to clear native vegetation (clauses 9(1) and (2)) and permits decisions to be made under other legislation allowing minor or preliminary work in respect of:

- a proposal;
- clearing of native vegetation;
- works approval; and
- licence,

notwithstanding the fact that an environmental impact assessment of a proposal has not been completed (clauses 13 to 16).

1.16 Clauses 1 to 4, 5(2), 6 to 8 and 17 contain the formal provisions of the Bill and propose amendments that are consequential and transitional in respect of the substantive amendments proposed by the other clauses.

The Bill is one of a suite of bills

1.17 In the Second Reading Speech, the Minister for Environment advised that the Bill was one of a suite of four bills directed at streamlining the approval process.[2] The other bills are:

- Approvals and Related Reforms (No.2) (Mining) Bill 2009;
- Approvals and Related Reforms (No.3) (Crown Land) Bill 2009; and
- Approvals and Related Reforms (No.4) (Planning) Bill 2009.[3]

Statistics

1.18 The statistical information presented in this report is, in general, from 2004 to 2009. The reason for this is that:

- Part V, Division 2 (which contains the provisions relating to the issue of permits to clear native vegetation), was inserted into the EP Act in 2003 and commenced in July 2004;[4] and
- neither DEC nor the Office of the Appeals Convenor[5] records differentiate between appeals lodged against an EPA decision not to assess and level of assessment prior to 2005.[6]

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2 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406.

3 The Approvals and Related Reforms (No.2) (Mining) Bill 2009 was introduced to the Legislative Council on 19 November 2009: Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9405. The other bills were introduced to the Legislative Assembly on 18 November 2009. (See Hon Brendon Grylls MLA, Minister for Lands, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 November 2009, p9263 (Regarding the Approvals and Related Reforms (No. 3) (Crown Land) Bill 2009) and Hon John Day MLA, Minister for Planning, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 November 2009, p9265 (Regarding the Approvals and Related Reforms (No. 4) (Planning) Bill 2009).

4 Section 110 of the *Environmental Protection Amendment Act 2003* and Amended Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority provided with letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p2.

5 The Appeals Convener is appointed by the Governor, has a statutory role under the EP Act and is independent of the Department of Environment and Conservation and Office of the Environmental Protection Authority.

6 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p2.

No prior consultation in respect of the Bill

1.19 The joint written answers to questions for the hearing of 8 February 2010, provided by DEC and Office of the Environmental Protection Authority (**OEPA**), (**Joint Written Answers of DEC and OEPA**) responded to the Committee's question as to who had been consulted in respect of the Bill by advising of "*briefings*" provided to the Environmental Stakeholder Advisory Group (**ESAG**),[7] The Chamber of Minerals and Energy, Western Australia (**CME**) and the Conservation Council of Western Australia Inc (**CCWA**).[8]

1.20 The CCWA, which is a member of ESAG, advised that at the time ESAG was requested to provide advice on appeals under the EP Act it was aware that a bill was under consideration but not the nature of that bill.[9] At the hearing it expressed the view that:

> *the consultation process that has been involved with the development of this bill has been severely lacking ....*[10]

1.21 At hearing, the OEPA advised that "*briefings*" had occurred after the introduction of the Bill to the Parliament and that there was no prior consultation in respect of the Bill.[11]

PURPOSE OF THE BILL

1.22 The stated purpose of the Bill is to improve timelines for approvals without compromising transparency, accountability or environmental outcomes.

1.23 In the Second Reading Speech, Hon Donna Faragher MLC, Minister for Environment said:

> *The approvals system has created uncertainty and delays. … By reviewing and streamlining approvals, the government is ensuring that resource development in WA occurs in a more efficient and*

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7 The Environmental Stakeholder Advisory Group was established by the Minister for Environment in June 2009. It has membership comprising mining, business and conservation groups. A full member list can be found in Attachment 1 to the Environmental Stakeholder Advisory Group, *The Appeals Process*, September 2009, unnumbered page.

8 Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority to the Committee's Questions for Hearing on 8 February 2010 tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p29.

9 Submission No 8 from Conservation Council of Western Australia Inc, 11 January 2010, p3.

10 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p2.

11 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p28.

> *sustainable manner, while not reducing the rigour of environmental impact assessment and regulation. …*
>
> *I am confident that these amendments will minimise impediments to efficient environmental impact assessment and environmental regulation without compromising environmental standards and community expectations for transparency and accountability.*[12]

1.24 In announcing the suite of four approval and related reform bills to the Australian Petroleum Production and Exploration Association, the Premier said:

> *We must create and maximise the opportunities presented by attracting investment in the State … We need an approvals system that welcomes investment and stimulates economic development, not stymies it.*
>
> *… The new process will be streamlined without compromising environmental, heritage and planning approvals.*[13]

12 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, pp9406 and 9408.

13 Premier's Media Statement 16 October 2009 (available www.mediastatements.wa.gov.au, (viewed on 15 January 2010).

CHAPTER 2
INQUIRY PROCESS

REFERRAL

2.1 The Bill was introduced to the Legislative Council on 19 November 2009 by Hon Donna Faragher MLC, Minister for Environment.[14]

2.2 Following its Second Reading Speech, the Bill stood referred to the Standing Committee on Uniform Legislation and Statutes Review pursuant to Standing Order 230A, which requires the Committee to report to the Legislative Council within 30 days of referral. As a consequence of the summer recess, the reporting date was effectively the first scheduled sitting day of 2010, being 2 March 2010.

2.3 The Committee sought, and was granted, extensions of time to report on the Bill to 28 April 2010.[15]

ADVERTISEMENT AND STAKEHOLDERS

2.4 The Committee's inquiry into the Bill was advertised in *The West Australian* on Saturday, 28 November 2009. The Committee wrote to stakeholders (a list of whom is **Appendix 1**) on 2 December 2009, inviting submissions. Details of this inquiry were published on the Committee's website.

2.5 The Committee also wrote to the Minister for Environment on 27 November 2009 requiring provision of the supporting documents for the Bill.

SUPPORTING DOCUMENTS

Provided by the Minister

2.6 The Minister for Environment provided the Intergovernmental Agreement on the Environment 1992 (**Environment IGA**) on 9 December 2009 (**Appendix 2**).

2.7 At the request of Committee staff, the Minister also provided, on 16 December 2009:

- the Agreement Between the Commonwealth of Australia and the State of Western Australia Under Section 45 of the Commonwealth *Environment*

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14 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406.

15 Hon Adele Farina MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 2 March 2010 p323, 24 March 2010 p979 and 22 April 2010 p2.

Protection and Biodiversity Conservation Act 1999 Relating to Environmental Impact Assessment, 2002 (**Bilateral IGA**); and

- the Agreement Between the Commonwealth of Australia and the State of Western Australia under Section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* Amending the Principal Agreement Relating to Environmental Impact Assessment (**Amendment Bilateral IGA).**

referred to in the Minister's letter of 8 December 2009.

Identified by the Committee

2.8 The Committee identified the following additional supporting documents:

- *A National Approach to Environmental Impact Assessment in Australia* (The former Australian and New Zealand Environment and Conservation Council);
- Council of Australian Governments (**COAG**) Communiqué of 10 February 2006;
- COAG Communiqué of 14 July 2006;
- the Strategic Plan of the Environment Protection and Heritage Council;
- COAG Business Regulation and Competition Working Group Communiqué of July 2008; and
- Ministerial Council of Minerals and Petroleum Resource (**MCMPR**) *Vision for Australia's Minerals and Petroleum Industry in 2025* and its *Agenda for Achieving the Vision* (jointly, **MCMPR Vision**).

SUBMISSIONS

2.9 The following stakeholders provided written submissions to the Committee:

- Hon Giz Watson MLC;
- The Western Australian Farmers Federation;
- The Wilderness Society WA;
- Department of Mines and Petroleum (**DMP**);
- Dr J E Wajon;

- Dr Margaret Matthews;
- Fire & Emergency Services Authority;
- CCWA;
- Environmental Defender's Office (**EDO**);
- Busselton-Dunsborough Environment Centre;
- CME;
- Peel Preservation Group Inc; and
- South West Environment Centre (Inc).

2.10 The Committee thanks all persons and entities for their submissions and assistance in the Committee's inquiry.

HEARINGS

2.11 The Committee held the following hearings:

8 February 2010

- Mr Kieran James McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Advisor, both of DEC; and
- Ms Michelle Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services, both of OEPA.

15 February 2010

- Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, both of the Office of the Appeals Convenor; and
- Mr Piers Verstegen, Director, and Dr J Nicholas Dunlop, Environmental Science and Policy Co-ordinator, both of the CCWA.

Written Evidence

2.12 Although the Committee provided the government departments with written questions in advance of the hearing, a number of questions were taken on notice at the hearing. Additional questions also arose in the course of the hearings. The Committee received the following documents:

- DEC and OEPA - **Joint Written Answers of DEC and OEPA**, tabled at hearing with DEC on 8 February 2010;

- DEC and OEPA - joint written answers to questions taken on notice and additional questions put to the OEPA by the Committee, and amended answers to questions for hearing on 8 February 2010, dated 15 February 2010 (**Amended Joint Written Answers of DEC and OEPA**);

- Office of the Appeals Convenor - written answers to questions for hearing 15 February 2010, tabled at hearing on 15 February 2010 (**Written Answers of Office of the Appeals Convenor**);

- CCWA - provision of example requested at hearing 15 February 2010; and

- Office of the Appeals Convenor - written answers to questions taken on notice at the hearing of 15 February 2010, dated 22 February 2010 (**Additional Written Answers of Office of the Appeals Convenor)**.

2.13 The Committee thanks all witnesses for their assistance in this inquiry.

Further delay in provision of information

2.14 At the hearing on 8 February 2010, the Committee requested the OEPA to provide it with correspondence from the Commonwealth Department of the Environment, Water, Heritage and the Arts (**DEWHA**) received by the OEPA in December 2009 in respect of negotiation of a replacement bilateral agreement with the Commonwealth.

2.15 The OEPA advised the Committee on 15 February 2010 that it had sought DEWHA's permission to provide the letter to the Committee.

2.16 Not having received the DEHWA correspondence, the Committee wrote to the OEPA on 26 March 2010 inquiring as to the progress of negotiations and requiring a copy of the DEWHA December 2009 letter.

2.17 The OEPA provided the letter from DEWHA, dated 18 December 2009, (**DEWHA Letter**) by letter dated 30 March 2010. The DEWHA Letter is (**Appendix 3**). That letter also enclosed the latest draft of the EPA's proposed administrative procedures.

Detail of proposed administrative procedures not available at hearing

2.18 At the time of the Committee hearings in respect of the Bill, a draft of the proposed administrative procedures was not available to the public or the Committee.

2.19 At the hearing with the OEPA, the Chairman said:

> *But in view of that, it is very difficult for this committee to assess, and provide advice to the Parliament on, the merits of the bill before us without having the full package before the committee for its consideration.*[16]

2.20 The OEPA's response was:

> *I can understand you would like some more information around those administrative reforms. They are being worked up and implemented …,*[17]

but that the Committee could not be provided with the proposed changes as:

> *It is my understanding, because they are still in draft form with the EPA, that I am not able to do that.*[18]

2.21 In particular, the OEPA did not, at the hearing or in its written responses to the Committee's questions, identify the proposed period for public comment on a referred proposal.

2.22 The Committee was provided with a copy of the proposed administrative procedures on 15 February 2010, which it received after the hearings held that day. The Committee was on 30 March 2010 provided with a copy of the version of the draft administrative procedures published by the OEPA after the Committee's request for an update on their implementation (**Draft Administrative Procedures**).

2.23 Late provision of important information (such as the DEHWA letter and proposed administrative procedures), frustrated the Committee's consideration of the Bill and its ability to finalise this report.

PARTICIPATING MEMBER

2.24 Hon Giz Watson MLC was a participating Member of the Committee for the hearings held 15 February 2010. Hon Giz Watson MLC did not, however, participate in the deliberations of the Committee.

REVIEWS OF THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

2.25 There have been several recent committees and taskforces examining the approval of development proposals in Western Australia. These include:

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16 Hon Adele Farina MLC, Chairman, Standing Committee on Uniform Legislation and Statutes Review, during the Committee's hearing with the Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p6.

17 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p7

18 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p12

- 2002 - the Independent Review Committee's *Review of the Project Development Approvals System* (**Keating Report**);

- March 2009 - the EPA's *Review of the Environmental Impact Assessment Process in Western Australia* (**EPA Report**);

- April 2009 - Industry Working Group, *Review of the Approval Processes in Western Australia* (**Jones Report**) (for the Minister of Minerals and Petroleum);

- April 2009 - Expert Committee - *Regulation Review: Clearing of Native Vegetation* (**CNV Report**) (for the Minister for Environment);

- August 2009 - Environmental Stakeholder Advisory Group, *The Role and Structure of the Environmental Protection Authority* (**Bowen Report**) (for the Minister for Environment);

- September 2009 - Environmental Stakeholder Advisory Group, *The Appeals Process* (**ESAG Appeal Report**) (for the Minister for Environment); and

- 2009 - Ministerial Taskforce on Approvals, Developments and Sustainability (**Ministerial Taskforce**).

2.26 The Keating, EPA, Jones, CNV and Bowen Reports were published prior to the Committee's inquiry.

2.27 At the request of the Committee, the Minister for Environment provided a copy of the ESAG Appeal Report on 15 February 2010. That report was published on 22 February 2010.

2.28 The Ministerial Taskforce report was not available to the Committee and had not been made public at the time of the Committee's inquiry.

2.29 In addition to the various reviews of the approval of development proposals in Western Australia, there has been a contemporaneous independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), which published its report, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* in October 2009 (**Hawke Review**).

2.30 The Committee has noted in this report the findings and recommendations of the various published reviews as they are relevant to the amendments proposed by the Bill.

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

2.31 The establishment of a Committee to scrutinise uniform legislation arose from the concern that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, bind a State Parliament to enact legislation giving effect to national uniform schemes or intergovernmental agreements.[19]

2.32 Due to the limited information available to the Parliament in respect of negotiations for a uniform scheme, the purpose of the Committee is not only to identify any provisions of uniform legislation that detract from the powers and privileges of the Parliament but (to the extent necessary and possible within the limited time available for its inquiry) provide the Parliament with the rationale for, and practical effect of, the uniform legislation.

2.33 Related to the limited availability of information is the lack of opportunity for the Parliament to constructively review uniform legislation from a technical perspective.[20]

2.34 The various uniform legislation scrutiny committees in the different Australian jurisdictions have, since 1996, used the same fundamental legislative scrutiny principles (**FLP**s) as a guide to answering the broader questions whether the legislation:

- has sufficient regard to the rights and liberties of individuals;
- allows delegation of power only in appropriate cases and to appropriate persons; and
- has sufficient regard to the powers and privileges of the Parliament.

2.35 The FLPs are set out in **Appendix 4**.[21]

2.36 Particularly pertinent to this inquiry are:

- FLP 1 - *Are rights, freedoms or obligations dependent on administrative power only if sufficiently defined and subject to appropriate review?*

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19 See generally the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents,* 27 August 2004.

20 Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report No. 10, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles,* 31 August 1995, pvi.

21 Further background on the fundamental legislative scrutiny principles can be found in the western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004,* 18 November 2004, pp4-9.

- FLP 3 - *Does the Bill allow delegation of administrative power only in appropriate cases and to appropriate persons? … The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.*

- FLP 11 - *Is the Bill unambiguous and drafted in a sufficiently clear and precise way?*

CHAPTER 3

APPLICATION OF STANDING ORDER 230A

INTRODUCTION

3.1 The Bill was not identified as uniform legislation in the Second Reading Speech.

3.2 Notwithstanding the referral of the Bill to the Committee, the Minister for Environment has asserted to the Committee that the Bill is not uniform legislation to which Standing Order 230A applies:

> *it neither ratifies nor gives effect to a bilateral agreement, nor introduces a uniform scheme or legislation throughout the Commonwealth.*[22]

3.3 The Committee has, therefore, been required to undertake an inquiry into the uniform nature of the Bill. This has added considerably to the Committee's workload at a time when it was undertaking six inquiries.

3.4 In Chapter 2 (paragraphs 2.14 - 2.17) it was noted that the Committee was only provided with copies of the Bilateral IGA, Amendment Bilateral IGA on request and the DEWHA Letter on repeated request. It is also reported in Chapter 2 that little detail of the proposed administrative procedures was provided at the hearings and that the EPA's Draft Administrative Procedures was only provided on specific request (see paragraphs 2.18 - 2.23).

3.5 The Committee's ability to inquire and report within its limited timeframes would be greatly enhanced by a more co-operative approach on the part of the Executive.

STRUCTURES OF UNIFORM LEGISLATION

3.6 The Committee's reports almost invariably contain a paragraph in terms similar to the following:

> *National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth, can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The legislative structures are summarised in Appendix … .*

[22] Letter from Hon Donna Faragher MLC, Minister for Environment, 8 December 2009, p1.

3.7 National legislative schemes implementing uniform legislation take a variety of forms. Nine different structures, each with varying degrees of emphasis on national consistency or uniformity of laws and adaptability, have been identified; however, this is not an exhaustive list. The structures are constantly evolving and changing in step with the way in which national ministerial council evolve and change. The structures are summarised in **Appendix 5**. That document contains what it describes as a "*brief description*" of the structures identified by the Legislative Assembly's Standing Committee on Uniform Legislation and Intergovernmental Agreements.

3.8 Structure 1 of the Structures of Uniform Legislation, identifies *Complementary Commonwealth-State or Co-operative legislation* as uniform. That is:

> *The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.*

3.9 Structure 2 speaks of *Complementary or Mirror Legislation*, where:

> *For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.*

3.10 Structure 9 speaks of *Adoptive Recognition* in which:

> *A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.*

3.11 Appendix 5 is a useful summary, not an exhaustive list. The Cross-border Justice Amendment Bill 2009 and Professional Standards Amendment Bill 2009, for example, were both bills identified by the Executive (correctly in the Committee's opinion) as bills to which SO230A applied without falling neatly into the identified structures. [23]

3.12 As found below, the relationship between the *Environmental Protection and Biodiversity Conservation Act 1999 (Cwlth)* (**EPBC Act**) and EP Act bears resemblance to each of uniform legislation structures 1, 2 and 9.

3.13 In its Report 23 - *The Work of the Committee during the Second Session of the Thirty-Sixth Parliament – August 13 2002 to November 16 2004*, the Standing Committee on Uniform Legislation and General Purposes said:

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[23] See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 40, *Cross-border Justice Amendment Bill 2009*, 13 October 2009, and Report 42 - *Professional Standards Amendment Bill 2009*, 19 November 2009.

> *The Committee emphasises that the term 'uniform legislation' does not mean that the legislation is identical in nature. As noted in the Committee's Nineteenth Report, some collaborative arrangements may not necessarily involve identical or even common legislative elements at all. Indeed it has been suggested that the phrase "harmonisation in law" is also an appropriate description for uniform legislation.*[24]

3.14 As seen below, the bilateral agreement process giving effect to the Environment IGA and the various COAG and Ministerial Council intergovernmental agreements in respect of reforming and streamlining approval processes are directed at achieving greater harmonisation of the laws applicable to environmental impact assessment.

WHETHER THE BILL IS UNIFORM LEGISLATION

Introduction - purpose of the Bill

3.15 The general explanation provided for the Bill is that: "[t]*he approvals system has created uncertainty and delays*", and that the Bill is intended to have the practical effect of "*streamlining*" the approval process, leading to reduction of uncertainty and delay.[25]

3.16 In the Second Reading Speech, the Minister for Environment explained the removal of the right to appeal against the EPA's decision on the level of assessment of a proposal by advising of the expectation that the EPA would provide an opportunity for members of the public to comment on the level of assessment in revised administrative procedures and proposed reduction of the number of the EPA's levels of assessment from five to two.[26]

3.17 Deletion of the right of appeal in respect of the EPA's declaration that a proposal is a derived proposal was explained in the Second Reading Speech as being directed at underutilisation of strategic proposals, which had:

> *led to perverse outcomes such as the late involvement of the commonwealth on matters of national environmental significance. The failure to have an effective strategic assessment process also reduces the likelihood of a commonwealth bilateral agreement.*

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[24] Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee during the Second Session of the Thirty-Sixth Parliament – August 13 2002 to November 16 2004*,18 November 2004, pp9-10.

[25] Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406.

[26] Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

> *This* [deletion of the appeal] *is intended to streamline the administrative process for declaring a proposal to be a derived proposal and encourage greater use of strategic assessments.*[27]

3.18 Each of these rationales suggests that the Bill gives effect to at least one intergovernmental agreement (Standing Order 230A(1)(a)), is part of the package of amendments requiring the ratification of a replacement bilateral agreement and/or is, by reason of its subject matter, directed at the introduction of a uniform scheme or uniform laws in the sense intended in Standing Order 230A(1)(b) and reflected in the Structures of Uniform Legislation set out in Appendix 5.

3.19 For example, as the Hawke Review observed, the:

> *Council of Australian Governments (COAG) has agreed that strategic assessments should be used as a means of harmonising environmental regulation across the federation.*[28]

Commonwealth Jurisdiction, National Approach IGA, Environment IGA, *Environmental Protection and Biodiversity Conservation Act 1999 (Cwlth)* and Bilateral Agreements

Commonwealth jurisdiction

3.20 In their article *Promise or Pretence - Compliance with the Intergovernmental Agreement on the Environment: The National Environment Protection Council (Western Australia) Act 1996*, Professor Meyers et al observed that a particular feature of Australia's efforts to regulate environmental impact assessment:

> *has been the development of the role of the Commonwealth government in environmental protection and the consequent conflicts with State governments that have traditionally exercised constitutional authority over management of natural resources and the environment.*[29]

3.21 There is an overlap in the jurisdiction of the various states and territories and that of the Commonwealth (which is primarily treaty-based) to regulate environmental

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27 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

28 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p79.

29 Associate Professor Gary D Meyers, Ms Sonia Potter and Mr Geoff Leane (1997) *Promise or Pretence - compliance with the Intergovernmental Agreement on the Environment: The National Environment Protection Council (Western Australia) Act 1996*, Murdoch University Electronic Journal of Law, Volume 4, Number 1 (March 1997), paragraph 3. (Available World Wide Web URL: http://www.murdoch.edue.au/pub/elaw/issues/v4n1/meyer497.html - viewed January 2010).

protection and resource development.[30] (Paragraph 3.35 sets out the current areas of Commonwealth regulation.)

National Approach IGA

3.22 In 1991, due to concerns at the variety of assessment procedures applicable in the different jurisdictions - especially where a resource or development proposal required approval from both a State and the Commonwealth - the Australian and New Zealand Environment and Conservation Council[31] adopted *A National Approach to Environmental Impact Assessment in Australia* (**National Approach IGA**).[32]

3.23 The objects of the National Approach IGA include improving consistency in assessment across jurisdictions and, where a proposal has an environmental impact in more than one jurisdiction, applying consistent environmental protection measures in each jurisdiction.

3.24 A further object of the National Approach IGA is to facilitate consistent opportunities for public involvement in decision-making. The National Approach IGA identifies outcomes that include: public access to information; public access to the assessment process; and accountability of decision-makers.[33]

Intergovernmental Agreement on the Environment

3.25 On 1 May 1992, all Australian jurisdictions entered into the Environment IGA. That agreement is aimed at providing "*a cooperative national approach to the environment*" and "*greater certainty in Government and business decision making*", recognising that: "*environmental concerns and impacts respect neither physical nor political boundaries"*.[34]

3.26 Under the Environment IGA, each State has responsibility for the legislative and administrative framework within which living and non living resources are managed

30 The Commonwealth does not have specific power to legislate in respect of the environment but has power to legislate in respect of environmental matters where it has power to legislate in a given area. The Commonwealth most frequently relies on its external affairs power (section 52 (xxix) of the *Constitution of the Commonwealth of Australia*).

31 A Ministerial Council operating between 1991 and 2001, which has now been subsumed into the National Resource Management Ministerial Council and the Environment Protection and Heritage Council. (See website: http://www.environment.gov.au/about/councils/anzecc/index/html, viewed 23 December 2010.)

32 Thomas I and Elliott M, *Environmental Impact Assessment in Australia: theory and practice* (Fourth Edition), The Federation Press, New South Wales, 2005, p98.

33 Ibid, pp98-100.

34 Intergovernmental Agreement on the Environment, 1 May 1992, p1.

within the State.[35] However, the States also have an "*interest and responsibility*" to participate in the development of national environmental policies and standards.[36]

3.27 The Environment IGA provides that:

- the Commonwealth will consult with the states prior to entering into international agreements concerning the environment;[37]
- the Commonwealth has an interest in ensuring that legislative and administrative frameworks of the states in respect of land use, resource use and development proposals meet its responsibilities and interests as set out in the Environment IGA;[38]
- in the event the Commonwealth is of the view that State processes are inadequate to accommodate its interests, the State will consider reviewing its processes;[39]
- to ensure State resource and planning processes properly address areas of Commonwealth interest, State processes may be referred for Commonwealth accreditation;[40] and
- certainty and avoidance of duplication and delay in the assessment process is desirable and the parties agree to improve consistency in approach between different levels of government and to avoid duplication where more than one government is involved and interested in the subject matter of an assessment.[41]

3.28 Particularly pertinent to the Bill:

- Item 3 of Schedule 2, *Resource Assessment, Land Use Decisions and Approvals Processes*, to the Environment IGA provides that the parties agree that:

  legislative and administrative frameworks to determine the permissibility of land use, resource use or development proposals should provide for:

35 Intergovernmental Agreement on the Environment, 1 May 1992, section 2.3.

36 Ibid, section 2.3.1.

37 Ibid, sections 2.5.2 and 2.5.

38 Ibid, Schedule 2, item 4.

39 Ibid, Schedule 3, item 6.

40 Ibid, Schedule 2, item 6 and Schedule 3 item 4.

41 Ibid, Schedule 3, item 1.

> *ii. the assessment of the regional cumulative impacts of a series of developments and not simply the consideration of individual development proposals in isolation;*
>
> …
>
> *iv. consultation with affected individuals, groups and organisations;*
>
> …
>
> *vi. mechanisms to resolve conflict and disputes over issues which arise during the process;*[42]

and

- Item 3 of Schedule 3, *Environmental Impact Assessment*, to the Environment IGA provides that assessment processes are to be based on:

> *v. following the establishment of specific assessment guidelines, any amendments to those guidelines will be based only on significant issues that have arisen following the adoption of those guidelines;*
>
> …
>
> *x opportunities will be provided for appropriate and adequate public consultation on environmental aspects of proposals before the assessment process is complete;*
>
> *xi mechanisms will be developed to seek to resolve conflicts and disputes over issues which arise for consideration during the course of the assessment process.*

3.29 In their text *Environmental Impact Assessment in Australia: theory and practice*, Thomas and Elliott state:

> *Development of consistency is a key element of the Schedule (3), dealing with EIA … This Schedule (reproduced in Appendix B) sets out a common set of principles which will achieve greater certainty about the application of EIA throughout Australia, and avoid duplication and delays in the process.*[43]

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42 Ibid, Schedule 2, clauses 2 and 3.

43 Thomas I and Elliott M, *Environmental Impact Assessment in Australia: theory and practice* (Fourth Edition), The Federation Press, New South Wales, 2005, p 100.

1997 Heads of Agreement

3.30 In 1997, COAG entered into the Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment (**1997 Heads of Agreement**), which provides:

> *1. The Commonwealth and States will seek to establish bilateral agreements which will replace, wherever possible and appropriate, the case-by-case assessment and approval process. Where an activity or proposal ('proposal') is within the scope of a bilateral agreement, the environmental assessment and approval process will be dealt with by the relevant State and the Commonwealth in accordance with the provisions of that agreement.*
>
> *2. For proposals other than those subject to a bilateral agreement, the case-by-case assessment and approval process will be streamlined to achieve more certain, timely and open decision-making.*[44]

3.31 The 1997 Heads of Agreement also provide that:

> *the environmental assessment and approval processes relating to matters of national environmental significance should be streamlined with the objectives of:*
>
> *relying on State processes as the preferred means of assessing proposals ….*[45]

3.32 These intergovernmental agreements to rely on State processes of assessment for Commonwealth assessment purposes have the effect of leading to a uniform national regime, as the harmonising of individual State processes with Commonwealth processes inevitably tends to a greater harmonisation between the processes of the individual States.

Environment Protection and Biodiversity Conservation Act 1999 (Cwlth) and Bilateral Intergovernmental Agreements

3.33 The EPBC Act is the principal piece of Commonwealth environmental legislation.

3.34 Part 3 of the EPBC Act sets out the Commonwealth requirements for environmental approvals and assessments of "*actions*" (being a project, development, undertaking or

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44 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment, November 1997, Attachment 2: *Environmental approval processes.*

45 Ibid, Clause 5.

activity).[46] By section 67A of the EPBC Act an "*action*" is a "*controlled action*" if approval of the action (under Part 9) is required for the purposes of Part 3.

3.35 Part 3 of the EPBC Act requires approvals for actions in respect of matters including:

- World Heritage properties;
- National Heritage places;
- wetlands of international importance;
- listed threatened species and communities;
- migratory species;
- protection of the environment from nuclear actions;
- marine environment;
- Commonwealth land; and
- additional matters of national environmental significance.

3.36 Section 45 of the EPBC Act provides for the Commonwealth to enter into a bilateral agreement with a State, for the purpose of:

> *(iv) minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa).*

3.37 Where an action is assessed pursuant to a process specified in a bilateral agreement, separate assessment is not required under the EPBC Act.[47]

3.38 The EPBC Act and *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cwlth) (**EPBC Regulations**) set out a range of requirements that must be met for a State assessment process to be accredited in a bilateral agreement. These include that the process is sufficiently comparable to the Commonwealth processes of assessment under the EPBC Act and will provide for a period of public comment equivalent to timeframes stipulated in the EPBC Act.

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46 An "*action*" is: *"(a) a project; and (b) a development; and (c) an undertaking; and (d) an activity or series of activities; and (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d)"*. (Section 523 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth)).

47 Sections 47 and 83 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth)).

3.39 Western Australia entered into a bilateral agreement with the Commonwealth, the Bilateral IGA, in 2002.[48] (This was extended in its operation by the Amendment Bilateral IGA in 2007).

3.40 The process for assessment specified in Schedule 1 of the Bilateral IGA relates to the EPA's current public levels of assessment under its current administrative procedures. (See Chapter 4, paragraphs 4.263ff for discussion of the current and proposed administrative procedures.) Schedule 1 states:

> *Selecting the assessment approach*
>
> [The EPA] *determines, for the purposes of section 40 of the* [EP Act], *that:*
>
> *(a) the proposed action should be assessed by it; and*
>
> *(b) the proponent is required to undertake an environmental review and the level of assessment for that environmental review is either a PER or ERMP.*

3.41 A "*PER*" is to correspond to assessment by public environment report under the EPBC Act*;* an "*ERMP"* is to correspond to assessment by environmental impact statement under the EPBC Act.[49] (See Chapter 4, paragraph 4.49 for description of these assessment levels.)

3.42 Schedule 1 to the Bilateral IGA also provides:

- the decision as to the approach that will be taken (that is, the level of assessment) is to be based on information and criteria equivalent to guidelines issued under the EPBC Act;[50]
- the EPA is to prepare written guidelines to ensure the assessment will assess all relevant impacts and addresses the matters required to be addressed by the EPBC Act;[51]
- the EPA may publish draft guidelines for public comment;[52] and

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48 This was a recommendation of the Independent Review Committee's Final Report - *Review of the Project Development Approvals System* (p7).

49 Agreement Between the Commonwealth of Australia and the State of Western Australia Under Section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* Relating to Environmental Impact Assessment, 2002 p14.

50 Ibid, clause 2 of Schedule 1.

51 Ibid, clause 3.1 of Schedule 1.

52 Ibid, clause 3.2 of Schedule 1.

- the matters that are to be addressed in the EPA report and recommendations.[53]

3.43 The Bilateral IGA, therefore, requires the EPA to conduct its PER and ERMP assessments in accordance with guidelines issued by the Commonwealth and for its reports and recommendations on those assessments to address the matters stipulated by the Commonwealth. The integration of the Commonwealth and State regimes is illustrated by the fact that the proposed changes to the EPA's administrative procedures require negotiation of a replacement bilateral agreement.

Draft Administrative Procedures require negotiation of a replacement bilateral agreement

3.44 At hearing, the OEPA advised that the outstanding issue in finalising the proposed changes to the EPA's administrative procedures was the process for amending the bilateral agreement, which it had been advised required negotiation of a "*new*" bilateral agreement.[54] The OEPA advised the Committee that the Commonwealth had set out its issues in a letter of December 2009. The Committee requested that the letter be tabled by 15 February 2010.[55] As noted in Chapter 2, that letter was not provided until 30 March 2010, after further request from the Committee.

3.45 The OEPA's letter of 30 March 2010 states that the DEHWA Letter provides advice as to the requirement for "*revision*" of the Bilateral IGA.[56] The DEHWA Letter identifies the outstanding issues somewhat differently from the OEPA. Dr Collins writes:

> *thank you once again for your letter and I look forward to your advice once the draft Administrative Procedures have been finalised so that we may commence the process outlined above.*[57]

3.46 The "*process outlined above*" is the development of:

> *joint administrative arrangements between the two appropriate agencies. Such arrangements are required to provide for a level of operational detail in relation to the day-to-day administration of the processes established in the bilateral agreement. …they are important*

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53 Called an "*Assessment Report*" in the Agreement Between the Commonwealth of Australia and the State of Western Australia Under Section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* Relating to Environmental Impact Assessment, 2002. (Ibid, clauses 7.2 and 7.3 of Schedule 1).

54 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp6 and 11.

55 Ibid, p11.

56 Letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p1.

57 Letter from Dr Kathryn Collins, Assistant Secretary, Approvals and Wildlife Division, Department of the Environment, Water, Heritage and the arts (Cwlth) to Mr Colin Murray, Director, environmental impact Assessment Division, Environmental Protection Authority, 18 December 2009, p2.

> *in providing for cooperation at officer level and further aligning business practices with respect to any new agreement.*[58]

3.47 The DEHWA Letter advised that DEWHA considered a draft number 4 of the proposed administrative procedures. Its preliminary view was that that draft's description of the PER process "*suggests*" that it was capable of accreditation in "*the bilateral agreement*". However, as the proposed Draft Administrative Procedure API process is a non-public form of environmental review (see Chapter 4, paragraph 4.296) it did not meet legislative requirements for accreditation in relation to minimum periods of public consultation.[59]

3.48 The Committee notes that the EPBC Regulations require the processes accredited by way of bilateral agreement to comply with the EPBC Act and that sections 95 and 95A of the EPBC Act currently provide a minimum of 10 business days for comments to be made by the public on a proposal that is to be assessed by way of referral information without public review. (As seen in paragraph 3.106, the Hawke Review has recommended that this be increased to 11 business days.)

3.49 The EPBC Act and EPBC Regulations also prescribe the information that is to be made available for the purposes of public comment. As reported in Chapter 4, there is some ambiguity in what information will be made available through the Draft Administrative Procedures.

3.50 The DEHWA letter states:

> *The accreditation of any new assessment processes will amount to a substantial change to the existing bilateral agreement and a replacement agreement will therefore need to be developed. Once the Administrative Procedures have been finalised therefore, a draft replacement bilateral agreement will need to be developed at officer level between DEC and this Department*.[60]

3.51 That letter also states that Part 5 of the EPBC Act requires that any proposed "*replacement*" bilateral agreement be exhibited for a period of public comment of at least 28 days, following which a review of any comment is to be undertaken and the proposed agreement is submitted to the Commonwealth Minister for consideration.[61]

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58 Ibid, p2.

59 Ibid.

60 Ibid.

61 Ibid.

3.52 The DEWHA Letter proposes accreditation of EPA assessments on a case by case basis for any period during which the new assessment processes are in effect prior to receipt of accreditation under a replacement bilateral agreement.[62]

Finding 1: The Committee finds that in order for the EPA's environmental impact assessment processes to be accredited for the purposes of the EPBC Act, formal execution of a replacement bilateral agreement between the State and the Commonwealth is required.

3.53 By letter dated 30 March 2010, the Committee was advised by the OEPA that the timing of gazettal of the Draft Administrative Procedures had not been determined and that:

> *The Office of the EPA and DEHWA are currently discussing and seeking advice on possible provisions to be included in the replacement bilateral agreement.*[63]

3.54 Unless an amendment to a bilateral agreement is considered insignificant, the EPBC Act makes no distinction between entering into a bilateral agreement and entering into a bilateral agreement to amend an existing bilateral agreement.

3.55 Discussions for the replacement bilateral agreement started in mid 2009.[64] The Commonwealth provided advice in December 2009 as to the process for making a replacement agreement. On 8 February 2010, the Committee was advised that the OEPA was:

> *meeting with some commonwealth representatives in about two weeks' time to pick up on some issues that they flagged in that letter in December. It really comes down to looking at the options — if we proceed to gazette the administrative procedures, what you have in place in the interim period before a new bilateral agreement is in place, and whether that is acceptable or not; whether there is enough certainty in that for the community and for proponents. When we meet with them later this month we will clarify that. We will be*

62 Ibid, p3.

63 Letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p1.

64 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p11.

> *making a decision. The EPA will make a decision on how to proceed.*[65]

3.56 The letter of 30 March 2010 from the OEPA does not advise the nature of the provisions currently undergoing negotiation. The Committee observes that the OEPA's description of the stage of negotiations in that letter is essentially the same as was given on 8 February 2010.

3.57 It is not known to the Committee whether DEWHA, at the time of its letter of December 2009, had the same version of the proposed procedures as the Draft Administrative Procedures. However, it is noted that the API level of assessment in the Draft Administrative Procedures do not meet the criteria set out in the EPBC Act and that there are questions as to whether the PER level of assessment meets the criteria in relation to information to be made publicly available.

3.58 In the event a bilateral agreement is entered into after receipt of public comment on the proposed agreement, the DEWHA Letter advises that the parties will need to develop joint administrative arrangements between their respective agencies for the purpose of, amongst other things, "*further aligning business practices with respect to any new agreement*".[66]

3.59 Given this process, the requirements of the EPBC Act and EPBC Regulations for consistency between State assessment processes and Commonwealth assessment processes for accreditation and the importance of a bilateral agreement to streamlining environmental impact assessment processes, it appears to the Committee that it is possible that the Draft Administrative Procedures may be amended in the process of negotiation of a replacement bilateral agreement. (See also Chapter 4, paragraphs 4.326ff)

3.60 The final content of the EPA's new administrative procedures and, therefore, the full practical effect of the Bill, will not be known until negotiations with the Commonwealth for a replacement bilateral agreement have concluded.[67]

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65 Ibid.

66 Letter from Dr Kathryn Collins, Assistant Secretary, Approvals and Wildlife Division, Department of the Environment, Water, Heritage and the arts (Cwlth) to Mr Colin Murray, Director, environmental impact Assessment Division, Environmental Protection Authority, 18 December 2009, p3.

67 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp6-7; Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority to the Committee's Questions for Hearing on 8 February 2010 tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p9.

Finding 2: The Committee finds that the final content of the EPA's new administrative procedures are unknown and dependent on negotiations with the Commonwealth for a replacement bilateral agreement.

3.61 The Committee observes that the process for making a bilateral agreement has not concluded and that that process involves public consultation on the proposed agreement, which may include the public making comment on the consistency of the EPA's proposed administrative procedures with the EPBC Act. There is, therefore, no certainty that a replacement bilateral agreement will be entered into or that the EPA will adopt the current Draft Administrative Procedures.

Finding 3: The Committee finds that there is no certainty that a replacement bilateral agreement will be entered into with the Commonwealth or that the proposed Draft Administrative Procedures will be adopted by the EPA.

Finding 4: The Committee finds that in the absence of the replacement bilateral agreement and EPA proposed administrative procedures being finalised, the Legislative Council should not consider the Bill.

Commonwealth environmental impact assessment processes and processes for making bilateral agreements subject to review

3.62 The DEWHA Letter drew the OEPA's attention to the fact that bilateral agreements and the requirements that must be met to enter into them was considered by the Hawke Review, which had presented its report.[68] Relevant recommendations of the Hawke Review are set out in the final section of this Chapter. The tenor of the Hawke Review is that the framework for environmental impact assessment should be set in the EPBC Act, not regulations, and recommendations are made for the introduction of merits review of various decisions.

3.63 It is not known which of the recommendations (if any) of the Hawke Review will be adopted by the Commonwealth. However, as the DEWHA Letter indicates, that

[68] Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999,* October 2009, p2.

review adds a further element of uncertainty to the processes that will be considered consistent with the requirements of the EPBC Act.

Government's position

3.64 The Minister for Environment acknowledges that Schedule 3 of the Environment IGA "*is relevant to environmental impact assessment legislation*" but is of the view that it has been "*overtaken*" by enactment of the EPBC Act and the Bilateral IGA, as amended by the Amendment Bilateral IGA.[69]

3.65 The Minister for Environment also states:

> *Western Australia's environmental impact assessment processes under the Environmental Protection Act 1986 (EP Act) were compliant at the time of signing of the IGAE agreement in 1992, and thus there was no need to introduce any new provisions.*[70]

Committee's conclusions

3.66 The Committee is of the view that the EPBC Act, and bilateral agreements between the Commonwealth and the State, are informed by the Environment IGA in respect of environmental impact assessment, rather than supersede it.

3.67 As seen above, the National Approach IGA and the Environment IGA (for example, see item 3(v) of Schedule 3) impose an **ongoing** obligation for environmental impact assessment regulation to comply with the Schedule 3 principles, including the introduction of improved consistency within the levels of government of a jurisdiction and between the different jurisdictions (in particular, the Commonwealth and a State) and provision of mechanisms to resolve conflicts and disputes arising in the environmental assessment process, and restrict the circumstances in which compliant guidelines may be altered.

3.68 Thomas and Elliott state in respect of the National Approach IGA:

> *There are already many examples of where these principles are part of existing procedures, but the national approach continues to lead to greater precision, and consistency in the way* [Environmental Impact Assessment] *is implemented.*[71]

3.69 Thomas and Elliott also observe in respect of the Environment IGA:

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69 Letter from Hon Donna Faragher MLC, Minister for Environment, 8 December 2009, pp1 and 2.

70 Ibid, p1.

71 Thomas I and Elliott M, *Environmental Impact Assessment in Australia: theory and practice* (Fourth Edition), The Federation Press, New South Wales, 2005, p100.

> *as EIA procedures are amended the principles of the* [Environment IGA] *and the national approach provide direction for change towards greater consistency.*[72]

3.70 The Hawke Review, for example, recommended that specific criteria be developed in Commonwealth regulations to clarify when assessment under the EPBC Act would be by way of preliminary documentation and when by way of EIS (environmental impact statement)[73] so as to meet the Commonwealth's obligations under the Environment Agreement to "*give clear guidance on the types of proposals likely to attract environmental impact assessment and on the level of assessment required*".[74]

3.71 The Hawke Review also noted that the basis of COAG's support for bilateral agreements and strategic assessments is that these processes generate efficiencies in environmental management, in particular, in harmonising Commonwealth, State and Territory environmental impact assessment processes.[75]

3.72 That the Environment IGA imposes ongoing obligations in respect of legislation relating to environmental impact assessment is also the view of the MCMPR. In its *Carbon Dioxide Capture and Geological Storage: Australian Regulatory Guiding Principles* (2005), the MCMPR noted:

> *The following guiding principles facilitate a nationally consistent approach to the application of Carbon Dioxide Capture and Geological Storage (CCS). These guiding principles should take account of Council of Australian Governments (COAG) agreed principles relating to Ecologically Sustainable Development, the Intergovernmental Agreement on the Environment, Principles of Good Regulation and relevant COAG agreed Occupational Health and Safety Principles.*[76]

3.73 The MCMPR Vision includes the following statements:

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72 Ibid.

73 Section 101A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) sets out the requirement of assessment by way of environmental impact statement.

74 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p70.

75 Ibid, p13 (see also p152).

76 Ministerial Council on Minerals and Petroleum Resources, *Carbon Dioxide Capture and Geological Storage: Australian Regulatory Guiding Principles* (2005), 4. That document also states: "*Further, the Intergovernmental Agreement on the Environment (between the Australian Government, States and Territories and the Australian Local Government Association) (1992) outlines that all parties agreed that the development and implementation of environment policy and programs by all levels of Government should be guided by a number of considerations and principles including polluter pays (i.e. those who generate pollution and waste should bear the cost of containment, avoidance or abatement), intergenerational equity and the precautionary principle*" (p11).

> *Council believes that, to be highly valued by society for its contribution to triple bottom line outcomes and hence a sustainable future, and thereby maintain its* ***licence to operate****, the industry must:*
>
> - *operate to accepted world's best environmental practices; …*
> - *undertake meaningful consultation with stakeholders regarding the decisions that may affect them; …*
>
> *Actions*
>
> …
>
> - *Council will give particular emphasis to: …*
>   - *improving the quality of community consultation and participation in decision making processes, and …*
>
> (MCMPR emphasis)

3.74 The EPA Report states:

> *Greater consistency with Commonwealth assessment approaches is advisable given the Council of Australian Governments' (COAG) interest in regulatory and approval process reform.*[77]

3.75 While the Committee finds in Chapter 4 (Finding 18) that enactment of the Bill is not necessary to implement the proposed administrative changes, the Bill is necessary for the removal of certain appeal rights and thereby facilitates the movement of the framework for community participation in environmental impact assessment from the EP Act to administrative procedure. This movement is said to "*streamline*" the appeal, and thus approvals, process.[78]

3.76 An important aspect of this "*streamlining*" is interlocking the EPBC Act and EP Act and achieving sufficient uniformity in the environmental impact assessment processes regulated by the respective Acts to enable an assessment under the EP Act to be accredited as an assessment under the EPBC Act.

3.77 The proposed changes to the EPA's administrative procedures have not been implemented, the Committee is advised, as they require ratification of a replacement

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77 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2010, p25.

78 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406.

bilateral agreement. In fact, there is no legal obstacle to a proponent pursuing separate State and Commonwealth assessments for a proposal.

3.78 The "*requirement*" for a bilateral agreement arises from the agreements in the National Approach IGA, the Environment IGA and the 1997 Heads of Agreement that assessment processes between the jurisdictions will be harmonised and that State processes will be accredited by the Commonwealth to avoid duplication. It also arises from the various agreements referred to below on streamlining assessment processes.

3.79 The Bill, therefore, ratifies or gives effect to the various intergovernmental agreements imposing an ongoing obligation on the State to implement nationally consistent regulation of environmental impact assessment with a view to streamlining approval processes for development (Standing Order 230A(1)(a)).

Finding 5: The Committee finds that the Bill ratifies or gives effect to the National Approach IGA, Environment IGA and the 1997 Heads of Agreement, imposing an ongoing obligation on the State to improve consistency in internal and intergovernmental regulation of environmental impact assessment with a view to streamlining approval processes for development (Standing Order 230A(1)(a)).

COAG and Ministerial Council Intergovernmental Agreements to Streamline Regulatory Processes

Introduction

3.80 At the COAG meeting of 10 February 2006, all jurisdictions committed to "*address as a priority*" those areas where "*inconsistent regulatory regimes are impeding economic activity*".[79]

3.81 Six 'hotspots' where federal and state jurisdictions inter-related were identified for priority action, including development assessment arrangements. At the COAG meeting of 14 July 2006, it was agreed by all jurisdictions to add environmental assessment processes to the list of 'hotspots' and that:

> *Senior Officials, working closely with officials from environmental agencies, report back to it by the end of 2006 with strategies further*

[79] Council of Australian Governments Communiqué 10 February 2006, p8. (Available World Wide Web URL: http://www.coag.gov.au/coag_meeting_outcomes/ viewed on17 December 2009.)

> *to improve and streamline environmental approvals processes, within the existing architecture of the EPBC Act.*[80]

3.82 The Executive's approach to streamlining the assessment process under the EP Act is being undertaken within the architecture of the EPBC Act.

Planning Approval Process

3.83 The Bill is one of a suite of four bills introduced to the Parliament in November 2009 and directed at streamlining the approval process, including the Approvals and Related Reforms (No.4) (Planning) Bill 2009.[81]

3.84 While the intended impact of the Bill on resource development is highlighted in the Second Reading Speech, it is apparent from the summary of the relevant provisions in Chapter 1 that the amendments proposed by the Bill have significant practical effect for schemes and proposals relating to 'planning and development' matters.

3.85 The need to reform and/or streamline assessment and approvals processes for planning proposals informs much of the COAG discussion of the Nation Building Programs.[82]

3.86 In the Second Reading Speech to the Approvals and Related Reforms (No. 3) (Planning) Bill 2009, the Minister for Planning identified an intergovernmental agreement in respect of reform of the approval of planning matters in stating:

> *The proposed reforms are consistent with the state's undertaking at the Council of Australian Governments to reform Western Australia's planning system. These reforms are also in line with resolutions of*

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80 Council of Australian Governments Communiqué 14 July 2006, Attachment E, p1. (Available World Wide Web URL: http://www.coag.gov.au/coag_meeting_outcomes (viewed on17 December 2009.)

81 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406. The Approvals and Related Reforms (No. 2) (Mining) Bill 2009 was introduced to the Legislative Council on 19 November 2009: Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9405. The other bills were introduced to the Legislative Assembly and have yet to be introduced to the Legislative Council (See footnote 4 of this report).

82 See, for example the record of the need for "*planning reforms for individual infrastructure projects"* in the COAG Communique of 2 February 2009 and the following passage: "*COAG also agreed that Coordinator–General mechanisms would take responsibility for ensuring the timely delivery of the Nation Building Programs and projects funded by the Commonwealth and delivered by the States under the Building Australia Fund, the Education Investment Fund and the Health and Hospitals Fund and work together to streamline assessment and approvals processes for these projects. Jurisdictions will also appoint Coordinators with specific project delivery responsibility for each of these major projects. COAG also agreed that funding agreements between the Commonwealth and State Governments for major infrastructure projects will require an integrated assessment and approval process encompassing all statutory assessments and approvals by the three levels of government with target time periods for each stage of the process, and that the process would be subject to transparent regular reporting arrangements including formal reporting through the Commonwealth Coordinator-General"* in the COAG Communique of 2 July 2009: (Available World Wide Web URL: http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/index.cfm, (viewed on17 December 2009).

> *the Local Government and Planning Ministers' Council and the advice of the Development Assessment Forum, which is a national body dedicated to research into planning reform.*[83]

3.87 In its Report 19, the Standing Committee on Uniform Legislation and General Purposes said:

> *An analysis (which took seven years) of about 250 intergovernmental agreements revealed that they may be formed as:*
>
> …
>
> *f) The wording and occasionally the accompanying schedules of national or state bills, and the expansion of aims contained in second reading speeches in one or more parliaments.*[84]

3.88 Insofar as it forms part of the context of, and gives effect to, the wider reform of approval of planning matters, the Bill forms part of the uniform scheme identified by the Minister for Planning.

Environmental assessment process

3.89 In its Report 19, the Standing Committee on Uniform Legislation and General Purposes also identified:

> *i) Official annual and other reports of joint action taken at the discretion of the administrators involved,*[85]

as a source of an intergovernmental agreement.

3.90 The Ministerial Council, the Environment Protection and Heritage Council, has as part of its Strategic Plan for 2009-11, to:

> *Promote and facilitate streamlining of assessment processes and harmonising of environmental standards.*[86]

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83 Hon John Day MLA, Minister for Planning, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 November 2009, p9265.

84 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, August 2004, pp15-6. (The reference in that report was to K Wiltshire, *Working with Intergovernmental Agreements – The Canadian and Australian Experience*, Centre for Research on Federal Financial Relations, Australian National University, Canberra, 1980, pp360–361 citing K Wiltshire, ed. Administrative Federalism, Select Documents in Australian Intergovernmental Relations, Brisbane, University of Queensland Press, 1977.)

85 Ibid.

86 Environment Protection and Heritage Council, *Strategic Plan for 2009-11*, p4 (Available World Wide Web URL http:www///ephc.gov.au/sites/default/files/EPHC_Strategic_Plan_Final_200911.pdf, (viewed on 11 February 2009).)

Strategic assessments

3.91 In July 2008, a meeting of the COAG Business Regulation and Competition Working Group agreed to identify opportunities for strategic assessments under the EPBC Act to avoid unnecessary delays in development approval processes. The meeting communiqué noted:

> *Strategic assessments are conducted over an entire region and provide a mechanism to approve classes of development which have been assessed under this process, rather than conducting individual assessments and approvals. Strategic assessments provide certainty for development proponents and reduce duplication, while providing greater protection for the environment.*

3.92 That COAG is looking to increased use of strategic assessments as a means of harmonising the environmental impact assessment process across jurisdictions has been noted. The Second Reading Speech states that clause 5(1)(d) of the Bill, which proposes deletion of section 100(1)(f) of the EP Act, is intended to encourage use of the strategic assessment under the EP Act.

Ruling that SO230A applies to a bill that is in part the result of an intergovernmental agreement

3.93 On 19 September 2003, the Deputy President of the Legislative Council, Hon Simon O'Brien MLC, issued a Ruling in respect of the Criminal Code Amendment Bill 2003 that:

> *Having made inquiries, it is clear that, at least in part, the Bill arises as a result of an agreement entered into with other States and the Commonwealth. Therefore, Standing Order No 230A applies and the Bill stands referred to the Standing Committee on Uniform Legislation and General Purposes.*[87]

Committee's conclusions

3.94 The various COAG and Ministerial Council Intergovernmental Agreements to:

- streamline approval of developments/economic activity;
- prioritise the streamlining of environmental impact assessment processes;
- harmonise the environmental impact assessment processes through encouraging strategic assessments; and

[87] Hon Simon O'Brien MLC, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 September 2003, p11,598.

- reform the planning process,

are intended to be given effect and/or implemented by the Bill.

Finding 6: The Committee finds that the Bill is intended to give effect to/implement the various COAG and Ministerial Council Intergovernmental Agreements set out in this Chapter of its Report (Standing Order 230A(1)(a)).

WHETHER DEROGATION FROM SOVEREIGNTY OF PARLIAMENT

3.95 An issue the Committee examines in considering uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or provision of a uniform bill itself, derogates from the sovereignty of the State.

3.96 In a sense, all uniform legislation has this effect. As the Standing Committee on Uniform Legislation and General Purposes pointed out in its Report 19:

> *Where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.*[88]

3.97 The Standing Committee on Uniform Legislation and General Purposes identified derogation in State Parliament sovereignty in: fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation; and lack of notice and detailed information as to negotiations inhibiting Members formulating questions and performing their legislative scrutiny role.[89] (This is not an exhaustive list of the ways in which State sovereignty might be impinged upon by uniform agreements or schemes.)

3.98 Again in its Report 19, the Standing Committee on Uniform Legislation and General Purposes said:

> *it is important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to*

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88 Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004, p11.

89 Ibid.

> *which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws.*
>
> *2.8 The Committee, while prevented by the standing orders from examining the policy behind a uniform law, is in a position to alert the Council to the constitutional issues associated with particular forms of uniform laws as they are introduced.*[90]

3.99 The Committee has commented in Chapter 2, and in this Chapter, on the difficulties caused by late provision of sufficiently detailed information of the proposed administrative changes to enable it to seek evidence on, and describe, the practical effect of the Bill. It is not apparent to the Committee that this has necessarily arisen from the uniform regime.

3.100 However, implementation of movement of the framework for early public consultation in respect of a proposal and scheme from the EP Act to the administrative realm, is by reason of the uniform regime, viewed by the Executive as being dependent on negotiation of a replacement bilateral agreement between the State and the Commonwealth.

3.101 Whether the Draft Administrative Procedures are gazetted, and when, may depend on the outcome of negotiations for a replacement bilateral agreement.

3.102 In the event the Parliament enacts clause 5(1) of the Bill prior to a replacement bilateral agreement being signed, the relevant appeals may be deleted without the administrative processes providing an opportunity for public consultation, on which it has relied in passing the Bill, being gazetted.

3.103 In this circumstance, the Parliament may consider that its sovereignty is derogated.

3.104 The transfer of the governing framework for early public participation from the EP Act to the administrative realm raises questions of derogation of Parliamentary sovereignty but, again, this is not the consequence of the uniform regime. (In fact, the Commonwealth sets its framework for public participation in the EPBC Act and that Act and subsidiary legislation provide the framework for information to be made available to the public.) This practical effect of the Bill is considered in Chapters 4, 5 and 6.

RELEVANT FINDINGS OF THE HAWKE REVIEW

Time for public comment to be in EPBC Act and longer than proposed by EPA

3.105 The Hawke Review observed in respect of the EPBC Act:

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90 Ibid, p10.

> *An inherent tension arises from weighing the competing principles of* [ecologically sustainable development]. *Decision-making outcomes will often differ depending on the proportionate weighting afforded to environmental, social or economic considerations in each case. As much of the decision-making under the Act involves weighting of these considerations and value judgements, a high degree of transparency is needed if the public and proponents are to have trust in the system.*[91]

3.106 The Hawke Review regarded concerns as to the limited time available under the EPBC Act for making public comment (10 business days) as justified. It recommended that the EPBC Act be amended to ensure that no public consultation process can be less than 11 business days.[92] The reasoning was:

> *The need for adequate time for preparation of public input is acknowledged, but the difficulty is balancing this with the need for efficient and timely decision-making under the Act. The public's ability to input effectively into processes under the Act should be enhanced by adoption of the recommendations about publication of documents outlined above* [see paragraph 3.107], *and the recommendation about enhanced information delivery below.*
>
> *Some smaller changes are also proposed to improve the community's opportunity to provide considered input into processes under the Act. The first is that where the minimum required consultation period is currently ten business days under the Act, this should be increased to 11 business days. This would ensure that the consultation period would always stretch over a minimum of two weekends, allowing time-limited volunteer submitters greater opportunity to draft submissions.*[93]

Information to be provided to the public to be in EPBC Act and more extensive than that proposed by the EPA

3.107 The Hawke Review also recommended that the EPBC Act be amended to require statements of reasons for all decisions made by the Minister and delegates under that Act to be released at the time of the decision, as well as all additional information

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91 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p53.

92 Ibid, Recommendation No. 45, p244.

93 Ibid, p243.

requested from proponents to support decision-making under that Act and all submissions received in accordance with the EPBC Act.[94]

Recommendation for introduction of merits review of decisions on whether to assess and level of assessment

3.108 The Hawke Review's recommendation that the Australian government consider amending the EPBC Act "*so that the controlled action and/or assessment approach decisions are open to merits review*"[95] is discussed in Chapter 6.

94 Ibid, Recommendation 44, p242.

95 Ibid, Recommendation 49, p259.

CHAPTER 4

THE *ENVIRONMENTAL PROTECTION ACT 1986* AND EVIDENCE AS TO THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

INTRODUCTION

4.1 This Chapter places the provisions of the Bill in the context of the EP Act and identifies some issues arising for the purposes of the later discussion.

4.2 The EP Act is the principal, but not sole, piece of State legislation regulating environmental matters in respect of development and use of land and resources.

4.3 The EP Act states that it, or a policy approved pursuant to it, prevails over inconsistent legislation.[96]

4.4 There are, however, exceptions to this general position. For example, section 6(1a) of the *Mining Act 1978* restricts (in specified circumstances) the persons who may refer an application for a mining lease for an environmental impact assessment, and is expressed to have effect notwithstanding the EP Act.

4.5 The relationship between the EP Act and other legislation is complex. From comments in the various reviews, it appears that there has on occasion been reluctance by later decision-makers to accept decisions made under the EP Act as to environmental matters.[97]

4.6 The provisions of the EP Act relating to authorisation for a decision-maker to make a decision which could result in implementation of a scheme or proposal operate in a contentious policy environment with competing perspectives necessitating compromise.

4.7 The ESAG Appeal Report states:

> *it should be noted that in most cases it is recognised by the interested parties that each 'proposal' submitted to the EPA for assessment will be approved for implementation and that the essential outcomes of the*

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96 Section 5 of the *Environmental Protection Act 1986*.

97 In its 2001 Report, *Review of the Project Development Approvals System*, the Independent Review Committee recommended: "*All environmental conditions relating to a proposal that has been formally assessed under the Environmental Protection Act should be considered in any subsequent approval to have been conclusively determined under the processes of that Act. Any other approvals should not revisit or reconsider those environmental matters and should frame their conditions to be entirely consistent with those conditions*". (Independent Review Committee, Final Report - '*Review of the Project Development Approvals System*', April 2002, p2.)

> *appeals is to inform the Minister and modify the 'conditions' to be applied to those proposals.*[98]

4.8 The EPA Report, however, states:

> *The emphasis of the EP Act is to consider a referred proposal on the basis of its potential for significant adverse effects on the environment and to determine whether the proposal may be implemented.*[99]

4.9 The introduction to the Jones Report suggests that environmental considerations should not be determinative of development approval:

> *The environment is an important consideration, but it is not always, or even often, the only one. A weak economy is a far greater threat to the environment than is responsible development.*[100]

4.10 The submission from Hon Giz Watson MLC urged the Committee to recommend an amendment of the short title of the Bill to replace the word "*Approval*" with "*Assessment*" as: "*the possible end point of a process should not be used as a name for the process itself*".[101] (All four bills comprising the suite of which the Bill is a component - see Chapter 1 paragraph 1.17 - are titled "*Approvals and Related Reforms*". The title of the Bill is a policy decision of the government and outside the Committee's Terms of Reference.)

4.11 The Committee notes that the different views as to the part environmental impact assessment plays in the approval of developments underlies and informs the views of the different stakeholders expressed in this inquiry.

4.12 However, relevant to the amendments proposed by the Bill, is the mining industry's acceptance of sustainable development founded on what it identifies as the "*social licence to operate*". The Minerals Council of Australia's *Enduring Value - the Australian Minerals Industry Framework for Sustainable Development* (**Minerals Council Enduring Values**) states:

> *The future of the Australian minerals industry is inseparable from the global pursuit of sustainable development. …*
>
> *Foundation* (sic) *to the industry's commitment is the concept of a 'social licence to operate'. Simply defined the 'social licence to*

98 Environmental Stakeholder Advisory Group, *The Appeals Process*, 21 September 2009, p4.

99 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p16.

100 Industry Working Group, *Review of the Approval Processes in Western Australia*, April 2009, p2

101 Ibid.

> *operate' is an unwritten social contract. Unless a company earns that licence, and maintains it on the basis of good performance on the ground, and community trust, there will undoubtedly be negative implications. Communities may seek to block project developments; employees may chose to work for a company that is a better corporate citizen; and projects may be subject to ongoing legal challenge, even after regulatory permits have been obtained, potentially halting project development.*
>
> *… to the minerals industry 'social licence to operate' is about operating in manner that is attuned to community expectations ….*[102]

4.13 The MCMPR Vision also states that industry must undertake meaningful consultation with the stakeholders regarding the decisions that affect them to maintain its "*licence to operate*".[103]

4.14 The way in which the differing views as to the purpose of environmental impact assessment are resolved is a matter of policy on which the Committee does not comment. The Committee reports on the practical effect of the Bill having regard to its stated purpose as explained by the Executive.

ENVIRONMENTAL PROTECTION ACT 1986 - PROVISIONS RELEVANT TO CLAUSE 5(1) OF THE BILL - PROPOSALS AND SCHEMES

Environmental Protection Authority

4.15 The EP Act establishes the EPA,[104] membership of which is appointed by the Governor on recommendation of the Minister for Environment but, except as specified in the EP Act, is not subject to the direction of the Minister.[105]

4.16 From 1 July 2006 to 27 November 2009, the EPA's administrative support was provided by DEC. From that date, it has comprised a separate department, the OEPA.[106]

4.17 The EP Act provides, in Part IV, for the EPA to undertake environmental impact assessments of:

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102 The Minerals Council of Australia, *Enduring Value - the Australian Minerals Industry Framework for Sustainable Development* (Summary Booklet), June 2005, p2.

103 Ibid, pp16 and 19.

104 The Environmental Protection Authority was established under previous legislation and section 7 of the *Environmental Protection Act 1986* continues its existence.

105 Section 8 of the *Environmental Protection Act 1986*.

106 Office of Environmental Protection Authority, Homepage, http://www.epa.wa.gove.au (viewed on 15 January 2010).

- certain proposals (being "*a project, plan, programme, policy, operation, undertaking or development or change in land use, or amendment of any of the foregoing*" that is not a scheme)[107] referred to it pursuant to section 38 of the EP Act; and

- schemes (being a local planning scheme or regional scheme made under the *Planning and Development Act 2005*, as well as a scheme, plan or policy within the meaning of various specified planning Acts),[108] referred to it by the responsible authority pursuant to the legislation under which the scheme is made.[109]

Proposals referred for Part IV assessment

4.18 Section 38 of the EP Act provides that a decision-making authority[110] must refer a "*significant*" proposal (being one that is likely, if implemented, to have a significant impact on the environment), and proposals of a prescribed class, to the EPA.[111] Any other person may also refer a significant proposal.[112]

4.19 The Minister for Environment may refer any proposal that raises public concern about the likely effect on the environment.[113]

However, only the proponent of a proposal may refer a proposal under a previously assessed scheme[114] (whether or not the proposal is likely to have significant environmental impacts) or a "*strategic proposal*".[115] Strategic proposals are dealt with in paragraphs 4.114ff.

4.20 Table 1 sets out the advice provided in the Amended Joint Written Answers of DEC and OEPA as to the numbers of proposals referred between 2004 and 2009. These figures are slightly different from those provided to the Committee on 8 February

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107 Section 3(1) of the *Environmental Protection Act 1986*.

108 Such as the *East Perth Redevelopment Act 1991*. (Section 3(1) of the *Environmental Protection Act 1986*).

109 Section 48A of the *Environmental Protection Act 1986.* For example, section 81 of the *Planning and Development Act 2005* requires a local government which resolves to adopt or amend a local planning scheme to refer that scheme to the EPA "*forthwith*".

110 "*Decision-making authority*" is defined in section 3(1) of the *Environmental Protection Act 1986*.

111 Sections 38(5) and 37B(1) of the *Environmental Protection Act 1986*.

112 Section 38(1) of the *Environmental Protection Act 1986*.

113 Sections 38(1) and (4) of the *Environmental Protection Act 1986.*

114 Being: "*an application under the assessed scheme or an Act for the approval of any development or subdivision of any land within the area to which the assessed scheme applies*": Section 3 of the *Environmental Protection Act 1986*.

115 Sections 38(2) and (3) of the *Environmental Protection Act 1986*. Section 37B(2) of the *Environmental Protection Act 1986* provides: "*A proposal is a* ***strategic proposal*** *if and to the extent to which it identifies — (a) a future proposal that will be a significant proposal; or (b) future proposals likely, if implemented in combination with each other, to have a significant effect on the environment*".

2010.[116] The Committee, therefore, presents Table 1 as an approximation, not firm statement.

Table 1

Year	No. Referred	Not Assessed (Assessed)	Of the not assessed proposals, no. where recommendation be dealt with under Part V, Division 2
2004	**153**	**124 (29)**	**9**
2005	**156**	**99 (57)**	**18**
2006	**139**	**106 (33)**	**25**
2007	**140**	**96 (44)**	**27**
2008	**130**	**95 (35)**	**33**
2009	**103**	**73 (30)**	**32**

4.21 Most proposals are not, therefore, subject to EPA referral.[117] The Jones Report describes the role of the EPA as assessing "*prescribed or high risk environmental proposals*".[118]

116 Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority to the Committee's Questions for Hearing on 8 February 2010 tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010, p3.

117 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p1 quoted in Western Australia, Legislative Council, Standing Committee on Legislation, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal,* 20 May 2009, pp130-31.

118 Industry Working Group, *Review of the Approval Processes in Western Australia,* April 2009, p51

Schemes referred for Part IV assessment

4.22 The OEPA advises that "*fundamentally*" all schemes are required to be referred to the EPA.[119] As noted above, schemes are referred by the responsible authority pursuant to the legislation under which the scheme is made.

4.23 However, the OEPA said:

> *Most of the schemes that are referred relate to just the change of zoning of an independent property to allow for an additional use, or something like that. The vast majority of schemes that are referred to the EPA through the management provisions under the Planning and Development Act have little, if any, environmental consequence. At the other end, there certainly can be major scheme amendments, particularly metropolitan region scheme amendments — we are now going to other regions — and the Bunbury region scheme, and there are others. Some of those can have fairly significant implications* ….[120]

4.24 Table 2 has been prepared from information provided in the Amended Joint Written Answers of DEC and OEPA and the Written Answers of the Office of the Appeals Convenor.

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119 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p21.

120 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p21.

Table 2

Year	No of schemes referred	No of appeals on scope and content of review
2000	334	-
2001	362	1
2002	281	-
2003	268	-
2004	345	-
2005	289	-
2006	389	-
2007	339	3
2008	384	2
2009	313	2

Referral of proposal/scheme constrains decision-making authorities

4.25 Part IV of the EP Act is predicated on the fact that the implementation of proposals or schemes referred to the EPA requires the grant of some other approval, or the taking of some action, under another State law.

4.26 By section 41 of the EP Act, after referral of a proposal to the EPA (or notification that a proposal has been referred) a decision-making authority is restrained from making any decision that could result in the implementation of the proposal until advised either that:

- the proposal will not be assessed (and any appeal has been resolved); or
- the environmental impact assessment process has been completed and a decision has been made that the proposal may be implemented (with or without conditions).

4.27 Clause 13 of the Bill proposes an amendment to section 41 of the EP Act to permit a decision-making authority to make a decision that would result in implementation of

the proposal in so far as it relates to the doing of minor or preliminary work to which the EPA has consented under section 41A(3). (See Chapter 9)

4.28 In general, restraints on decision-making in respect of schemes are to be found in the provisions of the planning Act pursuant to which the scheme is made. Section 82 of the *Planning and Development Act 2005* provides, for example, in respect of local planning schemes, that a responsible authority is not to advertise a scheme until the EPA has advised that:

- any environmental review process has been undertaken in accordance with the EPA's instructions;[121] or
- a specified period has elapsed since forwarding of the Environmental Review Report to the EPA.

4.29 Section 86 of the *Planning and Development Act 2005* provides that the Minister for Planning is not to approve a local planning scheme until notified that the scheme will not be assessed or receipt of a statement pursuant to section 48F(2) of the EP Act[122] or the 28 days for notification of a decision to assess has expired.

Decision as to whether Part IV assessment is necessary and relevance of Part V

4.30 On receipt of a referred proposal or scheme, the EPA makes a decision as to whether an environmental impact assessment is necessary.[123]

4.31 The percentage of the proposals referred to the EPA that are assessed by it varies between 19% and 37% (respectively in 2004 and 2005). On average, the EPA assesses some 28% of the proposals referred to it. (See Table 1 for numbers of proposals referred and number of referred proposals assessed by the EPA.)

4.32 However, even in the event the environmental matters raised by a proposal are significant, where there is other applicable legislation designed to ensure an environmental outcome, the EPA may not subject the proposal to an assessment under

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121 In the event there is disagreement between the EPA and responsible authority on this latter point, the relevant planning Act generally provides that there is to be discussion between the responsible Ministers. Section 48J of the *Environmental Protection Act 1986* provides that the Governor's decision is final in the event the matter cannot be resolved between the Ministers.

122 Section 48F(2) of the *Environmental Protection Act 1986* requires the Minister to serve a statement on relevant persons setting out the agreed conditions in respect of implementation of a scheme and advising that there are no environmental reasons the scheme should not be implemented subject to those conditions).

123 Sections 39A and 48A of the *Environmental Protection Act 1986*.

Part IV of the EP Act. Instead it may decide not to assess but provide recommendations as to environmental assessment to another agency.[124]

4.33 An example of the way this works in practice is the Minister's refusal of an appeal in respect of the level of assessment for a proposal to mine sand at the Banksia Park Rifle Range in Wellard. The Minister decided that a "*formal assessment*" was not necessary as 'potential environmental impacts could be addressed through existing legislation'.[125]

4.34 However, the Minister directed the EPA:

> *to provide a clear advice to the proponent and State Government agencies involved in relation to managing the impacts of fauna and flora, managing noise levels and addressing other environmental issues such as dust mitigation.*[126]

Finding 7: The Committee finds that the percentage of proposals referred to the EPA that have been assessed by it over the past six years varies between 19% and 37%. On average, the EPA assesses some 28% of the proposals referred to it.

4.35 Relevant to the Bill, this situation arises in respect of the Part V, Division 2 provisions of the EP Act, which provide for the CEO of DEC to issue permits to clear native vegetation (see paragraphs 4.175ff for these provisions). See Table 1 for the number of proposals that are not assessed but in respect of which a recommendation is made that the proposal be dealt with under Part V, Division 2 of the EP Act.

4.36 As seen below, there are differing views between DEC and stakeholders as to the circumstances in which the EP Act permits the EPA to decline to assess a significant proposal on the basis that it be dealt with pursuant to Part V, and/or when it is

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124 "*In fact the EPA does not formally assess all of the many referrals it receives each year. For the majority of projects, their environmental aspects are dealt with by other approval agencies, although often with advice from the EPA. But when the environmental considerations are significant, the EPA is expected to assess them.*": (Independent Review Committee, *Review of the Project Development Approvals System*, 2002, p75.) The recommendations in section 3.3 of the Expert Committee, *Regulation Review: Clearing of Native Vegetation*, relevantly included the following comment: "*In relation to the concerns about the EPA not assessing significant clearing proposals, it is noted that the EPA chooses to not assess significant proposals in cases where it is of the view that other approvals processes can deal with the environmental impacts, but that not assessing the proposal should not be read as implying that the proposal is not significant*": (Expert Committee, *Regulation Review: Clearing of Native Vegetation*, April 2009, p17.)

125 The Minister for Environment quoted in Dobson, J, "Shot in the Arm for Mine", *Kwinana Courier*, 11 December 2009, p1.

126 Ibid.

appropriate for the EPA to do so. These differing views have contributed to (but are not entirely responsible for) the competing views as to the importance of the right of appeal against that decision.

Appeal against EPA decision not to assess a proposal

4.37 Section 100(1)(a) of the EP Act currently confers a right of appeal to the Minister for Environment in respect of a recorded decision that a proposal is not to be assessed. That right may be exercised by the proponent, decision-making authority or any other person. It must be exercised within 14 days of the public record being made available.[127]

4.38 Clause 5(1)(a) of the Bill proposes deletion of this right of appeal in the event that the EPA makes a recommendation that a proposal be assessed under Part V, Division 2, of the EP Act, which contains the provisions in respect of applications to the CEO for a permit to clear native vegetation.

4.39 Table 3, which sets out the number of such appeals, has been compiled from the Amended Written Answers of DEC and the OEPA and information provided by the Office of the Appeals Convenor.

Table 3

Year	No. proposals not assessed with Part V, Division 2 recommendation	No. appeals on decision not to assess where Part V, Division 2 recommendation made
2004	9	no data
2005	18	3
2006	25	7
2007	27	6
2008	33	2
2009	32	9 (10)*

[127] Section 100(3a)(a) of the *Environmental Protection Act 1986.*

* The Office of the Appeals Convenor identified 9; the Joint Written Answers of the DEC and OEPA identified 10.[128]

4.40 The Executive's position is that the appeal against the decision not to assess is duplicitous and unnecessary when a recommendation is made that the proposal be assessed under Part V, Division 2, as the Part V, Division 2 process has its own appeal rights and the process of issuing a permit under Part V, Division 2 is in all material respects the same as that applicable under Part IV.

4.41 Submissions to the Committee, however, assert that:

- the question of whether a proposal should be assessed is broader than whether it has implications for the clearing of native vegetation;
- the Part IV process of environmental impact assessment of clearing of native vegetation is more rigorous than that applied under Part V, Division 2 and provides more information for the community to decide whether or not to make submissions on implementation of the proposal; and
- significant proposals should be assessed by the EPA under Part IV.

4.42 The competing arguments are discussed in paragraphs 4.190ff and in Chapter 7.

Lodging of appeal acts as restraint on decision-making authority

4.43 As noted above, the lodging of an appeal against the decision not to assess restrains a decision-making authority from making a decision that would result in the implementation of a proposal until that appeal has been resolved.[129]

Restraint on proponent when decision to assess proposal

4.44 In addition to the restraint imposed on a decision-making authority by section 41 of the EP Act (effective on referral of a proposal), upon a decision that the proposal will be assessed being recorded in the public record, section 41A of the EP Act restrains a person from implementing the proposal prior to a decision being made by the Minister for Environment that the proposal may be implemented. Section 41A does not, however, apply to a person performing minor or preliminary work with the EPA's consent.[130]

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128 Additional Written Answers provided with letter from Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, 22 February 2010, p1. Amended Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority, provided with letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p3.

129 Section 41 of the *Environmental Protection Act 1986.*

130 Section 41A(3) of the *Environmental Protection Act 1986.*

4.45 "*Minor or preliminary works*" are discussed in Chapter 9.

EPA decision as to level of assessment of proposal, scoping of review of a scheme and use of administrative procedures

4.46 In the event that it does decide to assess a proposal or scheme, the EPA sets a 'level' for assessment (for a proposal) or issues instructions as to the scope and content of an environmental review (for a scheme), which is kept in a public record pursuant to section 39 of the EP Act.[131]

4.47 In practice, the extent of assessment of a proposal is a two-stage process. The EPA first sets the "*level of assessment*" of a proposal by reference to gazetted administrative procedures.[132]

4.48 The EPA Report identifies five levels of assessment for which Administrative Procedures have been gazetted:

> *1. Assessment on Referral Information (ARI) – an "expedited" level of assessment (quick yes) where there are only one or two issues of local significance that can be readily managed and there is no formal public review stage.*
>
> *2. Environmental Protection Statement - an "expedited" level of assessment (quick yes) where there are a number of issues of local significance that can be readily managed and there* (sic) *no formal public review is considered necessary because adequate consultation with stakeholders has been conducted by the proponent.*
>
> *3. Proposal Unlikely to be Environmentally Acceptable (PUEA) – an "expedited" level of assessment (quick no) where the EPA indicates that a proposal is clearly environmentally unacceptable and cannot be reasonably modified to become acceptable.*
>
> *4. Public Environmental Review (PER) – a level of assessment with a public review period where there is a number of complex local and regional issues of interest where it must be demonstrated that they can be managed in an environmentally acceptable manner.*
>
> *5. Environmental Review and Management Programme (ERMP) – a level of assessment with a public review period applied to a proposal*

131 Section 39(1) of the *Environmental Protection Act 1986*.

132 Section 122 of the *Environmental Protection Act 1986* provides that the EPA may, from time to time, draw up administrative procedures for the purposes of, in particular, establishing principles and practices of environmental impact assessment under the *Environmental Protection Act 1986*. The administrative procedures may (but are not required to) be published in the *Gazette*.

> *of State interest which raises a number of complex issues of a strategic nature requiring substantial assessment to determine whether they can be managed in an environmentally acceptable manner.*[133]

4.49 The Bill proposes to reduce those levels. There will be two levels: public review and assessment without public review. The proposed administrative changes are discussed in more detail in paragraphs 4.263ff.

4.50 The EPA Report found a reason for delay in the assessment process:

> *There is a significant workload in the consideration of referrals and in the request for further information prior to setting level of assessment.*[134]

4.51 At hearing, however, the OEPA advised that setting the level of assessment generally occurs concurrently with the decision on whether or not to assess the proposal, and within 28 days of referral.[135]

4.52 Once the administratively designated 'level of assessment' of a proposal has been determined, the EPA works with the proponent and other government agencies to 'scope' the assessment[136] (the second stage of determining the extent of assessment). The OEPA identifies the 'scoping phase' of the assessment as:

> *the crucial time in any proposal to both identify the issues but also get all of the key officers, not just in the office of the EPA but also in other parts of government, familiar with the project as well and starting to think about what are the key issues, what are the likely management responses around those.*[137]

Appeal against level of assessment of proposal/scope of review of scheme

4.53 Sections 100(1)(b) and (c) of the EP Act currently confer a right of appeal to the Minister for Environment in respect of the "*recorded level of assessment*" of a proposal or instructions issued as to the content and scope of an environmental review of a scheme. That right may also be exercised by the proponent, decision-making authority, responsible authority or any other person.

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133 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, pp23-4.

134 Ibid, p33.

135 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp14-15.

136 Ibid, p15.

137 Ibid, p9.

Clause 5(1)(b)

4.54 Clause 5(1)(b) of the Bill proposes deletion of these appeal rights.

Different understandings held by the DEC/OEPA and stakeholder groups as to what constitutes an appeal on level of assessment of proposal

4.55 Table 2 sets out the number of scope and content appeals in respect of schemes. The Committee has not at this point of the report included an equivalent table in respect of appeals against level of assessment of a proposal as there appear to be different understandings held by the DEC, OEPA, Office of the Appeals Convenor and stakeholder groups as to what constitutes such an appeal. (The table is to be found at paragraph 4.25.)

4.56 These different understandings of the DEC, OEPA, Office of the Appeals Convenor and stakeholder groups is of significant concern and may be the product of insufficient detail in the EP Act and poor detail in the administrative procedures. It is likely that deletion of detail of the approvals framework in the EP Act, as proposed by clause 5(1) of the Bill, will lead to further ambiguities arising. This is discussed in Chapter 6.

Subject matter of appeal against "level of assessment"

4.57 In the Second Reading Speech, the Minister for Environment gave the following rationale for deleting the right to appeal against the scope of the environmental review of a scheme:

> *The bill removes appeals on the scope and content of a planning scheme assessment, noting that there is no equivalent provision in respect of proposals.*[138]

4.58 From a reading of the EP Act, it appeared to the Committee that the recorded 'level of assessment' of a proposal was equivalent to instructions as to the scope and content of an environmental review of a scheme.

4.59 The evidence of the OEPA, however, was that the EPA saw setting the level of assessment as a preliminary step to the 'scoping' of an environmental impact assessment of a proposal.

4.60 "*Level*" and "*level of assessment*" are not defined terms in the EP Act. The EP Act does not expressly provide for "*scoping*" of an environmental impact assessment of a proposal or indicate whether that should occur before or after the "*level of assessment*" has been set or should be encompassed in the level of assessment that is set.

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138 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

4.61 Section 39A of the EP Act provides that the EPA must make a decision whether or not to assess a proposal: it says nothing about 'level of assessment'. That concept arises from section 39(1)(b) which provides that the "*level of an assessment*" is to be kept in the public record by the EPA and section 100(1)(b), which provides that the "*recorded level*" of assessment may be appealed.

4.62 The Shorter Dictionary defines "*level*" as follows:

> *A position (on real of imaginary scale) in respect of amount, intensity, extent, etc; a relative height, amount or value … a layer or position in a hierarchy.*[139]

4.63 The latter definition appears to be the way the OEPA and Office of Appeals Convenor interpret the appeal right - that is, it is confined to an appeal against a designated administrative level, and is not available in respect of the 'scope' of an assessment:

> ***The CHAIRMAN****: But currently, in terms of the appeal on the level of assessment, information is provided to the public about the scoping that is required as part of that level of assessment at the time it is advertised.*
>
> ***Mr Murray****: No, it is not. Scoping happens after the EPA has made a decision to assess.*[140]

4.64 In discussing whether a public inquiry was a higher "*level of assessment*", the Office of the Appeals Convenor's response was also couched in terms of an appeal against "*level of assessment*" being confined to contesting the EPA's administrative procedure designation:

> ***Mr Clement****: Yes. There have been some recent appeals on ERMP levels of assessment. There are now three uranium proposals going through an assessment proposal at the moment. The level of*

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139 See, for example, the evidence of Dr J Nicholas Dunlop: "*We see an environmental assessment document that a proponent may have taken months or years to put together. We then have a period of weeks, perhaps, in which to get across that document and to check it, try to get independent advice sometimes on contentious things about whether the material presented is likely to be accurate, and sometimes we even have to do surveys and studies of our own. Those things take a considerable amount of time. If we are unable, as is often the case, to get the amount of time increased for us to deal with it, the likely consequence of that is that the information will never see the light of day in the assessment process. It may first appear only during the appeals process. … We frequently extended the length of time through the appeal process"* and Mr Piers Verstegen: "*if there was an accountable process to raise those issues earlier on, you might have had a situation where there could have been a project which could have been defined and implemented which was much more environmentally acceptable"*. (Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, and Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010; pp8 and 10.)

140 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p14.

assessment set for those proposals have all been ERMP, which is the highest level. Appellants have put forward the proposition that a public inquiry is a higher level of assessment, but the view that we take is that a public inquiry is not a higher level of assessment; it is the way the assessment is conducted. There might be a public inquiry, but it would still be an ERMP level of assessment — if that makes sense?

***The CHAIRMAN**: No, it does not make sense to me. Can you clarify that? Why would there be a distinction in the legislation if you are effectively implementing them as though they are the same type of inquiry?*

***Mr Clement**: All inquiries are conducted by the EPA; however, the minister, in consultation with the EPA, can convene a public inquiry. The public inquiry is then the body that reports to the minister on the assessment, but the level of assessment is still set. In the case of an ERMP, it would be an ERMP level of assessment reviewed by a public inquiry as distinct from the EPA. It is not how. The methodology remains the same. The difference is the body that is reviewing the assessment, so the level of assessment remains the same.*

…

***The CHAIRMAN**: From your point of view, the only distinction in the legislation for a public inquiry is that it would be assessed by someone, either in conjunction with the EPA or other than the EPA?*

***Mr Clement**: It is also that a public inquiry is conducted under the Royal Commissions Act. That is also a distinction for the public inquiries and so on that would go with that.*

***The CHAIRMAN**: Given what you have just said, you do not think that a public inquiry conducted under the Royal Commissions Act would be a higher and more thorough level of assessment than a standard ERMP?*

***Mr Clement**: That is the view that is taken.*

***The CHAIRMAN**: Therefore, it is possible to appeal on the level of assessment, being an ERMP, and asking for a higher level of assessment, which would then be a public inquiry?*

***Mr Clement**: We have appeals, as we have said.*

> ***The CHAIRMAN****: Yes, but it seems to me that you have also said that you dismiss them because, in your view, an ERMP is the highest level of assessment?*
>
> ***Mr Clement****: In the case of the two recent proposals that have raised these very issues, the minister determined that the appeals were valid. You can validly appeal the level of assessment, notwithstanding it is the highest level. In terms of your question about whether a public inquiry is held, that is not necessarily an outcome of appeal but is an issue in the province of the minister. That is a separate issue from the appeal outcome. As an appeal outcome, can a level of assessment be changed from ERMP to public inquiry? Our view is no, because an ERMP is the highest level of assessment, but the minister at any time can convene a public inquiry in relation to a proposal.*[141]

4.65 However, the outcome of that appeal against level of assessment was an increase in the public consultation period.[142] This example illustrates the way in which the differing views of the DEC, OEPA, Office of the Appeals Convenor and stakeholder groups influence the perception of the importance of the appeal right.

4.66 The Joint Written Answers of DEC and OEPA reveal that no appeals against an EPA decision to assess a proposal subject to public review resulted in a higher level of assessment being imposed.[143] The Amended Joint Written Answers of DEC and OEPA identified only one appeal where the Minister for Environment determined that the appeal level should be increased from PER to ERMP.[144]

4.67 However, the CCWA gave evidence of what it viewed as 'successful' appeals against 'level' of assessment that managed to increase the public consultation period although the administrative designation as to "*level*" remained unchanged.[145]

4.68 The Office of the Appeals Convenor identified, at the Committee's request, 11 appeals on level of assessment that had resulted in additional or changed assessment parameters, while initially reporting only one appeal that had resulted in a higher level

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141 Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p7.

142 A Kolberg, 'Outburst over 'no public inquiry'', *The Kalgoorlie Miner*, 12 October 2009, p3.

143 Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority to the Committee's Questions for Hearing on 8 February 2010 tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p5.

144 Amended Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority, provided with letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p5.

145 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010; pp14-15.

of assessment.[146] The following evidence was also given by the Office of the Appeals Convenor:

> ***Mr Sutton**: An example might be where the EPA set a level of assessment to deal with particular environmental issues. Let us say there were four issues through the appeals process, and appellants raise another issue that the minister picks up. She would not change the level of assessment but would indicate to the EPA that it needs to include an additional factor in the assessment.*
>
> ***The CHAIRMAN**: Could that change of parameters also include more stringent advice, being a higher requirement in terms of the advice that needs to be provided through the PER or the ERMP on a particular matter?*
>
> ***Mr Clement**: It would not be that specific.*
>
> ***Mr Sutton**: It is mainly the scope more than anything else.*
>
> …
>
> ***Mr Sutton**: It would be issues such as additional parameter in the scoping, another environmental factor.*
>
> ***Mr Clement**: Longer consult period.*
>
> ***Hon LIZ BEHJAT**: Is an additional assessment parameter just another way of saying you are putting a higher level of assessment onto something?*
>
> …
>
> ***Mr Sutton**: It may not reach the threshold to go to the higher level, so it might be an issue of a similar magnitude and geographical location, so it does not meet the threshold to go to the next level; it stays within that level. JP just mentioned a good example: the EPA might have said eight weeks public consultation, but, if through the appeals process, people say that they have not had enough time to have a look this; it might go up to 10 weeks.*[147]

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146 Amended Written Answers provided with letter from Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, 22 February 2010, p4.

147 Mr Anthony Sutton, Appeals Convenor and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, pp9-10.

4.69 In justifying the replacement of appeals with consultation, the Office of Appeals Convenor advised:

> *We particularly see that middle level of appeal, which is either the instructions or level of assessment, as I think I said before. It is primarily about scoping and I can see that in many cases, when we go out on site and have a look at the issues, they are fairly blatant and sometimes one wonders how they have come all the way through the system in a formal appeals process.*[148]

4.70 The submissions to the Committee, and evidence of the CCWA at hearing, suggested that the community views "*level*" in the first sense of the definition of that word in paragraph 4.63: that of a position in respect of "*amount, intensity, extent; a relative … amount or value*". The Busselton-Dunsborough Environment Centre, for example, saw the appeal on the level of assessment as necessary to:

> *fully explore the potential risks and issues surrounding a proposal,*[149]

and the Environmental Defender's Office:

> *the setting of the level of assessment is critical to determining how thoroughly the impacts of a proposal are assessed,*[150]

whereas the government departments appear to view "*level*" in the second sense of the definition in paragraph 4.63: that of a "*layer or position in a hierarchy*".

4.71 The evidence provided to the Committee reveals a fundamental difference of opinion between government departments and the community as to the nature, purpose and effectiveness of the appeal rights proposed to be deleted by clause 5(1)(b) of the Bill.

4.72 However, the evidence of the Office of the Appeals Convenor is that this appeal is primarily about scoping issues and is critical in identifying issues not earlier identified by the OEPA or EPA despite being "*fairly blatant*" to the extent that the Office of the Appeals Convenor "*wonders how they have come all the way through the system in a formal appeals process*".

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148 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p17.

149 Submission No 10 from Busselton-Dunsborough Environment Centre, 11 January 2010, p1.

150 Submission No 9 from Environmental Defender's Office Western Australia (Inc), 11 January 2010, p1.

Finding 8: The Committee finds that the right of appeal conferred by section 100(1)(b) of the EP Act against the decision of the EPA as to the recorded level of assessment of a proposal is used to challenge not only the level designated in accordance with gazetted administrative procedures of the EPA but also the 'scoping' of the assessment and length of any period for public comment.

Environmental impact assessment/review process

4.73 The EPA generally requires the responsible authority or proponent to conduct assessment activities, although it has power to conduct investigations and assessment activities itself.[151] (The EPA also has power to, with the approval of the Minister for Environment, set up a committee to conduct a public inquiry but that has not occurred to date).[152]

4.74 The first stage of the assessment of proposals is what the OEPA describes as the 'scoping phase', in which the OEPA determines the extent of the assessment at the EPA designated administrative level.

4.75 The scoping phase was identified in the EPA Report as a major reason for delay:

> *There are significant delays on up to 30% of proposals at the scoping phase where two or more iterations of the scoping document are required before approval.*
>
> *External factors have contributed significantly to delays in progressing assessments, in particular poor quality proponent documentation.*[153]

4.76 The evidence of the OEPA at the hearing also identified this stage of the assessment process as the one at which the most significant delay occurred due to poor proponent documentation. The OEPA also identified deliberate proponent delay for reasons unconnected with the assessment process (such as state of the market).[154]

4.77 The EPA decision to simplify the administrative "*levels of assessment*" is directed at removing proponent confusion as to what is required in terms of scoping for each level and is linked with the EPA decision to itself take on the scoping role for some

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151 Sections 40 and 48C of the *Environmental Protection Act 1986*.

152 Section 40(2)(c) of the *Environmental Protection Act 1986.*

153 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p33.

154 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp30 and 31.

proposals. The OEPA is of the view that by it taking control of the scoping process there is potential to cut in the vicinity of three months from the assessment process. However, it is cautious about realising this potential as the process will remain proponent-driven.[155]

4.78 The proposals the OEPA will scope is unclear. Mr Murray of the OEPA described those proposals as the: "*bulk of projects … the most complicated would remain with the proponent"*.[156] Ms Andrews of the OEPA, however, said that the OEPA would scope: "*some of the more straightforward proposals*".[157] The time that may be cut from the assessment process by the OEPA taking on the scoping role is not, therefore, clear.

4.79 These administrative changes are identified as delivering more significant reforms than the Bill. Ms Andrews, Acting General Manager of the OEPA, advised the Committee:

> *We certainly saw the amendment bill as being, as you suggest, not one of the things that is going to deliver the most significant reforms or improvements to the process; it is one element of it. It was very much seen as relatively straightforward changes and amendments to appeals to remove duplication. That was the flavour of this amendment bill. It was never seen as being something that was the major component to the reforms required to the environmental impact assessment process; in fact, those are administrative reforms that we are in the process of implementing. This is just a component of it sitting next to it.*[158]

Information may be made available to the public

4.80 The EPA may cause any information or report provided to it at its direction in respect of the assessment of a proposal to be made available for public review. If it does so, it will determine the extent to which submissions may be made and may require the proponent to respond.[159] It may also cause any environmental review undertaken at its direction by a responsible authority in respect of a scheme, and any report provided to the EPA in respect of that review, to be made available for public review. In the event

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155 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p6.

156 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p5.

157 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p8.

158 Ibid, p7.

159 Section 40(4) and 6(b) of the *Environmental Protection Act 1986*.

of such documents being made public, the EPA may seek submissions on the review or report.[160]

4.81 If the planning Act pursuant to which a scheme is made requires public review of a scheme, the responsible authority is to incorporate any environmental review undertaken at the direction of the EPA in that process.[161]

EPA Report to the Minister

4.82 Once the environmental impact assessment of a proposal or scheme is complete, the EPA reports to the Minister for Environment on the result of that assessment, making recommendations as to whether the scheme or proposal should be implemented and, if so, on what conditions (**EPA report and recommendations**).[162]

4.83 EPA reports and recommendations are published.[163]

Appeal in respect of EPA Report and recommendations

4.84 Section 100(1)(d) of the EP Act confers a right to appeal to the Minister for Environment in respect of the EPA section 44 report and recommendations in respect of a proposal. Section 100(1)(e) of the EP Act confers a right to appeal to the Minister for Environment in respect of the EPA section 48D report and recommendations in respect of the scheme.

4.85 These appeals were the only appeals identified in the EPA Report as contributing to delay in the assessment process. The EPA Report comment was:

> *There is a significant workload associated with appeals on the EPA's Reports.*[164]

4.86 The Bill does not propose any amendment of these appeal provisions.

Minister to consult prior to decision

4.87 After publication of the EPA's report and recommendations in respect of a proposal (and after any appeal has been resolved),[165] the Minister for Environment is to consult with the principal decision making-authority to reach agreement on whether or not the proposal may be implemented and, if so, the conditions and procedures that are to

160 Section 48C(4) of the *Environmental Protection Act 1986*.

161 Section 48C(6) of the *Environmental Protection Act 1986*.

162 Sections 44 and 48D of the *Environmental Protection Act 1986*.

163 Section 45(6) and 48F(3) of the *Environmental Protection Act 1986*.

164 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p33.

165 Section 45(6) of the *Environmental Protection Act 1986*.

apply.[166] (The EP Act provides varying methods of resolving an inability to reach agreement, depending on whether or not the relevant decision-making authority is a Minister).[167]

4.88 After publication of the EPA report and recommendations in respect of a scheme (and any appeal has been resolved)[168], the Minister for Environment is to consult with the Minister responsible for the scheme to reach agreement on the conditions, if any, to which the scheme should be subject if implemented.[169]

Agreement on implementation of proposal/scheme: decision-making authorities may proceed

4.89 Once agreement has been reached (or a decision made on an appeal in respect of which agreement could not be reached) in respect of the conditions and procedures which will apply to the implementation of a proposal, the Minister for Environment is required by section 45(5) of the EP Act to issue a statement setting out the agreement (**Section 45(5) Statement**), serve that statement on relevant persons and publish it.

4.90 Section 100(3) of the EP Act confers on a proponent only a right of appeal in respect of the Section 45(5) Statement. The Bill does not propose any amendment of this provision.

4.91 When the Minister is satisfied that there is no reason why the proposal should not be implemented, the Minister is to serve on a decision-making authority precluded by section 41 from making a decision that could have the effect of causing the proposal to be implemented an authority permitting such a decision to be made.[170]

4.92 Once agreement has been reached in respect of a scheme, the Minister is to issue a statement advising that there is no reason the scheme should not be implemented subject to the agreed conditions (**Section 48F(2) Statement**).

4.93 The Section 48F(2) Statement is to be served on any relevant responsible or decision-making authority.

4.94 A responsible authority may request the Minister responsible for the scheme to initiate a review of the conditions imposed on implementation. If this occurs, the responsible Minister and Minister for Environment are to consult on whether the conditions

166 Sections 44(2)(b) and 45 of the *Environmental Protection Act 1986*.

167 If the decision-making authority is a Minister, the Governor is to make the final decision on implementation: if the decision-making authority is not a Minister, an appeals committee is to report to the Minister for Environment. (Section 45 of the *Environmental Protection Act 1986*).

168 Section 48F(3) of the *Environmental Protection Act 1986*.

169 Sections 48D(3) and 48F of the *Environmental Protection Act 1986*.

170 Section 45(7) of the *Environmental Protection Act 1986.*

should be altered. A further statement is to be issued in respect of any altered conditions.[171]

Minister's powers in respect of proposals independent of any appeal - section 43

4.95 By section 43 of the EP Act, the Minister for Environment has power, independent of any appeal, to at any time prior to service of a Section 45(5) Statement, direct the EPA to assess a proposal or to assess or re-assess a proposal more fully or more publicly or both.

4.96 The Second Reading Speech referred to the powers conferred by section 43 of the EP Act. When speaking of the deletion of appeals against the decision not to assess where a recommendation is made for the proposal to be dealt with under Part V, Division 2 and level of assessment, the Minister for Environment said:

> *The minister maintains the power to remit a proposal to the EPA for reconsideration, as well as the power to direct the authority to assess a proposal more fully or more publicly.*[172]

4.97 Section 43 does not, however, empower the Minister for Environment to remit a proposal back to the EPA for "*reconsideration*".

4.98 So far as the Committee is able to ascertain from the EP Act, the power to remit a proposal for the EPA to make a "*fresh decision*" (which may include reconsideration as to whether to assess the proposal or to impose a lower level of assessment) is conferred by section 101(1)(b) of the EP Act and may be exercised only upon an appeal.

4.99 It appears to the Committee that if the Bill is enacted, the ability of the proponent to appeal for the purpose of lowering the level of assessment of a proposal will be lost.

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171 Section 48G of the *Environmental Protection Act 1986*.

172 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

Recommendation 1: The Committee recommends that the Minister for Environment identify the provision of the EP Act (or other legislation) conferring power on the Minister to remit a proposal to the EPA for "*reconsideration*" as to:

- **whether it should assess the proposal notwithstanding its recommendation that the proposal be dealt with pursuant to Part V, Division 2 of the EP Act; and**
- **the level of assessment of a proposal.**

4.100 The Second Reading Speech indicates that the Minister's powers under section 43 of the EP Act provide some avenue for oversight of EPA decision-making in the absence of an appeal right.[173] This was also the thrust of the evidence of the OEPA in discussing the practical effect of deleting the right of appeal against level of assessment in the context of the proposed new administrative procedures:

> *For instance, the minister has remitted back to the EPA after the EPA has assessed and reported several times. It is not something that happens every day, certainly, but the capacity for the minister to remit to ask the EPA to further assess or more fully assess exists and has been used.*[174]

4.101 However, when responding to the proposition that removal of the appeal avenues would result in increased calls for the Minister to exercise section 43 powers (a point made in submissions to the Committee), the Joint Written Answers of DEC and OEPA stated:

> *The Minister's power is not to guard against abuse or poor decision making but to acknowledge that the level of public interest may not*

173 Ibid.

174 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p17. See generally Ms Michelle Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp15-17.

> *always be apparent at the time of the EPA's decision on the level of assessment.*[175]

4.102 The role of section 43 of the EP Act is discussed further in considering the practical effect of the Bill in Chapter 5 and in Chapter 6, which deals with the principles of appropriate review of administrative power.

Minster's powers in respect of schemes independent of any appeal

4.103 At any time prior to final approval of a scheme by the responsible authority, the Minister for Environment may - independent of any appeal and with the agreement of the responsible Minister - order the EPA to assess (or re-assess) a scheme more fully or more publicly.[176]

Potential outcomes of appeals in respect of proposals

4.104 Section 101(1)(b) of the EP Act empowers the Minister for Environment, on an appeal in respect of decisions not to assess, and level of assessment, of a proposal to remit the proposal to the EPA for:

> *the making of a decision, or fresh decision, as to whether or not the proposal is to be assessed, or as to the level of assessment, or both.*

4.105 Section 101(1)(c) of the EP Act confers an additional power on the Minister for Environment on an appeal in respect of a decision as to level of assessment, to remit a proposal to the EPA for assessment, further assessment or re-assessment and provides that the Minister may - but is not required to - issue directions as to that assessment under section 43. (As noted above, section 43 of the EP Act relevantly empowers the Minister to issue directions to the EPA to assess a proposal, or assess or re-assess it more fully or more publicly.)

Whether appeal rights confer a benefit on a proponent

4.106 In the Second Reading Speech, the Minister for Environment said:

> *There is also no benefit for the proponent in appealing the level of assessment as the outcome is restricted to increasing it.*[177]

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175 Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority to the Committee's Questions for Hearing on 8 February 2010, tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010 p13.

176 Section 48E of the *Environmental Protection Act 1986*.

177 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p9407.

4.107 The Committee explored this statement at its hearings, as a plain reading of section 101(1)(b) of the EP Act was that the Minister had power to refer a matter back to the EPA for a "*fresh decision*". There did not appear to be any requirement that the EPA impose a higher level of assessment as a result of its fresh decision. It also appeared to the Committee that where a non-public review level of Proposal Unlikely to be Environmentally Acceptable (**PUEA**) (see paragraph 4.49 for a description of this level of assessment) had been assigned, a proponent might wish to seek a higher level of assessment with a view to persuading the EPA through a more detailed examination that the proposal should proceed.

4.108 When asked to identify the provision of the EP Act that required the EPA to impose a more onerous level of assessment on referral of a proposal after appeal, the OEPA response was:

> ***Ms Andrews**: My understanding of it is it is the operation of section 43 that requires that. It is the link between the appeal process and section 43 of the EP Act, which states that the direction is for the assessment of a proposal "more fully or more publicly or both". That is the wording in the act.*
>
> ***The CHAIRMAN**: I suppose that the issue there is whether the words "more fully or more publicly" actually means that it can be only a higher level of assessment. Do you actually have legal advice on that?*
>
> ***Ms Andrews**: Yes, legal advice has been sought previously. Colin might want to add something.*
>
> ***Mr Murray**: There has been advice given to the EPA about "more fully and more publicly", and that is saying that it should be a higher level of assessment involving either public input or a longer period of public input, and that is the way that section 43 has operated.*
>
> ***The CHAIRMAN**: Are you able to provide that legal advice to the committee?*
>
> ***Mr Murray**: I would need to check.*
>
> ***The CHAIRMAN**: With the leave of the other members of the committee I would like to, on behalf of the committee, formally ask for that —*
>
> ***Ms Andrews**: Certainly.*

> ***The CHAIRMAN**: — legal advice to be provided and for that to be provided by Monday of next week.*
>
> ***Ms Andrews**: Hmm.…*
>
> ***The CHAIRMAN**: Interesting question: in view of the interpretation that has been put on section 43 in which you suggest that the minister cannot impose a lower level of assessment, is it open under the act for the EPA to impose a lower level of assessment?*
>
> ***Ms Andrews**: I do not know what the process would be for it to revisit that decision — Colin, are you aware? — once it has made a decision. Are you talking about through the appeals process or through another process?*
>
> *…*
>
> ***Mr Murray**: Once the EPA has made a decision, the EPA's decision is locked in. The EPA cannot revisit it on the proposal that was referred. Where the minister remits it under section 43, the minister will determine the new level of assessment, which would be more fully, more publicly. There is a provision, as mentioned in the notes, where if the minister on appeal remits the decision back to the EPA for a fresh decision, the EPA can make a choice as to what level of assessment it goes to, so it could actually go to a lower level of assessment or a higher level of assessment or retain the level of assessment decision previously. The only other way in a process sense that the EPA —*
>
> ***The CHAIRMAN**: Sorry, Colin, can you just explain again those circumstances in which the EPA could actually look at a lower level of assessment?*
>
> ***Mr Murray**: Where the minister asks the EPA to make a fresh decision then, effectively, the EPA starts from scratch so it can set a lower level of assessment, retain the level of assessment decision or go to a higher level of assessment, but that requires the minister to send it back to the EPA for that decision to be made.*[178]

4.109 The OEPA did not provide the Committee with the legal advice it relied upon in giving its evidence.

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[178] Ms Michelle Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp3-4.

4.110 In its written evidence, the Office of the Appeals Convenor cited an example in which the proponent appealed an EPA decision to assess at PER level a proposal to develop a stockyard and storage facility at Cape Preston. In that case, the Minister remitted the proposal to the EPA for a fresh decision on assessment. The EPA then determined that a lower level of assessment was appropriate, given the additional information provided through the appeal.[179]

4.111 The Office of the Appeals Convenor also provided the following table setting out "*level of assessment*" appeals between 2005 and 2009:[180]

Table 4

Appeal year	Third party only	Proponent only	Both proponent and third party
2005	12	1	1
2006	10	6	2
2007	8	3	1
2008	5	0	2
2009	6	2	0

4.112 The Office of the Appeals Convenor advised of four proposals being subject to public review as a result of an appeal. Of those, three were the result of the proponent appealing a PUEA level of assessment.[181]

Finding 9: The Committee finds that proponents do utilise the current right, conferred by section 100(1)(b) of the EP Act, to appeal against the decision of the EPA as to level of assessment.

179 Amended Written Answers provided with letter from Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, 22 February 2010, p4.

180 Ibid.

Finding 10: The Committee finds that in the event the Minister for Environment determines an appeal against level of assessment by referring a proposal back to the EPA for a fresh decision, the EPA may impose a lower level of assessment, a higher level of assessment or the same level as previously imposed.

Finding 11: The Committee finds that where the EPA has set a non-public level of assessment on the basis that a proposal is unlikely to be environmentally acceptable, proponents may seek imposition of a higher level of (public) assessment.

Potential outcomes of appeals in respect of scope and content of environmental review of schemes

4.113 Sections 101(1)(da), (2a), (2b) and (2c) of the EP Act require an appeal as to the EPA instructions issued in respect of the environmental review of a scheme to be resolved in accordance with an agreement between the Minister for Environment and the Minister responsible for the scheme or, in the event an agreement cannot be reached, the decision of the Governor.

PROVISIONS RELEVANT TO DERIVED PROPOSALS

Referral of strategic proposals

4.114 As a result of the Supreme Court holding that anticipatory proposals were not "*significant proposals*", the EP Act was amended in 2003 to allow a proponent to refer a strategic proposal to the EPA for assessment and for limited environmental impact assessment of subsequent proposals anticipated by the strategic proposal.[182]

4.115 Section 37B(2) of the EP Act provides:

> *A proposal is a **strategic proposal** if and to the extent to which it identifies —*
>
> *(a) a future proposal that will be a significant proposal; or*

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181 Ibid, p5. See also transcript in which the Appeals Convenor and Deputy Appeals Convenor identify the appellants as the proponent: Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, pp5-6.

182 In respect of the environmental assessment of the Burrup draft land use management plan in 1995 - see Second Reading Speech to the Environmental Protection Amendment Bill 2002, Hon Kim Chance MLC, Minister for Agriculture, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 November 2002, p2637.

> *(b) future proposals likely, if implemented in combination with each other, to have a significant effect on the environment.*

4.116 Only a proponent may refer a strategic proposal for an environmental impact assessment under section 38 of Part IV of the EP Act.[183]

4.117 Sections 41 (and 41A), which impose restraints on decision-making authorities (and proponents) pending referral of (EPA decision to assess) a proposal do not apply to strategic proposals. Nor does section 45(7) of the EP Act, which empowers the Minister for Environment to serve a "*statement*" on a decision-making authority and a "*written authority*" permitting a decision that might result in implementation of the proposal to be made, apply.[184]

4.118 However, the other provisions of Part IV, including the obligation under section 39(1)(b) of the EP Act to record the "*level of assessment*", apply.[185] The Second Reading Speech to the Bill states that strategic proposals are subject to the same appeal rights as other proposals.[186]

4.119 The evidence of the OEPA, and the Draft Administrative Procedures - (see paragraphs 4.266ff), speak of two levels of assessment - API and PER.

4.120 However, the Draft Administrative Procedures also state:

> *A strategic assessment by the EPA will involve a scoping phase, public review of a document prepared by the proponent, and the proponent's responses to issues raised, prior to the EPA submitting its Report to the Minister.*[187]

The Draft Administrative Procedures do not state that a strategic proposal will be subject to the public level of assessment that applies to other proposals.

4.121 The Amended Joint Written Answers of OEPA and DEC identify proposals which:

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183 Section 38(3) of the *Environmental Protection Act 1986.*

184 Section 40B of the of the *Environmental Protection Act 1986.*

185 "*A strategic proposal is a referral under the Environmental Protection Act. It is still treated as a proposal*.": Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidenc*e, 8 February 2010, p24.

186 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p9407.

187 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p9.

> *were set at strategic environmental assessment (SEA), which also includes a public review period.*[188]

4.122 On its reading of the EP Act, it appeared to the Committee that section 100(1)(b) of the EP Act would enable an appeal against the decision of the EPA to assess a proposal at "*SEA*" level - in effect, an appeal against the EPA's acceptance of a proposal as a strategic proposal.

4.123 However, the EPA Report and OEPA treatment of strategic environmental assessment (**SEA**) suggested that from an administrative perspective it was not viewed as a "*level of assessment*". This treatment of assessment of strategic proposals appears to be inconsistent with the EP Act. It also appears to be inconsistent with the Bilateral IGA in that a SEA 'level of assessment' does not fall within the accredited assessment processes.

Recommendation 2: The Committee recommends that the Minister for Environment clarify for the Legislative Council:

- **that "*strategic environmental assessment*" is a "*level of assessment*" for the purposes of section 100(1)(b) of the *EP Act*;**
- **if not, the relationship between designating a proposal referred to the EPA pursuant to section 38 of the *EP Act* as one that will be subject to "*strategic environmental assessment*" and section 39(1)(b) of the *EP Act*;**
- **whether the SEA level of assessment falls within the accredited assessment processes of the Bilateral IGA (and has been accredited by the Commonwealth government).**

4.124 The purpose of allowing for strategic environmental assessment is to "*build the proper protection of the environment into the upfront strategic design of a project*".[189] In 2002, the view was:

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188 Amended Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority, provided with letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p6.

189 Second Reading Speech to the Environmental Protection Amendment Bill 2002: Hon Kim Chance MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 November 2002, p2637.

> *Although there are some benefits for the State in increased efficiency from strategic assessment, the main benefits and main costs accrue to the proponent.*[190]

4.125 That view has changed. In the Second Reading Speech to the Bill, the Minister for Environment said:

> *Strategic assessments have a number of benefits. These include early consideration of environmental matters, greater certainty to local communities and developers over future development, capacity to achieve better environmental outcomes, allowing cumulative impacts to be addressed at the landscape level, and flexible time frames commencing early in the planning process.*[191]

4.126 The EPA Report states:

> *Strategic environmental assessment is intended to contribute to sustainable development by ensuring the incorporation of environmental considerations into policies, plans and programmes that set the framework for subsequent activities. Good governance and public participation, transparency and good quality information are all important principles applied to the strategic environmental assessment process (as well as project-based EIA). In some circumstances, strategic environmental assessment has included consideration of social and economic issues.*[192]

4.127 The EPA Report also states:

> *One of the major themes from the Stakeholder Forum held in April 2008 was that there should be a greater use of strategic environmental assessment.*[193]

4.128 The submissions of CCWA and The Wilderness Society confirm in principle broad stakeholder support for increased use of strategic assessment (albeit the CCWA advises that the proposed deletion of section 100(1)(f) of the EP Act under clause 5(1)(d) might require reconsideration of that position).[194]

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190 Ibid, p2638.

191 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

192 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p29

193 Ibid.

194 Submission No 3 from The Wilderness Society WA, 11 January 2010; p2 and Submission No 8 from the Conservation Council of Western Australia Inc, 11 January 2010, p5.

4.129 The OEPA explained strategic and derived proposals as follows:

> *The act constructs "strategic proposals" as being conceptual relatively early in the normal sense of things. The assessment of the strategic proposal is intended to set conditions, limits, boundaries and even where development may or may not happen within a conceptual area, but that conceptual area is defined. A "derived proposal" would be a proposal that subsequently comes in as a development within that strategic proposal and where all of the issues that relate to that development have already been addressed. An analogy would be a scheme that zones land for a permitted use and someone then comes in and wants to develop, consistent with that permitted use. That would be a derived proposal. An example that the EPA is dealing with at the moment is the Kimberley LNG precinct. It is a precinct, and there will be an LNG project within it. There may well be a series of other defined developments within it also. The strategic proposal would consider what environmental values would be affected by the development within that precinct, and it may well define an air shed limit, a noise limit or some other limit in that assessment. Provided that the subsequent development is consistent with those rules and meets the requirements of any conditions that are applied through the strategic proposal statement issued by the minister, from the EPA's point of view, all those matters will have been addressed and that will be deemed to be a "derived proposal", and the relevant conditions that fit under the strategic proposal would then apply.*[195]

4.130 However, as discussed below, the ambit of "*strategic proposal*" and how that term inter-relates with a "*strategic plan*" or "*strategic scheme*" is, in light of the comments and recommendations of some of the recent reviews, not clear to the Committee.

Derived proposals

4.131 A proponent may apply to the EPA for a declaration that any proposal referred pursuant to section 38 is a derived proposal. The EPA is to declare the proposal a derived proposal if it considers that:

- the referred proposal was identified in a strategic proposal previously assessed under Part IV of the EP Act; and

[195] Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p23.

- in respect of that assessment, a Ministerial agreement or decision was made that the referred proposal could be implemented (with or without conditions).[196]

4.132 If a proposal is declared a derived proposal, the EPA is not to assess the proposal other than for the purposes of conducting an inquiry as to whether any implementation conditions should be changed.[197]

4.133 The EPA may refuse to declare a proposal a derived proposal if it considers that:

> *(a) environmental issues raised by the proposal were not adequately assessed when the strategic proposal was assessed;*
>
> *(b) there is significant new or additional information that justifies the reassessment of the issues raised by the proposal; or*
>
> *(c) there has been a significant change in the relevant environmental factors since the strategic proposal was assessed.*[198]

4.134 By section 39B(5), a declaration under section 39B as to whether or not a proposal is a derived proposal is to be recorded in the public record kept pursuant to section 39(1) of the EP Act.

Third party appeal against declaration proposal is a derived proposal

4.135 Section 100(1)(f) of the EP Act currently provides a right for any person to appeal against a decision of the EPA to declare, pursuant to section 39B, a proposal a derived proposal.

4.136 Clause 5(1)(d) of the Bill proposes deletion of this appeal right.

4.137 In the Second Reading Speech to the Bill, the Minister for Environment explained this amendment as follows:

> *This is intended to streamline the administrative process for declaring a proposal to be a derived proposal and encourage greater use of*

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196 By section 39B of the *Environmental Protection Act 1986*. An application may only be made by the proponent.

197 Sections 38(3), 39B(6) and 46(4) of the *Environmental Protection Act 1986*. Section 39A(8) provides that section 39A, which sets out the assessment process for a proposal, does not apply to derived proposals.

198 Section 39B(4) of the *Environmental Protection Act 1986*.

> ***strategic assessments***. *Strategic proposals are subject to the same appeal rights as other proposals, and the notice declaring a proposal to be a derived proposal must be published.*[199]
>
> (Committee's emphasis)

4.138 This right of appeal in respect of the declaration of a proposal as a derived proposal has never been used. As this right of appeal has never been used, there is no evidence that delay experienced as a result of its use has served as a deterrent to proponents utilising the strategic proposal provisions of the EP Act.

4.139 The OEPA advised that uncertainty around strategic assessment arose because it had not performed enough assessments for the process to be clear.[200] When asked about the period for which a strategic assessment environmental approval might operate, the OEPA answered:

> *We do not have standard strategic assessment experience yet because we have not done any of them, so there is probably not a standard in that realm.*[201]

4.140 The advice in the Amended Joint Written Answers of DEC and OEPA is that the following numbers of proposal had been subject to strategic environmental assessment:[202]

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199 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p9407.

200 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p23.

201 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p24.

202 Amended Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority, provided with letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p6.

Table 5

Year	No. of strategic assessment
2004	1
2005	2
2006	1
2007	-
2008	3
2009	-

4.141 The Amended Joint Written Answers of DEC and the OEPA did not provide any information as to whether there had been any applications to declare a proposal a derived proposal.

No legislative restriction on the period of time within which an application for declaration may be made

4.142 Some submissions expressed concern at the period of time that might elapse between assessment of a strategic proposal and referral of a derived proposal.[203]

4.143 The OEPA advised that the Minister's decision in respect of a strategic proposal would have a time limit, which would be determined during the assessment process on a case by case basis:

> *For normal proposals, it is often five years, but you can see that for strategic assessments there is a thought that they will have a longer time limit.*[204]

4.144 No upper time limit was indicated to the Committee.

4.145 The CCWA's concern was:

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203 See, for example, Submission No 6 from Dr Margaret Matthews, 11 January 2010, p1 and Submission No 8 from Conservation Council of Western Australia Inc, 11 January 2010, p5.

204 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p24.

> *One of the issues associated with this is that a strategic assessment could happen and lay on the table for a very long period of time, and you could have a situation where up to five years later, or even 10 years later, a proponent comes with a very significant project, and things have dramatically changed in terms of the way the community perceives these issues and even the way the environment is capable of receiving these types of impacts. So you have got a situation where it is very important that new evidence can be brought to bear in relation to the EPA decision making in relation to these things.*[205]

4.146 The OEPA's view was that section 39(4) of the EP Act provided a safeguard in respect of this issue.[206] (See paragraph 4.134 for the text of section 39(4)).

4.147 The EDO's view is:

> *It is certainly a positive feature of s 39B that it sets out appropriate circumstances where the EPA may refuse to declare a derived proposal. Nevertheless, there is still a subjective judgement to be applied in determining whether there has been an "adequate" assessment or whether new information provided is "significant". The EPA, members of the community and the Minister for environment* [sic] *could easily come to a different view about these matters.*[207]

4.148 This further confirms the need to retain this right of appeal and the need for the life of strategic assessment environmental approvals to be fixed and known. See Chapter 7 for a discussion of issues arising in the event this right of appeal is deleted from the EP Act.

What constitutes a "*strategic proposal*" and a "*derived proposal*"

4.149 In the explanation set out in paragraph 4.129, the OEPA uses an analogy of a derived proposal being a proposal made under an assessed strategic scheme to describe the relationship between a strategic proposal and a derived proposal. This highlights a question arising from the various reviews. It is not clear what constitutes a strategic proposal in circumstances where the discussion is often about "*strategic assessments*" (see passage in Second Reading Speech in paragraph 4.138) and there are no specific provisions in the EP Act for assessment of strategic schemes. (The Committee notes

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205 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence,* 15 February 2010, p16.

206 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p25.

207 Submission No 9 from Environmental Defender's Office Western Australia (Inc), 11 January 2010, p3.

that as there is no 'significance' test for referral of a scheme, separate provision for strategic schemes is unlikely to be necessary.)

4.150 The EPA Report, for example, identified the following as "*strategic environmental assessments*":

> • *land use concept plans, structure plans and outline development plans*
>
> • *rural planning strategies*
>
> • *water resource plans*
>
> • *conservation estate management plans*
>
> • *forest management plans*
>
> • *industrial estate development plans*
>
> • *plans for selection of industrial land sites*
>
> • *development plans for residential or industrial zoned land which was not previously the subject of an "assessed scheme"*
>
> • *mining or exploration approval policy or plan within a region*
>
> • *policy for location of port developments*
>
> • *regional air quality management plans*
>
> • *water source development program*
>
> • *river protection strategies*.[208]

4.151 It seemed to the Committee that many of these examples blurred the distinction between "*scheme*" and "*proposal*" and between "*scheme*" and "*strategic proposal*".

4.152 This issue also arose, albeit with a different emphasis, in submissions. The CCWA submission stated:

> *The Commonwealth (DEHWA) and the State EPA are increasingly emphasising the need for more strategic assessment, particularly for that of Planning Schemes (to avoid the need to assess masses of small scale proposals). If this trend is continued we are likely to see very*

[208] Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, Appendix 7, Strategic Environmental Assessment Discussion paper, March 2009, p9.

> *broad-scale or 'coarse' strategic assessments undertaken which would leave open the possibility of almost any sort of development. For example, a strategic assessment of a regional planning scheme may identify industry or heavy industry zones. This could lead to proposals of that nature being classified as derived proposals and thereby escaping the necessary degree of public scrutiny required for communities to have confidence in government decisions.*[209]

4.153 The CCWA expressed its concern:

> *In this case we are likely to see the 'strategic assessment' provisions in the Act used as a back-door means by which developers might escape proper scrutiny of their proposals. There is also a risk that some years after a strategic assessment has been completed communities may be confronted with a 'derived proposal' project of which they have no knowledge*.[210]

4.154 Dr Margaret Matthews expressed concern at the "*high level*" of strategic assessment in the following terms:

> *A strategic regional assessment cannot consider all of the impacts of any possible future proposal or the interests of stakeholders potentially affected by particular proposals.*[211]

4.155 The Committee sought to clarify the distinction between treatment of a proposal made under an assessed 'strategic scheme' and a derived proposal made pursuant to a 'strategic proposal':

> ***The CHAIRMAN****: … Noting that the EPA report identifies strategic schemes as "strategic proposals", will a strategic scheme be assessed as a strategic scheme or a strategic proposal?*
>
> ***Mr Murray****: It has to be assessed as a scheme because it will be referred under the Planning and Development Act to the EPA as a scheme. A scheme will come into the EPA under the provisions of section 48. A strategic proposal is defined under section 38 and comes into the EPA under section 38. They are discrete points of entry into the EPA and therefore they are separate forms of assessment.*

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209 Submission No 8 from Conservation Council of Western Australia Inc, 11 January 2010, p4.

210 Ibid, p5.

211 Submission No 6 from Dr Margaret Matthews, 11January 2010, p1.

> ***The CHAIRMAN****: I am just trying to get the terminology clarified. Would a proposal made under a strategic scheme be considered possibly a derived proposal?*
>
> ***Mr Murray****: No, because the provisions under the planning act say that once the EPA has assessed a scheme, implementation of that scheme cannot be reassessed by the EPA unless there are matters that are in addition to those which the EPA has already assessed. That is what we call "deferred factors". If all of the issues that development under a scheme raised had been assessed by the EPA, the EPA has no right to reassess a proposal. We do not call them proposals because we try to distinguish between them. A proposal is defined under section 38; a scheme is defined under section 48, so we would normally refer to it as a development or a subdivision, or whatever is the specific instrument.*[212]
>
> (Although, the Committee notes, the EP Act uses the term "*proposal under an assessed scheme*" to distinguish between these proposals and proposals not made under an assessed scheme and the EPA Report lists "*development plans*" and "*development programs*" as instruments that may be subject to "*strategic assessment*".)

4.156 CCWA's concern with "*coarse*" strategic assessment was noted in paragraph 4.153.

4.157 The OEPA's evidence on this was:

> ***The CHAIRMAN****: If you assessed a scheme that provided for an industrial area and then you had a development proposal for an industry within the industrial area, there would still be circumstances in which the EPA would assess that proposal?*
>
> ***Mr Murray****: Correct. That would be on the basis that there would be matters that clearly would not have been addressed through the scheme, so they would still be outstanding and the EPA could assess that as a proposal.*[213]

4.158 It appears to the Committee that, as well as proponents, other important stakeholders are uncertain as to what will constitute a strategic proposal or a derived proposal. The Committee was, for example, surprised to learn that Smiths Beach was assessed as a strategic proposal rather than a proposal.

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212 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p22.

213 Ibid.

Finding 12: The Committee finds that there is uncertainty amongst stakeholders as to what constitutes:

- **a strategic proposal as distinct from a strategic assessment of a scheme; and**
- **a strategic proposal as distinct from a proposal,**

and, where a scheme has been subject to strategic assessment, what constitutes:

- **a proposal under the assessed scheme as distinct from a proposal that requires referral to the EPA under section 38 of the EP Act; and**
- **a proposal under the assessed scheme as distinct from a derived proposal**.

Finding 13: The Committee finds that the appeals against the EPA's:

- **decision as to level of assessment of a strategic proposal (if such an appeal does exist);**
- **instructions as to the scope and content of an environmental review of a scheme; and**
- **declaration that a proposal is a derived proposal,**

provide a critical mechanism for public and proponent comment, and Ministerial review, of the validity of the distinctions drawn by the EPA between schemes, strategic proposals, proposals under an assessed scheme and derived proposals in the circumstances of uncertainty set out in Finding 12.

4.159 The uncertainty and lack of experience surrounding strategic environmental impact assessment (together with the fact that there is no evidence that the right of appeal against the EPA declaration that a proposal is a derived proposal is causing delay in the environmental impact assessment process - see paragraph 4.257 and Chapter 5, paragraph 5.2), is a material circumstance in the Committee's conclusion that the rights of appeal conferred by sections 100(1)(f) and 100(2) of the EP Act should be retained (see Chapter 7).

Evidence as to lack of use of strategic proposal provisions

Industry not ready/Uncertainty arising from lack of use of provisions

4.160 When asked why there had been little use of the strategic proposal provisions, the OEPA advised:

> *My discussions with industry about trying to encourage them to use the strategic proposal more has been: they are interested, but in recent years they have not been ready. The reason they are not ready is their development proposals are on very tight time frames and there is a "just-in-time" approach that industry has been taking for that.*[214]

4.161 The second reason provided was a desire for certainty about the process and obligations in view of the fact that the provisions had been little used.[215]

4.162 It is noted that there have been strategic proposals assessed under section 16(e) of the EP Act and that that assessment process uses the current Part IV assessment provisions for the significant subsequent proposal.

EPA assessment of strategic proposals under section 16(e) of EP Act

4.163 The EPA Report states:

> *The EPA has also conducted a number of "non-binding" strategic assessments of broad scale land development (for instance proposed industrial estates and Structure Plans), port development and industrial estates pursuant to Section 16(e) of the EP Act. A recent example is the EPA's report on the proposed sites for a Kimberley LNG precinct.*[216]

4.164 Section 16 of the EP Act sets out the functions of the EPA, which include:

> *(e) to advise the Minister on environmental matters generally and on any matter he may refer to it for advice, including any proposal or scheme …*

4.165 The section 16(e) process is described in the EPA Report as follows:

> *This can be the first stage of a two stage assessment process for significant proposals where:*

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214 Ibid,, p23.

215 Ibid.

216 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p29.

> *1. The first stage strategic assessment is non-binding and usually includes an assessment of alternatives and options. The strategic assessment identifies key environmental issues and determines information that will be required for a detailed assessment and whether the proposal may be potentially environmentally acceptable. An assessment of alternatives or options is usually part of this stage.*
>
> *2. The second stage assessment is binding, and includes a more detailed assessment of key issues and mitigation that may be applied to the proposal.*
>
> *Section 16(e) assessments have provided substantial flexibility to both the EPA and proponents for major complex proposals by going through a staged assessment.*[217]

4.166 The second "*binding*" stage is assessment under Part IV of the EP Act.[218]

CCWA view

4.167 As previously noted, while supporting increased use of the strategic proposal provisions, the CCWA was concerned (for the reasons set out in the quotes at paragraphs 4.145 and 4.153) that removal of the appeal right sent the message:

> *Well, the reason why you should use the strategic assessment provisions is because there is less accountability and less transparency associated with this track towards project approvals, so this is the way you should be progressing.*[219]

Proponent appeal against decision not to declare a derived proposal remains

4.168 A proponent may appeal against a decision not to declare a proposal a derived proposal.[220]

4.169 Submissions to the Committee pointed to the deletion of third party rights of appeal, while a proponent's right to appeal is retained, as inequitable.[221]

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217 Ibid.

218 The Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, later states, in making a recommendation: "*The EPA should explore with proponents, government agencies and responsible authorities opportunities for increasing the use of two-stage assessments – initial non-binding strategic assessment (eg under Section 16(e)) followed by the binding assessment (under Part IV*).": Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p31.

219 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p16.

220 Section 100(2) of the *Environmental Protection Act 1986*.

4.170 In the Second Reading Speech, the Minister for Environment advised:

> *It is proposed to remove the right of appeal on the declaration by the Environmental Protection Authority that a proposal is a derived proposal.*[222]

4.171 At the hearing, the OEPA response to the question of why third party appeal rights were being deleted but not that of the proponent was:

> *We are removing the right of appeal. We are not being selective; proponents do not retain the right of appeal, at this point.*[223]

4.172 On section 100(2) of the EP Act being brought to the attention of the OEPA, the question was taken on notice. The Amended Joint Written Answers of DEC and OEPA state:

> *We thank the Committee for bringing an inadvertent drafting error to our attention. The intention of the Bill was to remove all appeals by "any decision-making authority, responsible authority, proponent or any other person" in relation to the recorded declaration under section 39B.*[224]

4.173 The Amended Joint Written Answers of DEC and OEPA statement that the retention of section 100(2) of the EP is an inadvertent drafting error is consistent with the statement of the Minister for Environment in the Second Reading Speech that the right of appeal for all parties on the declaration by the EPA that a proposal is a derived proposal is to be removed. However, this intended consequence is not given effect by the Bill.

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221 Submission No 3 from The Wilderness Society WA, 11 January 2010, p2 and Submission No 1 from Hon Giz Watson MLC, 18 December 2010, p2

222 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p9407.

223 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p24.

224 Amended Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority, provided with letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p21.

Finding 14: The Committee finds that in order to give effect to the stated intent of the Executive, the Bill requires amendment to provide for:

- **deletion of section 100(2) of the EP Act; and**
- **consequential amendments to sections 100(3a)(d), 101(1) - line 1, 101(1)(dc), 101(2) and 101(3).**

PROVISIONS RELEVANT TO CLAUSES 5(1)(a) AND 9 OF THE BILL - CLEARING OF NATIVE VEGETATION

Requirement for permit

4.174 Section 51C of the EP Act provides that clearing of native vegetation is an offence unless it is:

- done in accordance with a permit;
- of a kind set out in Schedule 6;[225] or
- of a kind prescribed.[226]

4.175 Clearing of native vegetation is widely defined in the EP Act and includes the draining or flooding of land, the burning of vegetation and the grazing of stock and may be a partial clearing.[227]

Application made to CEO (unless delegated)

4.176 An application for a permit for clearing native vegetation is (except where the power has been delegated elsewhere) determined by the CEO.[228]

4.177 Since 1 July 2005, the Director Environment Division and the Deputy Director General Mineral and Petroleum Resources, DMP have exercised delegated responsibility for assessing and issuing permits to clear native vegetation in respect of mineral and petroleum activities regulated under the *Mining Act 1978*, *Petroleum Act 1967* (Cwlth), *Petroleum (Submerged Lands) Act 1982* and *Petroleum Pipelines Act*

225 Section 51C(b) of the *Environmental Protection Act 1986*.

226 Section 51C(c)of the *Environmental Protection Act 1986*..

227 Section 51A of the. *Environmental Protection Act 1986.*

228 Section 3 of the *Environmental Protection Act 1986*.

1969, and activities under State Agreements administered by the DMP in Western Australia.[229]

Who may apply for clearing permit

4.178 An application for a permit may be made by:

- if the permit is to relate to land specified in the application - the owner, or prospective owner, of the land to be cleared;[230] or
- if the permit is to relate to the clearing of different areas from time to time for a particular purpose - the person by whom (or on whose behalf) the clearing is to be done.[231] (This type of permit is intended to apply to activities such as bushfire clearing).

Process for issuing clearing permit

4.179 Any public authority or person who has a direct interest in the subject matter of the application is to be invited by the CEO to comment on it. An application is also advertised in *The West Australian* newspaper for submissions from the public.[232]

4.180 An application is to be supported by such information as is required by the CEO.[233]

4.181 The CEO's decision on whether to issue a permit is to be made in accordance with clearing principles set out in Schedule 5 to the EP Act[234] (unless, in the CEO's opinion, there is good reason why this should not be the case).[235]

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229 This delegation is supported by an Administrative Agreement between the two departments. Department of Mines and Petroleum website, http://www.dmp.gov.au/828.aspx (viewed November 2009). (Section 20 of the *Environmental Protection Act 1986* permits the CEO to, with the approval of the Minister for Environment, delegate all or any of the powers and duties of the CEO under the *Environmental Protection Act 1986*.)

230 Or a person acting on the owner's behalf.

231 Section 51E(2) of the *Environmental Protection Act 1986*.

232 Section 51E of the *Environmental Protection Act 1986* and Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p7.

233 Section 51E of the *Environmental Protection Act 1986*.

234 Schedule 5 of the *Environmental Protection Act 1986* provides: "*Native vegetation should not be cleared if — (a) it comprises a high level of biological diversity; (b) it comprises the whole or a part of, or is necessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia; (c) it includes, or is necessary for the continued existence of, rare flora; (d) it comprises the whole or a part of, or is necessary for the maintenance of, a threatened ecological community; (e) it is significant as a remnant of native vegetation in an area that has been extensively cleared; (f) it is growing in, or in association with, an environment associated with a watercourse or wetland; (g) the clearing of the vegetation is likely to cause appreciable land degradation; (h) the clearing of the vegetation is likely to have an impact on the environmental values of any adjacent or nearby conservation area; (i) the clearing of the vegetation is likely to cause deterioration in the quality of surface or underground water; or (j) the clearing of the vegetation is likely to cause, or exacerbate, the incidence or intensity of flooding*".

235 Section 51O of the *Environmental Protection Act 1986*.

4.182 Section 51O of the EP Act requires the CEO to have regard to any planning instrument, such as a scheme, strategy, policy or plan made under a scheme or a local planning strategy made under the *Planning and Development Act 2005,* that the CEO considers relevant.[236]

4.183 That section also empowers the CEO to consider any "*other matter*" that the CEO considers relevant.

4.184 DEC advised that the CEO's decision report in respect of a clearing permit application is published on its website and includes an assessment in accordance with section 51O. This appears to be an administrative practice rather than a legislative obligation.[237]

4.185 The CEO may impose conditions on grant of a clearing permit, which may later be amended on application of the permit holder or the CEO's initiative.[238]

Relationship between Part IV assessment and Part V, Division 2 of the EP Act

4.186 The DEC evidence on the relationship between Part IV assessment and Part V, Division 2 of the EP Act is:

> ***Mr McNamara****: I will ask Ms McEvoy to assist in a moment, but, in essence, applicants make their application to the Department of Environment and Conservation in accordance with the provisions of part V of the act. But quite separately from that, where, for example, there might be a major development proposal, a major mining proposal that triggers the significance test of the act anyway and is submitted to the EPA for its consideration whether to conduct an assessment — there could be a range of air quality, noise, dust, vegetation, other biodiversity considerations for example — the EPA makes its decision across that full range of factors. Ms McEvoy might be able to elaborate.*
>
> ***Ms McEvoy****: Keiran has got that correctly. Under the clearing provisions, the CEO, also under part V, has an obligation to refer a significant proposal to the EPA for their consideration so if there were a significant proposal that was submitted as an application for a*

236 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010, p7.

237 Ibid.

238 Section 51E(2) of the *Environmental Protection Act 1986*.

> *clearing permit, under section 38 the CEO must refer that to the EPA for their consideration as to whether or not to assess it.*[239]
>
> …
>
> ***The CHAIRMAN**: However, is it not the case, though, that if the EPA make a decision not to assess, then the opportunity to assess the clearing permit is avoided?*
>
> ***Ms McEvoy**: No, clearing requires a clearing permit unless there is a permit or an exemption. There is no exemption that applies if the EPA decides not to assess a proposal. It is only where they assess it and the minister issues of* [sic] *ministerial statement of implementation, and any clearing is done in accordance with the outcome of the EPA's formal assessment.*
>
> ***The CHAIRMAN**: Let me just get this right. If the EPA determined to assess, then there is no requirement to go through and get a separate clearing permit licence.*
>
> ***Ms McEvoy**: That is correct.*
>
> ***The CHAIRMAN**: If the EPA determined to assess only under the clearing permit licence, then you automatically jump to that process and that process is adopted.*
>
> ***Ms McEvoy**: The EPA does not determine whether a clearing permit is required; it is an independent fact. But if they make a recommendation that it be managed under a clearing permit, then the appeal right on the level of assessment will be removed.*[240]

4.187 The Committee notes that, in fact, it is the appeal right on the decision not to assess that will be deleted.

4.188 The Committee finds that it is apparent from this that the CEO makes a decision independent of any recommendation of the EPA as to whether a clearing permit is required for an activity to occur.

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239 Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p2.

240 Ibid, p8.

Finding 15: The Committee finds that the CEO makes a decision on whether a clearing permit is required independent of any recommendation of the EPA that a proposal is to be dealt with under Part V, Division 2, of the EP Act.

Whether a proposal involving significant clearing should be assessed under Part IV

4.189 On the question of which proposals the EPA will assess, the CNV Report noted conservationists' view that the EPA should assess all significant proposals regardless of the Part V, Division 2 provisions:

> *The CCWA expressed an additional concern that the EPA should always assess a proposal to clear 'significant' native vegetation and should not rely on DEC or DMP processes for such proposals. This is partly based on the concern that the EP Act specifically allows DEC to take into account factors other than environmental matters when it assesses proposals, whereas the EPA has an environmental protection mandate which is the purpose of the clearing controls.*[241]

4.190 This view was reflected in the submissions made to the Committee and in the evidence of the CCWA at the hearing.[242]

4.191 The opinion of the CME, however, is that:

> *the circumstances in which an appeal right should not apply should not be limited to when that decision includes a recommendation the proposal be dealt with through the clearing permit regime.*
>
> *Where other assessment processes may also be considered adequate by the EPA to deal with the proposal then an appeal right should also not apply. For example, assessments relating to mining proposals or proposals under State Agreements or environmental licence and works approval processes.*[243]

4.192 The CNV Report accepted that proposals with potentially significant effects would be dealt with solely pursuant to Part V, Division 2:

> *There is merit in the EPA making it clear when it chooses to not assess a proposal to clear significant vegetation, but that the*

241 Expert Committee, *Regulation Review: Clearing of Native Vegetation*, April 2009, pp15-16.

242 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p4.

243 Submission No 11 from The Chamber of Minerals and Energy Western Australia, 11 January 2010, p1.

> *vegetation is still considered significant by the EPA, that Part V of the EP Act, including the possible uses of sections 51O(3) and (4) is the most appropriate mechanism to deal with the mix of issues associated with the proposal.*[244]

4.193 The Second Reading Speech to the *Environmental Protection Amendment Act 2003*, which introduced the clearing permit provisions to the EP Act, identifies those provisions as replacing the clearing permit provisions of the *Soil and Land Conservation Act 1945*. The *Soil and Land Conservation Act 1945* required "*significant*" proposals to be referred to the EPA. Comment is made in that Second Reading Speech that the new CEO process is less onerous than a full EPA assessment but it is not clear whether the intention was that the CEO would continue to only deal with applications that did not have significant environmental implications.

4.194 The Second Reading Speech to the Bill states that the deletion of the section 100(1)(a) appeal right against the EPA decision not to assess where a recommendation is made for Part V, Division 2, assessment:

> *eliminates an unnecessary appeal point and acknowledges that clearing permit processes are robust, transparent and accountable with their own comprehensive appeal provisions.*[245]

4.195 Although the Keating Report does not address clearing of native vegetation (the provisions had not at the time of that review been inserted into the EP Act), it made a pertinent recommendation in respect of works approvals and licences (which raise the same issues), which might explain the intended relationship between an EPA and CEO clearing assessment:

> *Where a proposal is to be formally assessed under the Environmental Protection Act and a works approval and licence will subsequently be required, then the formal assessment process should focus on setting a framework approval through outcome based conditions. Matters of detail and operations should be deferred to the works approval and licence process. The level of information required in the formal process should be appropriate to the setting of outcome based conditions.*[246]

4.196 It is beyond the ambit of the Committee's inquiry into the Bill to determine whether the EP Act provides that the EPA should assess significant proposals that raise only

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244 Expert Committee, *Regulation Review: Clearing of Native Vegetation,* April 2009, pp17-18.

245 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p9407.

246 Independent Review Committee, Final Report - '*Review of the Project Development Approvals System*', April 2002, p3.

clearing of native vegetation issues or permits such proposals to be dealt with under Part V, Division 2.

4.197 The Committee simply notes that the DEC and OEPA view of the EP Act is that the EP Act does permit such proposals to be dealt with under Part V, Division 2. In that circumstance, an appeal against the EPA's decision not to assess on the basis that the proposal is significant and, therefore, an assessment of clearing of native vegetation issues should be conducted under the more rigorous Part IV process, may be viewed by the DEC and OEPA as being based on an invalid premise. Such an appeal may be seen as frivolous or vexatious and, therefore, unnecessary.

4.198 From the conservationist's perspective, however, an appeal against the EPA's decision not to assess a significant proposal where there is a recommendation that the proposal be dealt with under what it considers to be the less "*robust, transparent and accountable*" process of Part V, Division 2 of the EP Act - even where the only issues arising are in respect of the clearing of native vegetation - seeks to enforce EPA 'compliance' with the 'requirement' of the EP Act that the EPA assess significant proposals under Part IV. The right of appeal in those circumstances fulfils, in the conservationist's opinion, an important review function.

4.199 The question of whether the clearing permit appeal provisions in fact provide the same right of appeal as section 100(1)(a) of the EP Act is examined in Chapter 7.

4.200 That Chapter also deals with the deletion of the right to appeal against the decision not to assess on the basis that assessment should occur for reason other than the clearing implications of a proposal, in the circumstance that the EPA has made a recommendation that the proposal be dealt with under the provisions of the EP Act in respect of clearing permits.

4.201 At this introductory point, the Committee simply compares the two processes.

Evidence as to Part IV and Part V, Division 2 assessment processes

4.202 As noted, conservation groups hold the view that the EPA should always assess a proposal to clear 'significant' native vegetation and should not rely on DEC or DMP processes for such proposals. This view is based on concerns that section 51O of the EP Act permits the CEO to take into account non-environmental matters in reaching a decision.

4.203 Conservation groups are also of the view that assessment under Part V is qualitatively different from assessment under Part IV, as:

> *Approval processes under Part V are designed to control activities which are deemed to be environmentally significant so long as they adhere to certain standards;*[247]

whereas, it is their submission, that an assessment under Part IV asks whether an activity should be permitted. (See Introduction to this Chapter.)

4.204 The Committee asked the DEC to detail the differences in the assessment processes of the EPA and CEO in respect of the clearing of native vegetation. After reciting the legislative provisions (set out in paragraphs 4.175 - 4.185), the DEC said:

> *The clearing principles comprehensively address the environmental values of native vegetation. The Department of Environment and Conservation has published a guide on how it undertakes assessments under part V, division 2 — a copy of the guide is available on the department's website. The EPA has broad powers in relation to assessment generally and may make such investigations and inquiries as it sees fit and require any person to provide it with such information as is specified. The EPA publishes standards and policies in relation to assessment generally and for vegetation in particular. The issues considered in relation to clearing of native vegetation and the standards applied are generally consistent between both processes.*[248]

4.205 In a submission to the Committee, Dr J E Wajon expressed the opinion that the Part V clearing permit system is not as transparent as the Part IV process. Dr Wajon noted:

> *Applications for clearing permits are typically only advertised for 1 - 2 weeks, which provides very little time for the public to comment. Information provided with clearing permit applications are typically inadequate, and difficult to access. Even the information supposedly available via the internet on the Department of Environment and Conservation's website is not accessible as the software required is not universally available (or there appear to be other problems) - as I can attest from numerous attempts to comment on clearing permit applications. Significant proposals that involve clearing (indeed any clearing proposal) need to go through a much more transparent process with adequate time for public review.*[249]

4.206 The CCWA view is:

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247 Submission No 9 from Environmental Defender's Office Western Australia (Inc), 11 January 2010, p2.

248 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p10.

249 Submission No 5 from Dr J E Wajon, 10 January 2010, p2.

> ***Mr Verstegen*** *… the level of rigour associated with the assessment clearing applications under part 5 is nowhere near the level of rigour that would be applied by the EPA. Given that is the case, it is much more difficult for members of the community and third parties to apply the same sort of analysis in respect to that decision making …*[250]

> ***Dr Dunlop*** *… the information that we get, using the part 5 process, is often simply a rough aerial photograph and a diagram and something telling us what the generic nature of the vegetation type is. Something that was handled through the environmental assessment would have much more detail about the quality, value and function of the vegetation than we will get under part 5. As a mechanism, it is vastly inferior for us in coming to a conclusion about a clearing proposal.*[251]

Chamber of Minerals & Energy submission

4.207 The Committee put the matters raised by the CME (see paragraph 4.192) to the DEC. The DEC's response to the situation in respect of clearing permits under a delegated authority was:

> ***The CHAIRMAN****: … what is the practical effect of clause 5(1)(a) of the bill where an application for a clearing permit is to be made under other legislation or in another department pursuant to a memorandum of understanding with DEC?*

> ***Mr McNamara****: … In respect of the question as it relates to another department pursuant to an MOU with DEC, the answer is that the proposed amendment in clause 5(1)(a) of the bill does not have any effect other than in this case, as the EPA's recommendation must refer to part 5, division 2; in other words, the clearing provisions of the act.*[252]

4.208 The Committee understands that an application for a clearing permit made to the DMP is regarded as being 'dealt with' under Part V, as the DMP exercises delegated Part V authority. If that is the case, it appears to the Committee that the effect of proposed clause 5(1)(a) is no right of appeal against a decision of the EPA not to assess a proposal where the clearing permit application is in fact to be considered by DMP.

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250 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence,* 15 February 2010, p6.

251 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p7.

252 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010, p9.

4.209 However, it is not clear to the Committee which proposals for mining tenements are referred to the EPA for environmental impact assessment.

4.210 Section 6(1a) of the *Mining Act 1978* (which restricts, in specified circumstances, the persons who may refer an application for a mining lease for an environmental impact assessment, and is expressed to have effect notwithstanding the EP Act) has been noted above. In a hearing before the Committee in respect of the Petroleum and Energy Legislation Amendment Bill 2009, Mr Colin Harvey, Principal Legislation and Policy Officer, DMP advised:

> *There is a memorandum of understanding between the EPA and the Department of Mines and Petroleum. The department has its own environmental assessment branch, and operational activities up to a certain level, unless they trigger a referral under the EPA act, are dealt with in-house. But — and I can only speak from petroleum experience here — where it goes beyond that, then the matter is referred to the EPA, if indeed it has not already been referred to the EPA by the proponent. That is the way that pragmatically it has been worked for the last 10 years or so.*[253]

4.211 The CME submission was that section 100(1)(a) of the EP Act should be amended to delete appeals against the EPA's decision not to assess:

> *where other assessment processes may also be considered adequate by the EPA to deal with the proposal … For example, assessments relating to mining proposals or proposals under State Agreements …*[254]

Recommendation 3: The Committee recommends that the Minister for Environment identify for the Legislative Council the type of mining tenements and petroleum titles that are referred to the EPA for assessment under Part IV of the EP Act and those that undergo environmental impact assessment by the DMP.

253 Mr Colin Harvey, Principal Legislation and Policy Officer, Department of Mines and Petroleum, *Transcript of Evidence,* 9 February 2010, p12.

254 Submission No 11 from The Chamber of Minerals and Energy Western Australia, 11 January 2010, p1.

Recommendation 4: The Committee recommends that the Minister for Environment:

- **identify for the Legislative Council the type of mining tenements and petroleum titles in respect of which applications for permits to clear native vegetation are dealt with by the DMP pursuant to a Memorandum of Understanding between that Department and the Department of Conservation and Environment; and**

- **confirm if clause 5(1)(a) of the Bill will have the effect that there will be no appeal against the EPA's decision not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 where, in fact, the decision on the clearing permit application will be made by the DMP.**

Bilateral IGA

4.212 The Committee notes that the Bilateral Agreement IGA currently applies only to public review assessment of a proposal by the EPA.[255] (See Chapter 3 for discussion of the overlap between federal and State jurisdiction on environmental matters, the need for certain proposals to obtain federal environmental impact assessment approval and the Bilateral IGA provision for recognition of certain State assessment processes as meeting federal requirements).

4.213 Given this, it seems to the Committee there may be circumstances in which a proponent would prefer any clearing of native vegetation assessment to be conducted under the auspice of the EPA, rather than the unaccredited Part V, Division 2 assessment process of the CEO.

Revocation and suspension of clearing permit

4.214 The CEO may revoke or suspend a clearing permit for breach of condition, supply of false information on application and other reasons set out in section 51L of the EP Act.

4.215 No public submissions are invited in respect of decisions to amend, revoke or suspend.

[255] See Agreement Between the Commonwealth of Australia and the State of Western Australia Under Section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* Relating to Environmental Impact Assessment.

Appeals in respect of clearing permit

4.216 An applicant for a clearing permit may appeal to the Minister for Environment in respect of a refusal to grant a permit (in whole or in part), or the conditions imposed on a grant, currently within 28 days of being notified of the CEO's decision. A holder of a clearing permit may appeal to the Minister in respect of any amendment of conditions or the revocation or suspension of a permit, also currently within 28 days of notification of the CEO's decision.[256]

4.217 Any person aggrieved by a decision to grant a clearing permit may appeal to the Minister for Environment in respect of that grant or a condition imposed on a grant.[257]

4.218 The Bill does not propose deletion of these appeal rights. It does, however, propose a reduction of the time within which to lodge an appeal from 28 to 21 days.

4.219 Section 101A of the EP Act also currently confers a right for persons aggrieved by a decision of the CEO to: refuse a clearing permit; amend a clearing permit; or revoke or suspend a permit, to appeal to the Minister for Environment in respect of those decisions.[258]

4.220 Clause 9(3) of the Bill proposes deletion of these third party rights of appeal in respect of refusal of an application for a clearing permit and revocation and suspension of a clearing permit. This clause of the Bill is considered in Chapter 8.

4.221 By section 51F of the EP Act, an application for a clearing permit is not to be determined while a related proposal is being assessed pursuant to the EP Act. It is also not to be granted otherwise than in accordance with an implementation agreement or decision in respect of a related proposal.[259]

4.222 Clause 14 of the Bill proposes an amendment of section 51F to permit the CEO to make a decision in respect of an application for a clearing permit to perform minor or preliminary work to which the EPA has consented under section 41A of the EP Act. This clause of the Bill is considered in Chapter 9.

256 Sections 101A(1) and (2) of the *Environmental Protection Act 1986*.

257 Section 101A(4) of the *Environmental Protection Act 1986*.

258 Section 101A(3) of *Environmental Protection Act 1986*.

259 Section 51F of the *Environmental Protection Act 1986*.

PROVISIONS RELATING TO CLAUSE 10 - WORKS APPROVALS AND LICENCES

Works Approval

Requirement for works approval - activities not to be conducted on prescribed premises

4.223 The EP Act sets out a number of activities that may not be conducted on prescribed premises without a works approval or licence or under requirement of a closure or environmental protection notice. Those activities include:

- causing an emission;
- altering the method of operation of any trade;
- altering equipment for the control of noise; and
- installation of fuel burning equipment.[260]

4.224 Regulations may also prescribe conduct affecting the environment for which an authorisation (by way of licence, permit, approval or exemption) may be required.[261]

4.225 Any person who carries on work in relation to premises that could cause the premises to become "*prescribed premises*" commits an offence, unless that work is carried out in accordance with a works approval.[262] There are currently in excess of 90 prescribed premises set out in Schedule 1 of the *Environmental Protection Regulations 1987*, including:

> *24 Alcoholic beverage manufacturing: premises on which an alcoholic beverage is manufactured and from which liquid waste is or is to be discharged onto land or into waters.*
>
> *59 Biomedical waste incineration: premises on which — (a) infectious or potentially infectious waste produced by health care establishments, or by pathology, dental, or veterinary practices, or by laboratories, is incinerated;*

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260 Section 53 of the *Environmental Protection Act 1986.*.

261 Section 50D(2) of the *Environmental Protection Act 1986* defines "*Conduct affecting the environment*" to mean: "*(a) causing or allowing anything to be discharged, emitted or transmitted; (b) causing or allowing the nature or volume of anything discharged, emitted or transmitted to be changed; (c) conduct, or an operation or activity, that is a potential cause of pollution or environmental harm; or (d) causing or allowing conduct, or an operation or activity, that is a potential cause of pollution or environmental harm.*"

262 Section 52 of the *Environmental Protection Act 1986*. Item 26 of Schedule 2 of the *Environmental Protection Act 1986* provides that regulations may be made: "*Prescribing any premises or class of premises as prescribed premises for the purposes of Part V*", which Part the provisions concerning works approvals are located.

85 Sewage facility: premises — (a) on which sewage is treated (excluding septic tanks); or (b) from which treated sewage is discharged onto land or into waters.

86 Bulk material loading or unloading: premises on which clinker, coal, ore, ore concentrate or any other bulk granular material is loaded onto or unloaded from vessels by a closed materials loading system.

Application for works approval

4.226 An application for a works approval is to be made to the CEO and is advertised for public submissions.[263]

4.227 After considering any submissions, the CEO may either refuse or grant the works approval. If granting the works approval, the CEO may impose the conditions that the CEO deems necessary.[264]

4.228 Notice of refusal is to be provided to the applicant but does not appear to be required to be provided to other persons. There does not appear to be any legislative obligation to give contemporaneous public notice of a decision to approve a works approval.

4.229 The CEO is to keep a record of prescribed particulars in respect of works approvals and is to publish them "*from time to time*" in the prescribed manner.[265] However, no manner appears to have been prescribed in respect of the particulars to be kept or the manner of publication.

4.230 The Committee asked DEC to identify the regulation prescribing the publication of particulars in respect of a works approval. DEC responded by referring to regulation 5CAA of the *Environmental Protection Regulations 1987*.[266] That regulation, however, only prescribes the manner for advertisement of an application for a works approval and does not deal with its grant or refusal.

4.231 It appears that as a matter of administrative practice, DEC publishes the CEO's decision on a works approval in the public notices section of the Monday edition of *The West Australian*.[267]

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263 Section 54 of the *Environmental Protection Act 1986* and regulation 5CAA of the *Environmental Protection Regulations 1987*.

264 Sections 54(3) and 62 of the *Environmental Protection Act 1986*.

265 Section 63A of the *Environmental Protection Act 1986*.

266 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p11.

267 Ibid, p11.

Appeal against refusal, grant and conditions imposed on grant

4.232 An applicant may appeal to the Minister against refusal to grant a works approval or any condition imposed by the CEO.[268]

4.233 Currently, section 102(3)(a) of the EP Act provides a right for any other person to appeal to the Minister for Environment against refusal of a works approval. There is no right of appeal against grant of a works approval but a third party may appeal in respect of any condition imposed.

4.234 There is provision in the EP Act for transfer of a works approval. The person seeking the transfer may appeal to the Minister against a refusal and in respect of any conditions imposed by the CEO on grant of a transfer.[269]

Amendment, revocation and suspension

4.235 The CEO may amend a works approval[270] or revoke or suspend it.

4.236 While the CEO must provide the holder of a works approval with an opportunity to be heard in respect of the amendment, revocation or suspension of a permit,[271] there does not appear to be any public notification of the CEO's consideration or opportunity for any other person to make submissions or be heard.

Appeal against amendment, revocation or suspension

4.237 The holder of a works approval may appeal to the Minister against its amendment, revocation or suspension.[272]

4.238 Currently section 102(3) of the EP Act provides any other person may also appeal to the Minister in respect of the amendment, revocation or suspension of a works approval.

4.239 Clause 10 of the Bill proposes deletion of the third party appeal rights in respect of the refusal of a works approval and the revocation or suspension of a works approval. This clause of the Bill is considered in Chapter 9.

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268 Section 102(1) of the *Environmental Protection Act 1986*.

269 Sections 64, 102(1)(b) and (c) of the *Environmental Protection Act 1986*.

270 Section 59 of the *Environmental Protection Act 1986*.

271 Section 59B of the *Environmental Protection Act 1986*.

272 Section 101(2) of the *Environmental Protection Act 1986*.

Licence

Requirement for licence

4.240 An occupier of any prescribed premises who causes or increases (or permits to be caused or increased) an emission, or who alters the nature of the waste, odour, noise or electromagnetic radiation emitted from those premises without a licence, commits an offence (unless that event occurs pursuant to a works approval).[273]

Application and appeals in respect of licences

4.241 An application for a licence is to be made to the CEO and advertised for public submission.[274]

4.242 The conditions which may be imposed on a grant of a licence and circumstances pertaining to amendment, revocation, suspension and appeal are the same as those pertaining to a works approval.[275]

4.243 Clause 10 of the Bill also proposes deletion of the third party appeal rights in respect of the refusal of a licence and the revocation or suspension of a licence. This clause of the Bill is considered in Chapter 9.

Submission of the Chamber of Minerals & Energy

4.244 As noted above, the CME submission was that section 100(1)(a) of the EP Act should be amended to delete appeals against the EPA's decision not to assess:

> *where other assessment processes may also be considered adequate by the EPA to deal with the proposal … For example, assessments relating to … environmental licence and works approval processes.*[276]

Recommendation 5: The Committee recommends that the Minister for Environment provide the Legislative Council with an explanation as to why deletion of the right to appeal against the EPA's decision not to assess a proposal does not include the circumstance where the EPA makes a recommendation that the proposal be dealt with under Part 5, Division 3 (*Prescribed premises, works approvals and licences*) of the EP Act.

273 Section 56 of the *Environmental Protection Act 1986*.

274 Section 57 of the *Environmental Protection Act 1986* and regulation 5J of the *Environmental Protection Regulations 1987*.

275 Part V, Division 3 of the *Environmental Protection Act 1986.*

276 Submission No 11 from The Chamber of Minerals and Energy Western Australia, 11 January 2010, p1.

Provisions relating to Clauses 13 to 16 - Minor or Preliminary Works

4.245 Sections 54(4) and 57(4) of the EP Act restrain the CEO from making a decision on an application for a works approval or licence that is related to a proposal that has been referred to the EPA for assessment while a decision-making authority is precluded from making a decision by section 41 of the EP Act.

4.246 Clauses 15 and 16 of the Bill propose amendments to sections 54 and 57 to allow the CEO to make a decision on an application which is for the purpose of performing minor or preliminary works to which the EPA has consented under section 41A of the EP Act.

4.247 These provisions are considered in Chapter 9.

APPEAL PROCESS AND TIME TAKEN TO RESOLVE APPEALS

Appeal process

4.248 Sections 100, 101A and 102 of the EP Act, which confer appeal rights in respect of decisions made pursuant to Parts IV and V of the EP Act, have been reported above in the context of the relevant decision. The remedies available on appeal against the EPA's decision as to the level of assessment of a proposal and instructions as to the scope of the environmental review of a scheme are set out in Chapter 4, 4.105 to 4.113. The remedies available on appeal against the declaration of a proposal as a derived proposal are remittal to the EPA for a fresh decision[277] or for assessment, further assessment or re-assessment with or without section 43 instructions.[278]

4.249 The EP Act establishes the statutory Office of the Appeals Convenor. The Appeals Convener, appointed by the Governor, has a statutory role under the EP Act and is independent of the DEC and OEPA.[279]

4.250 The Minister has power to appoint an appeals committee to report on an appeal.[280] The Appeals Convenor, however, has all the powers and functions of an appeals committee[281] and generally handles the appeals under the EP Act against decisions made under Part IV and Part V.

4.251 When an appeal is lodged, the Appeals Convenor:

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277 Section 101(1)(dc) of the *Environmental Protection Act 1986.*

278 Section 101(1)(c) of the *Environmental Protection Act 1986.*

279 Section 107 of the *Environmental Protection Act 1986*.

280 Section 106(2) of the *Environmental Protection Act 1986*.

281 Section 107B of the *Environmental Protection Act 1986*.

- is to request the EPA or CEO (as relevant) to report to the Minister on the appeal; and

- may consult with the appellant or other persons to determine whether the appeal can be resolved.[282]

4.252 The Appeals Convenor or appeals committee is to conduct its inquiry:

> *according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms; shall not be bound by any rules of evidence; and may conduct its inquiries in what manner it considers appropriate.*[283]

4.253 The Office of the Appeals Convenor's description of the appeal process, after a question as to whether there was a target time for completing appeals was:

> *We have not started that process, but our rule of thumb is that when an appeal comes in, the first thing we do is send it to the EPA for comments, and often to the proponent for comments. What we normally say is once we get the EPA's advice, because that normally takes the longest to come back, within 30 days of receiving the advice, we will try to have that report to the minister. For 80 per cent of the time, that is done within 30 days. After that it sits with the minister and there is another period. When we get the EPA's response, which means that we have all the information we need to determine the appeal, we get the report back to the minister within 30 days.*[284]

4.254 The Jones Report complained:

> *The appeals convenor does not conduct an open hearing with all parties present so that they can each hear the others' views and test those views. Instead, the appeals convenor or his representative, meets with the parties individually and then informs the other party that he will convey the content of that meeting to them,*[285]

and recommended transferral of appeals to the State Administrative Tribunal (**SAT**) (See Chapter 5, paragraph 5.6).

4.255 The CCWA, however, drew attention to the level of analysis required:

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282 Section 106(1) of the *Environmental Protection Act 1986.*

283 Section 109(1)(b) of the *Environmental Protection Act 1986.*

284 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p11.

285 Industry Working Group, *Review of the Approval Processes in Western Australia,* April 2009 , p55.

> *in relation to less transparency and accountability, at the present time with every matter we raise as a point of appeal, the Appeals Convener is required to go away and compile some evidence and a response in relation to that, and go through that in great detail. That gets provided to the minister and the minister provides that back to appellants. There is a great level of detail and rigour in the involvement of the minister in that decision-making process.*[286]

4.256 The ESAG Appeal Report stated that, including the statutory 14 day appeal period, and 21 days for the EPA to produce its report, the usual time taken to produce the appeals report for the Minister was nine weeks.[287]

4.257 Chapter 5, paragraphs 5.8 to 5.38 set out the evidence as to median time taken to resolve appeals and reasons for delay. The Office of the Appeals Convenor advised that proponent delay could be significantly more than 50% of the time taken to resolve an appeal.[288]

4.258 The Appeals Convenor is to report to the Minister for Environment on findings and recommendations.[289] The Minister for Environment is required by section 109(3) of the EP Act to have regard to the findings and recommendations of the Appeals Convenor or committee in determining an appeal.

4.259 Section 110 of the EP Act requires the Minister for Environment to cause "*details*" of appeal decisions to be published.

EP Act provides for merits review

4.260 Sections 100, 101A and 102 of the EP Act provide for merits review of decisions made under Part IV and Part V of the EP Act ("*merits review*" is explained at Chapter 7).

4.261 Other than the decision of the Minister for Environment in respect of the resolution of the (merits reviews), the common law right to judicial review of administrative decisions is not ousted by the EP Act.

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286 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence,* 15 February 2010, p5.

287 Environmental Stakeholder Advisory Group, *The Appeals Process*, 21 September 2009, pp3-4.

288 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p11.

289 Section 109 of the *Environmental Protection Act 1986.*

PROPOSED ADMINISTRATIVE CHANGES

Introduction

4.262 This section outlines the proposed administrative changes and makes findings in respect of some preliminary issues.

4.263 Introduction of the proposed administrative changes requires negotiation of a replacement bilateral agreement. This is discussed in Chapter 3, where the Committee also finds that aspects of the proposed changes are not consistent with the uniform regime.

Details of proposed administrative procedures not available at hearing

4.264 As reported in Chapter 2, paragraphs 2.18ff, the Committee required a copy of the proposed administrative procedures, which was provided on 15 February 2010 as a draft. Final draft administrative procedures were published on the OEPA website on 29 March 2010 (**Draft Administrative Procedures**), after the Committee's request on 26 March 2010 for an update on progress as to their finalisation.[290]

4.265 As seen below and in Chapter 5, there are some differences between the OEPA evidence at hearing as to what would occur under the proposed administrative procedures and the terms of the Draft Administrative Procedures.

Summary of changes

4.266 In summary, the proposed changes to the EPA's procedures relevant to the Bill are that:

- notice of referral of a proposal will be published, following which there will be a **seven day period for the public to comment** on the proposal. The Draft Administrative Procedures state:

  The EPA will provide a 7-day public comment period on each preferred proposal, before it proceeds to make a decision on whether or not to assess the proposal, and if so the level of assessment;[291]

  This seven day period is half the 14 day period allowed for lodging an appeal. (The evidence of the CCWA and Office of the Appeals as to dialogue between

[290] Letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p1.

[291] 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p5.

an appellant and that Office suggests a further opportunity to present information which is not reflected in the Draft Administrative Procedures.)

- the number of administrative levels of assessment of a proposal will be reduced from five to two - one level involving a public review and one not involving a public review;[292] and

- the EPA will undertake the scoping of an environmental impact assessment for all proposals that are to be subject to a non-public review assessment and for the less complex proposals that are to be subject to public review.[293]

Purpose of the proposed administrative changes

4.267 The evidence of the OEPA was that poor quality proponent documentation, and proponent delay for reasons unrelated to the assessment process, particularly at the scoping stage of assessment (which occurs after the level of assessment has been set), was the major cause of delay in the environmental impact assessment process[294] (see paragraphs 4.76 to 4.80)

4.268 The Committee notes that the EPA Report made the following relevant findings:

- *50% of proposals being formally assessed are considered delayed*

- *12% of proposals are on hold by the proponent*

- *There is a significant workload in the consideration of referrals and in the request for further information prior to setting level of assessment*

- *There are significant delays on up to 30% of proposals at the scoping phase where two or more iterations of the scoping document are required before approval.*

External factors have contributed significantly to delays in progressing assessments, in particular poor quality proponent documentation.[295]

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292 Ibid, pp7-8.

293 Ibid, p23.

294 Mr Colin Murray, Director, Assessment and Compliance Services and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp5-6.

295 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p33.

4.269 The changes in the EPA's administrative procedures reducing the levels of assessment, and moving scoping of proposal assessment for the majority of proposals from proponents to the EPA, is centred around "*helping proponents do their job better*".[296] The OEPA's evidence was that these changes are:

> *around reducing the complexity of those levels of assessment, getting some greater certainty around what the processes are associated with those two levels of assessment, and some changes around the scoping process,*[297]

in the context of confusion amongst the public and proponents as to the distinctions between the current levels of assessment within the public and non-public groupings.[298]

4.270 Publication of notice of referral, and opportunity for public comment, is directed at gauging the level of public interest in a proposal:

> *At officer level we might assume that there is not a level of public interest around a proposal, and there is*

and identifying issues that the OEPA is not aware of:

> *That happens from time to time as well, that for some reasons our systems, our GIS systems, our corporate knowledge, whatever, are not aware of a particular issue but there is an opportunity for that to come that way,*[299]

before the EPA makes a decision on whether to assess and the level of assessment.

4.271 At present, due to lack of knowledge of a referral, the first opportunity for public expression to the EPA of interest in, and comment on, the issues raised by a proposal is on an appeal against the recorded decisions of the EPA.

4.272 It has been noted that the appeal against the level of assessment is also viewed by the public as an opportunity to provide input into the scoping of the assessment of a proposal and that the Office of the Appeals Convenor advised the Committee that:

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296 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p6.

297 Ibid, p5.

298 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p8.

299 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p10.

> *I guess what we see in those early appeal points is that it is primarily to do with the scoping of the project, so that the proponent knows what the key issues are, the community knows what the key issues are and the EPA sets its guidelines for assessment around those key issues. As I have said before, the sooner that is done, the better; I believe in the process.* [300]

4.273 At the hearing before the Committee, the officers of the OEPA advised of the persons who would be consulted at the scoping phase (which, it has previously been noted, currently occurs after the decision as to level of assessment has been made), being: internal specialists and other government agencies and departments, including specialists in the DEC.

4.274 The Committee has found that the right of appeal conferred by section 100(1)(b) of the EP Act against the EPA's decision as to level of assessment of a proposal is used to comment on the scoping of that assessment (see Finding 8). The evidence was that this right of appeal may achieve an extended public review period (see paragraph 4.67 - 4.69). Whilst there is provision in the Draft Administrative Procedures for extension of the public review period in respect of an assessment in the following limited circumstances:

- the review period coincides with a public holiday/s;
- the proponent requests an extension;
- receipt of public comment is delayed for reasons beyond the submitter's control;
- the proponent has failed to make the ESD/PER document "*reasonably*" available; or
- the EPA considers it "*necessary*",[301]

inadequate time for third party consideration and response to the issues arising in a proposal is not specified as a basis for extension of the public review period.

4.275 When it was put to the OEPA that by taking scoping decisions out of the early public review domain (that is, by way of appeal against the decision as to level of assessment), the ability of members of the public to have input into the scoping

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300 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p15.

301 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p27.

document was removed, the OEPA's response was that the publication of notification of referral allowed the public to draw issues to the attention of the EPA.[302]

4.276 The Office of the Appeals Convenor said:

> *Rather than waiting for it to come further down in the appeals process, if it is done early **and done comprehensively**, I think it makes good sense.*[303]
>
> (Committee's emphasis)

4.277 However, it is clear that not all information necessary for the EPA to make a decision as to the appropriate level of assessment and the scope of the environmental impact assessment may be available at the time public comment is to be made. It is, therefore, questionable that public participation and input can be "*comprehensive*" under the process outlined in the Draft Administrative Procedures.

4.278 As a declaration that a proposal is a derived proposal is made in respect of a proposal referred pursuant to section 38 of the EP Act, at hearing the OEPA ws of the view that the opportunity for public comment on referral will also allow the public to address the question of whether or not a proposal should be declared a derived proposal.[304]

4.279 The CCWA and other stakeholders were supportive of the intent to provide for early public comment:

> *The principle of giving the community increased involvement earlier on in the process is a good one and is one that is supported by the conservation sector, and I think will lead to less appeals at the end of the process where the minister is then faced with making tough decisions on issues.*[305]

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302 "*Under the new administrative procedures the intention is to provide the opportunity for the public to provide comment to the Environmental Protection Authority before the decision on level of assessment is made. That will inform the EPA about the issues that are of interest to the public but also an opportunity for the public to inform the EPA about whether it should be assessed or not and whether there should be a public process and if there is a public process, how long that public review process should be*".? Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p8.

303 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p15.

304 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p24. The Draft Administrative Procedures propose a seven period for public comment on the request that a proposal referred under section 38 be declared a derived proposal. ('Final Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p9.)

305 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p9.

4.280 The CCWA is also supportive of the reduction in levels of assessment which, it agrees, will make the process more efficient.[306]

4.281 However, concerns were raised by the CCWA as to whether the proposed administrative changes would result in less opportunity for comment, and less transparency, accountability and scrutiny of EPA decision-making in the context of the amendments proposed by the Bill.[307]

Relationship between administrative changes and the Bill

4.282 The Second Reading Speech states that the EPA is revising its administrative procedures and that:

> *Implementation of these reforms will ensure that opportunities for public participation are enhanced within the framework of a streamlined and efficient process.*
>
> *… The bill deletes section 100(1)(b) to preclude appeals on the level of assessment when the Environmental Protection Authority has decided to assess a proposal. The Environmental Protection Authority is reducing the number of assessment levels from five to two. It is also my expectation that the EPA will provide for the publication of referral information and the opportunity for comment on the level of assessment in its revised administrative procedures, as well as providing the outcome of its decision to ensure that transparency and accountability are retained.*[308]

4.283 The Executive's position is that proposed administrative procedures provide opportunity for early public comment which renders some of the appeals that the Bill deletes unnecessary:

> *Firstly, that is the point that is referred to in the second reading speech, and we have talked about in the answers here — this intention to introduce a new procedure in the EPA's process of publishing a notification when a referral has been received. We do not do that at the moment.*

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306 "*I think that the conservation sector has generally supported the process to reduce the number of levels of assessments because we believe that that is more efficient. Part of that process is to have management plans included in all assessed environmental assessment documents, which in the past has been moved off to subsidiary approvals, which is one of the things that has been slowing down the process quite significantly*". (Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, pp7-8.)

307 See, for example, paragraphs 4.332 to 4.337.

308 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, pp9406-07.

> *The public do not know when a referral has been submitted with the EPA. They only know about it once the chairman has made his determination. We are looking at introducing a step where there is a notification that is made public. We are opening up that part of the process to try to get that early identification of interest and issues.*
>
> …
>
> *So the framework that has been established by removing this appeal point* [against the EPA decision on level of assessment] *has been then shifting* [sic] *to earlier in the process the opportunity to identify any of the issues that the EPA might otherwise have missed.*[309]

4.284 While given in the context of discussion of the proposed deletion of the right of appeal against the EPA's decision as to level of assessment, this explanation also describes the practical effect of the Bill in deleting the other appeals against EPA decisions in the context of the proposed administrative changes.

4.285 That is, the framework for public participation in EPA decision-making prior to the EPA report and recommendations has been changed from legislative right to require a **review of the decision that has been made** by the EPA to an administrative opportunity to make **comment to the EPA prior to the decision being made.**

Finding 16: The Committee finds that the practical effect of clauses 5(1)(a), (b) and (d) of the Bill will be, in the event the proposed administrative changes are implemented in their current terms, to move the governing framework for public participation in the following decisions from legislative provision of a right to require a review of the decision that has been made by the EPA to an administrative opportunity to make comment to the EPA on the decision that it will make. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (clause 5(1)(d) of the Bill).**

309 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp 10 and 17.

Proposed period for public comment is seven days

4.286 The OEPA did not, at the hearing or in its written responses to the Committee's questions, identify the period for public comment. CCWA advised that it was not aware of the detail of the proposed administrative procedures, just that it was proposed there be an increased opportunity for public comment earlier in the assessment process.

4.287 The Draft Administrative Procedures provided to the Committee propose:

> *The EPA will provide a 7-day public comment period on each referred proposal, before it proceeds to make a decision on whether or not to assess the proposal, and if so the level of assessment.*[310]

4.288 The Hawke Review regarded concerns as to the limited time available under the EPBC Act for making public comment as justified. It recommended that the EPBC Act be amended to ensure that no public consultation process can be less than 11 business days.[311] The reasoning was:

> *The need for adequate time for preparation of public input is acknowledged, but the difficulty is balancing this with the need for efficient and timely decision-making under the Act. The public's ability to input effectively into processes under the Act should be enhanced by adoption of the recommendations about publication of documents outlined above* [see paragraphs below], *and the recommendation about enhanced information delivery below.*
>
> *Some smaller changes are also proposed to improve the community's opportunity to provide considered input into processes under the Act. The first is that where the minimum required consultation period is currently ten business days under the Act, this should be increased to 11 business days. This would ensure that the consultation period would always stretch over a minimum of two weekends, allowing time-limited volunteer submitters greater opportunity to draft submissions.*[312]

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310 'Final Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p5.

311 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999,* October 2009, Recommendation No. 45, p244.

312 Ibid, p243.

4.289 Under the rights of appeal conferred by section 100(1) of the EP Act, a person has 14 days to decide whether or not to lodge an appeal.[313] There may also be a further period of time allowed in the course of the appeal process to gather and provide information supporting the appeal.

Comment prior to decision does not equate to review of decision - Chapter 6

4.290 That an administrative opportunity for the public to make comment to a decision-maker **prior** to a decision being made is not an equivalent process to a statutory right to require a third party **review** of the decision made is discussed in Chapter 6, dealing with the question of whether the Bill has the practical effect that rights, freedoms and obligations are dependent on administrative power only if sufficiently defined and subject to appropriate review (FLP 1).

4.291 Whether the practical effect of the enactment of clause 5(1) of the Bill has potential, considering the Draft Administrative Procedures, to result in less meaningful or comprehensive public participation in the environmental impact assessment of a proposal is considered in Chapter 6.

New levels of assessment

4.292 The EPA Report states that there are currently five levels of assessment of a proposal for which Administrative Procedures have been gazetted.[314] These have been set out in paragraph 4.49. Consistent with the recommendations of the EPA Report, the Draft Administrative Procedures provide for two levels of assessment:

- assessment on proponent information (**API**) - which will not involve public review; and
- public environmental review (also called PER) - which will involve public review.[315]

4.293 The new Public Environmental Review level will incorporate both the process of the previous PER and ERMP, rather than the latter being deleted.[316]

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313 Section 100(3a) of the *Environmental Protection Act 1986*.

314 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p23.

315 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, pp7-8.

316 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p4.

4.294 The Draft Administrative Procedures provide that in addition to proposals deemed to be unlikely to be environmentally acceptable, proposals meeting the following criteria will not be subject to public review:

> *a) The proposal raises no more than three significant environmental factors that could be readily managed, and for which there is an established condition-setting framework;*
>
> *b) the proposal is consistent with established environmental guidelines, standards and policy frameworks; and*
>
> *c) there is limited or local interest in the proposal.*[317]

4.295 The assessment procedure at API level requires the proponent to advise the EPA of "*details of stakeholder consultation … Proponents should ensure that people are informed about their proposal and its impacts, and there are opportunities for public participation*". The EPA, therefore, relies on the proponent to identify issues raised by the public and any response.[318]

API criteria problematic

4.296 The Committee was surprised to see that a proposal that raises "*three significant issues*" and "*local interest*" will be assessed at API level. That is, without public review.

4.297 In the Committee's opinion, it is questionable whether this was the intent of the Parliament in passing the EP Act and, therefore, whether this provision of the Draft Administrative Procedures is consistent with the EP Act.

4.298 This part of the Draft Administrative Procedures highlights the problematic nature of moving the regulatory framework for early public participation to the administrative realm, while watering down the legislative framework by deleting important appeals from the EP Act.

4.299 It also highlights the problematic nature of administrative procedures as opposed to detailing the procedures in the Act or requiring the procedures to be detailed in regulations.

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317 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p8.

318 Ibid, p19.

Hawke Review

4.300 The Committee was advised by the OEPA that the Hawke Review has also recommended that the Commonwealth reduce its two levels of public assessment to one level.[319]

4.301 As noted in Chapter 3 above, the Hawke Review also made recommendations in respect of environmental impact assessment procedures (which it recommended be provided in legislation) that go further than the Draft Administrative Procedures in providing public opportunity for comment and information in respect of the decisions made. Chapter 5 reports the Hawke Review recommendation that the Australian government consider amending the EPBC Act "*so that the controlled action and/or assessment approach decisions are open to merits review*".[320]

SEA level of assessment

4.302 The ambiguity in the EPA treatment of the SEA level of assessment was reported on in paragraphs 4.150 - 4.160, where the Committee raised the question of whether this treatment was consistent with the EP Act and recommended that clarification be sought from the Minister for Environment.

Ambiguity in the information that will be made publicly available

Information that will be available for public comment

4.303 The Draft Administrative Procedures provide that the EPA will publish "*information on each proposal that it accepts as a referral on its website*" and that the referral should not contain confidential information as the "*referral information*" will be published.[321] The timing of this publication is not identified.

4.304 "*Referral information*" is not defined but appears from its context to be the information contained in the referral form relating to a proposal.

4.305 As the Draft Administrative Procedures state:

> *The referral form represents the minimum information required. However, as the scale, location and significance of potential environmental impacts varies for each proposal, the EPA may require*

319 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p8.

320 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999,* October 2009, Recommendation 49, p259.

321 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p5

> *further information to that submitted in the referral form, including a more detailed description of the proposal, environmental setting, potential environmental impacts, and mitigation proposed to address adverse impacts.*[322]

4.306 The EPA Report found that there was a significant workload in obtaining additional information on a proposal prior to setting the level of assessment. One reason given for this was poor proponent documentation. This was supported by the evidence of the OEPA. This raises a question as to whether the information made public at the time for public comment will be sufficient for third party comment to be "*comprehensive*". (See paragraph 4.277)

4.307 There is no provision for the additional or amended information gathered by the EPA after referral of a proposal to be made available during the seven day period for public comment or for extension of the period for public comment pending receipt of additional information.

4.308 This may not be necessary if the notice of referral is not published until the further information has been provided. As reported above, due to the Committee not having information as to the detail of the Draft Administrative Procedures until 30 March 2010, it was not able to canvass this with the OEPA.

4.309 However, the tenor of the Draft Administrative Procedures is that the notice will be published on acceptance of a referral, rather than on completion of its investigations into the preliminary matters necessary to establish whether the EPA should assess the proposal and, if so, the level of that assessment. The evidence of the OEPA that provision for public consultation would not impact on the EPA's ability to reach a decision on level of assessment within the statutory 28 day time period also suggests that it is only the referral information that will be made public prior to the period for making a comment elapsing.

4.310 The practical effect of the timing and period for public comment set out in the Draft Administrative Procedures appears to be that:

- not all of the information necessary for a proper consideration of a proposal, and available on an appeal, will be available to the public;
- there is a more limited time for stakeholders to: determine whether referral information in respect of a proposal addresses, or adequately addresses, all environmental impact issues; and gather, and present, information to the EPA in respect of those issues, than is available on appeal.

322 Ibid.

Information may become available later in the assessment process for proposals subject to public review

4.311 Under the heading "*Proponent information 1. Adequate information*", the Draft Administrative Procedures state:

> *The EPA requires that proponents make their documents, including referral information, environmental review documents, ESDs, PER documents and response to submissions (subject to matters that are confidential) publicly available during the EIA process, until the Minister issues a final decision on the proposal. The EPA may make information used in the assessment of a proposal (subject to matters that are confidential) publicly available.*[323]

4.312 It is not clear how this statement relates to the balance of the Draft Administrative Procedures, which require publication of more limited information in more limited circumstances. Nor is it clear what opportunity the public will have to comment on these documents prior to an appeal at the EPA report and recommendations.

4.313 With proposals that are to be subject to PER, either the EPA or the proponent (for more complex proposals) is to publish the environmental scoping document (ESD). This document will identify the:

- key, and other, environmental factors relevant to the proposal;
- impact predictions for the proposal;
- the information on the environmental setting necessary to carry out the assessment; and
- stakeholder consultation requirements.[324]

4.314 The ESD is only subject to separate public review in limited circumstances. In respect of ESD's prepared by the proponent, the Draft Administrative Procedures state:

> *The EPA will advise the proponent whether the ESD will be subject to a public review period at the time of publishing the level of assessment,*

and that those prepared by the EPA will not be made public until the PER document is released.[325]

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323 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p16

324 Ibid, p23.

4.315 It is anticipated that the OEPA will work with the EPA to perform the scoping work for proposals that are subject to non-public assessment and the less complex proposals subject to public review.[326] However, it is not clear to the Committee what constitutes a "*less complex*" proposal and what test will be applied to ensure consistency in making this determination.

4.316 The OEPA advised that the circumstances in which the EPA will do the scoping will be "*clearly stepped out*" in administrative procedures.[327] This is not the case.

Information in respect of decisions

4.317 The OEPA advised that information as to who was consulted, the nature of any comments and OEPA recommendations in respect of those comments will form part of the EPA's statement in respect of the decision on whether or not to assess, which statement was (by the proposed administrative procedures) to be made public.[328]

4.318 The Draft Administrative Procedures, however, require only limited information to be made available and in respect of some EPA decisions only.

4.319 The Draft Administrative Procedures state:

> *Where the EPA decides that a proposal will not be assessed, it will be recorded as part of that decision, one of the descriptors outlined below:*
>
> *Decision not to assess*
>
> …
>
> *b) Not Assessed - public advice given*
>
> *The EPA will provide advice to the DMA and proponent on the environmental aspects of the proposal. This advice is not legally binding on the DMA or proponent. The EPA's advice will be made available to the public, and will be forwarded on request.*
>
> *c) Not Assessed - managed under Part V.*

325 Ibid.

326 Ibid, p23.

327 "*Firstly, on the circumstances where the EPA does the scoping versus the proponent doing the scoping, that is going to be clearly stepped down in the administrative procedures as well*." Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p8.

328 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p19.

> *The EPA considers that the proposal could be managed under Part V of the Act. This includes provisions for clearing of native vegetation and licensing of prescribed premises.*
>
> *d) Not Assessed - public advice given and managed under Part V.*
>
> *The EPA provides advice to the DMA and proponent (see b above), and considers that the proposal could be managed under Part V of the Act (see c above).*
>
> …
>
> *Decision to assess*
>
> *Where the EPA decides to assess a proposal, it will determine which of the following two levels of assessment apply:*
>
> …
>
> *The levels of assessment are outlined in section 8 of these Administrative Procedures. The EPA will begin the assessment as soon as possible, after the notices on the level of assessment have been given.*[329]

4.320 There is a statement in the Draft Administrative Procedures that the EPA will publish the length of public review on the decision to assess at PER, but no requirement for the detail asserted by the OEPA.[330]

4.321 There is also a statement in the Draft Administrative Procedures that the EPA will publish the reasons for declaration of a derived proposal on its website.[331]

4.322 The Draft Administrative Procedures do not require the EPA to publish reasons for its decisions:

- not to assess a proposal with a recommendation that it be dealt with under Part V, Division 2 of the EP Act;
- to assess a proposal at API, PER or SEA level;

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329 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, pp6-7.

330 Ibid, p21.

331 Ibid, p10.

- the length of any public review; or
- as to the issues and extent of the scope of the environmental impact assessment.

4.323 The Committee is of the opinion that the OEPA evidence correctly describes the standard of transparency required, and that expected by the community. The Draft Administrative Procedures are deficient in this respect.

Scope and content of environmental review of a scheme

4.324 The Draft Administrative Procedures state, in respect of schemes:

> *The intent of the 1996 amendments to the Environmental Protection Act 1986 and the planning legislation was to ensure environmental factors are considered early in the planning process, as part of the scheme formulation or rezoning process. …*
>
> *The EPA will develop detailed procedures for the assessment of schemes in consultation with the relevant planning authorities.*[332]

Final administrative procedures not certain

4.325 The proposed administrative procedures, and internal EPA guidelines in respect of them, are currently in draft. They were published on the OEPA website on 29 March 2010.[333]

Whether proposed administrative procedures consistent with uniform regime

4.326 While the proposed administrative procedures were expected to be finalised in March 2010, this has not proved possible. The OEPA advised that the outstanding issue is negotiation of a replacement bilateral agreement with the Commonwealth to reflect the proposed new levels of assessment. As a result, the OEPA was unable to advise when the new procedures would come into effect.[334]

Whether there has been consultation on detail of proposed administrative procedures

4.327 The OEPA advised that the new administrative procedures arose from the recommendations of the EPA Report and that:

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332 'Final Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p13.

333 Ibid, p1.

334 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, pp6 and 11 and letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p1.

> *That review was undertaken with a stakeholder reference group, it had all the peak bodies represented on it, and 100 per cent endorsement and support for the reforms that were identified. These administrative procedures then pick up a lot of those reforms. We now have a stakeholder reference group. The EPA has set up an ongoing group that those draft guidelines have been to and comments sought. That has been the primary consultation process that we have undertaken with them.*[335]

4.328 The OEPA's view is that:

> *this process has been incredibly transparent and consultative.*[336]

4.329 The CCWA (which is a member of the stakeholder reference group), however, had a different perspective. When asked whether it had been consulted on the proposed changes to administrative procedures, it advised:

> *Not in specific detail … We have been told that those procedures are being developed,*[337]

and when asked to comment on the OEPA view that comment before the decision as to the level of assessment replaced the relevant appeal, said:

> *First of all, at the moment it is hard to comment because the administrative process does not exist and we have not seen it.*[338]

4.330 The Committee has found itself in a similar position.

4.331 The Committee notes that there is a difference between consultation on general direction for proposed reform and consultation on the measures taken to achieve reform - in this case, the Draft Administrative Procedures.

4.332 The CCWA expressed concerns as to whether there would be sufficient time available under the proposed changes to consider the issues that might arise in a proposal:

> *Our biggest concern about the loss of appeal right against the level of assessment is not the question of in-house assessment versus external assessment; it is about the time respondents have to deal with a*

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335 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p12. See also p 13.

336 Ibid, p13.

337 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence,* 15 February 2010, p5.

338 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence,* 15 February 2010, p7.

> *particular proposal. You can imagine the practicalities from our side of things. We see an environmental assessment document that a proponent may have taken months or years to put together. We then have a period of weeks, perhaps, in which to get across that document and to check it, try to get independent advice sometimes on contentious things about whether the material presented is likely to be accurate, and sometimes we even have to do surveys and studies of our own. Those things take a considerable amount of time. If we are unable, as is often the case, to get the amount of time increased for us to deal with it, the likely consequence of that is that the information will never see the light of day in the assessment process. It may first appear only during the appeals process.*[339]

4.333 Dr Dunlop pointed out:

> *if we have administrative procedures that require consultation on just about everything in terms of upfront consultation, we might not have the resources or the people to actually meet our obligations in that process; whereas at least with the appeals process it tends to be limited to those things which are raising significant concerns rather than having to deal with absolutely everything, which, quite frankly, we cannot do … It all sounds great in principle but whether we can service those demands ourselves in practice is a matter of ongoing concern.*[340]

4.334 The CCWA also expressed concerns about transparency and accountability:

> *One is that we are talking about all the stakeholders here, and we are likely to not get agreement between different stakeholders. There is no transparency here, so how it is going to deal with the different points of view is something that is not clear to us at all. The proponent is in this mix. The proponent is likely to have a very different view about what the content of an environmental assessment should be than some public interest groups may have.*
>
> *How that conflict resolution process can occur in an environment which is not going to be transparent is a matter of concern.*[341]

4.335 The OEPA response to the issue of transparency was that information as to who was consulted, the nature of any comments and OEPA recommendations in respect of

339 Ibid, p8.

340 Ibid, p9.

341 Ibid, p12.

those comments will form part of the EPA's statement in respect of the decision on whether or not to assess, which statement was (by the proposed administrative procedures) to be made public.[342]

4.336 The Draft Administrative Procedures, however, require only limited information to be made available and in respect of some EPA decisions only.

4.337 These matters are canvassed further in Chapter 6. Here it is simply noted that the OEPA has not invited public comment on the Draft Administrative Procedures.

Negotiation of bilateral agreement may require changes to Draft Administrative Procedures

4.338 The OEPA's evidence is that finalisation of the administrative procedures requires negotiation of a replacement bilateral agreement.[343] The Committee has observed in Chapter 2 that aspects of the proposed administrative changes do not meet the requirements of accreditation under the Commonwealth legislation and that the Commonwealth process for negotiation of a bilateral agreement requires public consultation on that agreement. Both of these aspects of the uniform regime may require changes to the current Draft Administrative Procedures.

4.339 The Parliament is, therefore, asked to consider enactment of the Bill at a time when the administrative changes said to render some of the appeals deleted by the Bill unnecessary (whether in tandem with other factors or not) have not been put in place and may not be implemented in their current terms.

Finding 17: The Committee finds that the Parliament is asked to consider enactment of the Bill at a time when the administrative changes said to render some of the appeals deleted by the Bill unnecessary (whether in tandem with other factors or not) have not yet been put in place and may not be implemented in their current terms.

342 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p19.

343 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp6 and 11.

Recommendation 6: The Committee recommends that consideration of the Bill be deferred until:

- **a replacement bilateral intergovernmental agreement has been entered into between the State and the Commonwealth; and**
- **the EPA's proposed administrative procedures have been gazetted pursuant to section 122 of the EP Act,**

in order that the Bill can be considered in its final context.

No certainty procedures will be maintained

4.340 The Committee enquired as to the process of altering gazetted administrative procedures. The OEPA advised that the procedures could be altered by the EPA independent of any view of the Minister or the public.[344]

Whether the EPA's proposed administrative procedures will apply to proposals assessed by DMP

4.341 The CCWA raised the question of whether the EPA's administrative procedure requirements in respect of public notification and opportunity for public comment would apply to mining proposals assessed by the DMP.[345]

4.342 As paragraphs 4.210 - 4.211 report, whether and if so the extent to which the DMP conducts environmental impact assessment of mining and petroleum proposals is unclear to the Committee. It has recommended clarification by the Minister for Environment (Recommendation 3).

Recommendation 7: The Committee recommends that the Minister for Environment advise the Legislative Council whether the EPA's proposed administrative procedures made pursuant to section 122 of the EP Act will apply to any mining proposal assessed by the DMP.

344 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp12-13.

345 Mr Piers Verstegen, Director, and Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, pp12-13.

Not necessary to delete appeals to implement proposed administrative changes

4.343 The Committee enquired of the Office of the Appeals Convenor whether any amendment of the EP Act was required to introduce the proposed administrative opportunity for early public comment. The OEPA confirmed that none was required:

> ***The CHAIRMAN****: Is there anything in the legislation as it currently stands that prohibits the EPA from undertaking that consultation now?*
>
> ***Mr Sutton****: Not to my knowledge, no.*
>
> ***The CHAIRMAN****: So we do not actually need any changes to the Environmental Protection Act in order to foster a better cooperative approach early on in the process?*
>
> ***Mr Sutton****: Not that we understand, no.*[346]

4.344 This advice confirmed the evidence of the OEPA that the Bill was "*just a component of*" the reforms of the environmental impact assessment process "*sitting next to*" the administrative reforms.[347]

4.345 Similarly, enactment of the Bill does not appear to the Committee to be necessary to authorise the administrative changes to the number of levels of assessment or entity performing the scoping of an environmental impact assessment.

Finding 18: The Committee finds that enactment of the Bill is not necessary to give effect to the proposed administrative reforms to the EPA's assessment of proposals and schemes.

4.346 The practical effect of clause 5(1) of the Bill is to remove from the EP Act the right of review of critical EPA decisions made prior to the EPA issuing its report and recommendations. Instead, reliance is placed on proposed EPA administrative

346 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p16.

347 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p7.

procedures (which are at this time uncertain) to allow for limited opportunity for public comment prior to those decisions being made. The Committee has concerns at this transfer of public participation from the legislative (Parliamentary) to the administrative (Executive) realm.

CHAPTER 5

PRACTICAL EFFECTS OF THE BILL - GENERAL

WHETHER RELEVANT APPEALS 'DELAY' ASSESSMENT/APPROVAL PROCESS

Generally no legislative restraint on proceeding with proposal, scheme or CEO decision to revoke, suspend or amend pending an appeal

5.1 Section 41 of the EP Act has the effect that a decision-maker is restrained from dealing with a proposal that has been referred to the EPA pending the outcome of an appeal against an EPA decision not to assess. In the event there is an appeal against that decision when a recommendation has been made that a proposal be dealt with under Part V, Division 2, the EP Act has the effect that there will be a 'delay' in the CEO proceeding with the Part V, Division 2 process:

- of 14 days - pending the lodging of an appeal; or
- longer in the event of an appeal.

5.2 The EP Act does not require the environmental impact assessment process to be suspended pending the lodging, or determination, of appeals against EPA decisions as to: level of assessment of a proposal (and, possibly, assessment of a proposal as a strategic proposal); instructions as to the scope and content of a review of a scheme; or declaration of a proposal as a derived proposal. Similarly, there is no restraint on the effect of CEO decisions as to the refusal, revocation or suspension of clearing permits, works approvals or licences pending an appeal.

5.3 The Committee was provided with no evidence, by way of submission or from the government departments at hearing, that the appeal provisions (other than in respect of the decision not to assess where there was a recommendation that a proposal be dealt with under Part V, Division 2) had the practical effect of delaying the assessment process.

5.4 Instead, there appears to be an assumption that time taken to resolve an appeal is "*delay*", despite the evidence of the Office of the Appeals Convenor that real issues are raised and the evidence that early resolution of issues leads to less time (and expense) being incurred in resolving issues than is the case when issues are raised later in the assessment process.

Review findings

5.5 The only report to make findings in respect of delay in the assessment/approval process due to appeals was the EPA Report, which identifies appeals on the EPA

report and recommendations as causing delay due to their significant workload.[348] The EPA Report did not identify delay in respect of the appeals the Bill proposes be deleted or amended.[349]

5.6 The Jones Report contained case studies that included lengthy periods of time to resolve appeals. However, it identified no appeal rights as causing unnecessary delay and recommended that appeals be subject to the more formal process of being referred to the SAT. The reason for this recommendation was that the SAT process was seen as being more consistent with procedural fairness: it was not identified as a speedier process.[350]

5.7 The CNV Report considered submissions that there was duplication between Part IV and Part V appeals in respect of the clearing of native vegetation and noted that there had, in the past, been some appeals that it considered frivolous or vexations. However, it noted that there was a process for easily dismissing such appeals. (See Chapter 7, paragraph 7.9.)

Evidence as to 'delay'

Whether proponents have complained about delays in appeal process

5.8 In response to a question as to whether proponents had made complaints at the length of time taken to resolve appeals, the Office of the Appeals Convenor said:

> ***Mr Sutton****: We have not had any formal complaints, that I am aware of, coming through to us.*
>
> ***Mr Clement****: In a general sense, in all appeals cases, proponents would be keen to have them dealt with quickly, but I do not know whether that can be classified as a complaint. It is just the nature of the role that proponents, generally speaking, want to get their proposals through our process as quickly as possible, which is understandable.*
>
> …

348 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009, p33.

349 The OEPA explanation that the EPA Report did not examine the appeal process has been noted earlier in this report but clearly the authors of the EPA Report did give consideration to the causes of delay in the environmental impact assessment process and did not feel constrained in identifying an appeal process as one of the causes.

350 Industry Working Group, *Review of the Approval Processes in Western Australia*, April 2009, p55.

> *I guess we take the word "complaint" to be something quite formal against our office. We do not get that sort of feedback.*[351]

5.9 It is noted that this response does not address informal complaints.

Time taken to resolve appeals

5.10 The DEC and OEPA were not initially in a position to provide the Committee with advice as to numbers of appeals, time taken to resolve appeals or appeals outcomes. At hearing, in response to the Committee expressing surprise at the information not being readily available, the OEPA said:

> *It is more a case of us having got the questions and really, in a practical sense, having started working with them on Thursday. That information, you are quite right, was looked at and explored last year. It was more updating it and giving it to you in a complete form. We just were not able to do that in the time frame.*[352]

5.11 However, the response in the Joint Written Answers of DEC and OEPA was that no information could be provided in respect of the questions relating to appeals as the information was not available to those entities but had to obtained from the Office of the Appeals Convenor.[353]

5.12 When the required information was made available by the Office of the Appeals Convenor, the Committee was advised that many of the statistics had been complied by hand for the purpose of answering the Committee's questions.[354]

5.13 The statistics revealed a considerable range in the time taken to resolve appeals. In Written Answers to the questions for the hearing of 15 February 2010, the Office of the Appeals Convenor advised that time taken to resolve appeals against an EPA decision not to assess a proposal had taken between 9 and 799 days. It provided the following explanation for the latter period:

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351 Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p17.

352 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p2.

353 Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority to the Committee's Questions for Hearing on 8 February 2010 tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010, pp3, 4 and 5.

354 Written Answers of the Office of the Appeals Convenor tabled during the hearing with Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, 15 February 2010, p4 and letter from letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p1.

> *The longest time to resolve this class of appeal was 799 days, in relation to the proposal by Haggarty Nominees Pty Ltd to develop a shell grit and lime sand mining operation at Jurien, within the Beekeepers Nature Reserve. The reason for the delay was due to the proponent preparing updated management plans for the site, which were not submitted for almost approximately 18 months after the appeal was received. By the time the Appeals Convenor finalised his report in August 2008, the State Election had been called and was* (sic) *unable to be determined by the Minister until later in 2008.*[355]

5.14 In respect of appeals against level of assessment, the Written Answers of the Office of Appeals Convenor stated that the time taken to resolve the appeal varied between 12 and 540 days. The 540 day appeal was lodged by a proponent who objected to a PER assessment. The Office of the Appeals Convenor advised in respect of that appeal:

> *The matter was in abeyance for a lengthy period pending additional information from the proponent on the relative values of the vegetation the subject of the application.*[356]

5.15 The Committee questioned the Office of the Appeals Convenor as to the wide range of the averages presented in response to the Committee's questions, the response was:

> *We are looking at medians. Perhaps in some cases that gives us better answers. There are often single or several appeals that last for a considerable period of time waiting for additional information or for a proponent who is not certain that he will proceed. In 2006, for example, there were a couple of proposals to clear native vegetation in the wheatbelt, which were on hold for a significant period of time. That then affects the average. From year to year the median is probably fairly consistent, but the average can vary depending on a couple of cases which might blow it out.*[357]

5.16 Median times for appeals on level of assessment varied between 67 days in 2005 and 131 days in 2008. The Office of Appeals Convenor noted that there was a spike in 2008 figures for time taken to deal with all appeals as a result of the State election.[358] The second highest median time was 102 days in 2006, which was also noted by the

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355 Written Answers of the Office of the Appeals Convenor tabled during the hearing with Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, 15 February 2010, p7.

356 Ibid, p8.

357 Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p13.

358 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p13.

Office of Appeals Convenor to be year distorted by appeals on proposals with particular issues. The next longest median was 95 days in 2007.

5.17 The Committee draws attention to the evidence in paragraphs 5.30 - 5.38 as to delay in an appeal due to inadequate scoping on the part of the proponent.

5.18 There is a suggestion in the evidence that an appeal may be dismissed due to the proponent undertaking a better scoping exercise during the course of an appeal. In this event, it is unlikely that the Minister for Environment would impose a requirement to repeat the exercise undergone in responding to the appeal. In this respect, an appeal may well be regarded by the appellants as successful but not appear in the final column of Table 6.

5.19 The Office of Appeals Convenor does not 'stop the clock' on an appeal process when delay is due to the proponent.[359] It also advised that it did not keep records allowing it to identify whether time taken to resolve an appeal was a consequence of EPA delay, proponent delay or delay in the Minister making a decision.[360]

5.20 The Committee sought advice as to how many appeals against level of assessment were successful but, as was reported in Chapter 3, the difference of opinion between the conservation stakeholder and OEPA and the Office of the Appeals Convenor as to what constituted success rendered the answers provided problematic. The following information was provided:

Table 6

Year	No. appeals on level of assessment	No. of appeals resulting in change in level/allowed with additional scope
2005	14	5
2006	18	1
2007	12	4
2008	7	-
2009	8	5

359 Ibid, p6.

360 Ibid, p11.

5.21 Table 3 above sets out the number of decisions of the EPA not to assess a proposal for the period 2004 to 2009 which were accompanied by a recommendation that a proposal be dealt with under Part V, Division 2. (The clearing of native vegetation provisions were inserted into the EP Act in 2003.) That table also sets out the number of appeals.

5.22 By comparing the number of proposals not assessed - Table 1 - with the number in respect of which a recommendation is made that the proposal be dealt with under Part V, Division 2, it can be seen that there is a trend of an increasing proportion of proposals not assessed by the EPA on the basis that clearing of native vegetation should be dealt with under Part V, Division 2.

Table 7

Year	No proposals not assessed	No not assessed with Part V, Division 2 recommendation	% not assessed with Part V, Division 2 recommendation	No of appeals on decision not to assess
2004	124	9	7%	-
2005	99	18	18%	3
2006	106	25	24%	7
2007	96	27	28%	6
2008	95	33	35%	2
2009	73	32	44%	11

5.23 The Committee has not had the opportunity to explore the reasons for the trend to not assess on the basis of a recommendation that a proposal be dealt with under Part 2, Division 2 or why there was a spike in appeals in 2009.

5.24 Median delays were provided by the Office of the Appeals Convenor in respect of appeals against the decision not to assess. However, these were not differentiated between those appeals generally and appeals against decisions with a recommendation that a proposal be dealt with under Part V, Division 2. The Committee did not, therefore, find the information of particular assistance.

5.25 Of the 27 appeals on the EPA's decision not to assess with a recommendation that a proposal be dealt with under Part V, Division 2 since 2005, only one may have been successful.[361]

5.26 In respect of appeals on the EPA's instructions as to the scope and content of environmental review of a scheme, the evidence was in respect of averages:

> ***Mr Sutton**: Under 1.13 we have got the days there — 101 days in 2001, 285 in 2007, 201 in 2008 and 107 in 2009. In 1.13.1, the shortest period taken was 101 days. The longest, which is the next paragraph down, which is the 427 days as pointed out there, as I mentioned earlier these types of appeals — so it is the planning side of things — once we have finished our report, the minister actually needs agreement with the Minister for Planning before the final ministerial outcome is made available or determined. The election in August 2008 was right in the middle of that. The appeals report was finished in April 2008. We worked through to get agreement with the Minister for Planning and the Minister for Environment and then there was the election. We had to go back through the process of both ministers agreeing again. That took additional time.*
>
> ***The CHAIRMAN**: So that is pretty unusual?*
>
> ***Mr Sutton**: That is pretty unusual, but you might see a spike in most of the 2008 figures. It really was the election more than anything else.*[362]

5.27 The Office of the Appeals Convenor advised that there had been eight appeals against the EPA's instructions as to the scope and content of the environmental review of a scheme, five of which had been successful in increasing the scope of the review.[363]

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361 Written Answers of the Office of the Appeals Convenor tabled during the hearing with Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, 15 February 2010 identify one successful appeal against the decision of the EPA not to assess a proposal (p2). The Office of the Appeal Convenor was asked to identify any successful appeals where there was a recommendation by the EPA that a proposal be dealt with under the clearing of native vegetation provisions of Part V of the EP Act. It is not, however, clear whether this proposal fell into this category as there is no statement in the written answers as to whether this was the case. The evidence of the Office of the Appeals Convneor in respect of this appeal was: *"Our understanding is that it was a proposal that the EPA said could be managed under part V, but it was the only not assessed appeal between 2005 and 2009 that went from not assessed to the appeal being allowed in full."* (Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p5.)

362 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p13.

363 Written Answers of the Office of the Appeals Convenor tabled during the hearing with Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, 15 February 2010, p6.

5.28 The Office of the Appeals Convenor's evidence to the Committee was that for 80% of appeals, its reports were provided to the Minister within 30 days of receipt of the EPA Report.[364] The ESAG Appeal Report stated that, including the statutory 14 day appeal period, and 21 days for the EPA to produce its report, the usual time taken to produce the appeals report for the Minister was nine weeks.[365]

5.29 For appeals against the EPA decision as to level of assessment, there then appears to be a further one to two months for the Minister for Environment to make a decision. It seems that there is a longer period for Ministerial consultation prior to resolution of appeals on instructions as to the scope and content of the environmental review of a scheme.

Delay attributed to the proponent, Ministerial consultation and elections

5.30 Delay in environmental impact assessment arises not only from poor proponent documentation (see Chapter 4, paragraphs 4.76 to 4.78) but also proponent delay in responding to an appeal (see paragraphs 5.13 to 5.15).

5.31 Provision of information can be an area of proponent delay. The Office of the Appeals Convenor also advised that delay can result from a proponent not being certain whether it wishes to proceed with an appeal or the proposal.[366]

5.32 The Office of the Appeals Convenor advised that proponent delay could be significantly more than 50% of the time taken to resolve an appeal.[367]

5.33 The evidence as to State elections, and requirement for Ministerial consultation, causing delay is recited in the quotes above.

5.34 While provision of the EPA report in relation to an appeal may also cause time additional to the usual 30 days for the Office of Appeals Convenor to provide its report to the Minister for Environment, that Office's view was that:

> *We find that the ones that come back from the EPA that take a little longer have normally gone to the State Solicitor's Office for legal advice, or they have added value to it in some way; they have taken another step to almost resolving the appeal. On face value it looks good to set a time frame, but we find that the extra value usually*

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364 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p11.

365 Environmental Stakeholder Advisory Group, *The Appeals Process*, 21 September 2009 , pp3-4.

366 Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p13.

367 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p11.

> *comes when the EPA has taken a step to seek further information itself.*[368]

Delay often attributable to matters that should have been resolved in scoping

5.35 In explaining delay on an appeal in respect of level of assessment, the Office of the Appeals Convenor said:

> *If you like, I can give you a little bit of information about the Dunsborough one as to why it, perhaps, took so long, from early 2009, right through to about August before a decision was made. Because it was deemed a public proposal unlikely to be environmentally acceptable, which is a big decision to make because that is the end of the project, we actually stopped the appeals process on the Armstrong one, gave the proponent the opportunity to address the key issues, and then they came back with information against those. If anything, the scoping had not really been done at the beginning of that proposal.*[369]

5.36 It also said:

> *We particularly see that middle level of appeal, which is either the instructions or level of assessment, as I think I said before. It is primarily about scoping and I can see that in many cases, when we go out on site and have a look at the issues, they are fairly blatant and sometimes one wonders how they have come all the way through the system in a formal appeals process.*[370]

5.37 The evidence provided to the Committee was that at least 50% of the time taken to resolve appeals under Part IV of the EP Act was due to proponent delay:

> ***The CHAIRMAN**: How much time did it take the proponent to come back to you with further advice? You talk about 122 days. On how many of those days was the ball in the proponent's court?*
>
> ***Mr Sutton**: Off the top of my head, it can easily be half of that time, which will give you an idea. It can be really quick and someone may come back straightaway, but they may need to do more work as well.*

368 Ibid.

369 Ibid, p5.

370 Ibid, p17.

…

> ***The CHAIRMAN**: You stated earlier that possibly up to 50 per cent of that time was when the ball was in the proponent's court and you were waiting for further advice from the proponent.*
>
> ***Mr Sutton**: Yes. It can be significantly more than 50 per cent.*[371]

5.38 It is not clear to the Committee how the legislative changes proposed by the Bill or the Draft Administrative Procedures will address this problem.

Finding 19: The Committee finds that, on the evidence made available to it, at least 50% of the time taken to resolve appeals under Part IV of the EP Act is due to proponent delay.

Committee's conclusions

5.39 On the statistics as to success, a question arises as to whether the appeal against the decision not to assess where there is a recommendation that a proposal be dealt with under Part V, Division 2, causes unnecessary delay.

5.40 However, as noted in Chapter 3, the number of appeals, and their lack of success, reflects the different interpretation of the conservationist stakeholders and the DEC, OEPA and the Office of Appeals Convenor as to whether significant proposals raising clearing of native vegetation issues should be assessed by the EPA. On this the ESAG Appeal Report said:

> *Habitat proposals which are not significant enough to be assessed under Part IV of the Act may require a clearing permit.*[372]

5.41 Retention of this right of appeal was seen as important by those making submissions to the Committee.

5.42 The Western Australian Farmers Federation supports the intent of the Bill: "*to remove duplicative or unnecessary appeal rights*", but advises that:

> *at this stage, WA Farmers has not been presented with any evidence that the proposed changes will have a positive impact on its members,*

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371 Ibid, pp5-6 and 11.

372 Environmental Stakeholder Advisory Group, *The Appeals Process*, 21 September 2009, p9.

nor will it decrease the associated costs of their involvement in land clearing applications.[373]

In that circumstance, it does not support the Bill.

5.43 In the contested environment as to the relationship between Part IV and Part V, Division 2, in which the intent of the Parliament in enacting the legislation and the Executive (as distinct from the EPA and DEC) in implementing it is not clear, the Committee is unable to conclude that removal of this appeal right will have the practical effect of reduction of "*unnecessary*" delay.

5.44 On the basis of the number of appeals (set out in Chapter 4), the Bill may reduce 'delay' in the environmental impact assessment/approval process:

- of a proposal that is not assessed on the basis of a recommendation that it be dealt with under Part V, Division 2 - for some 2 to 10 proposals each year. The median period of 'delay' resulting from an appeal is not known;

- of a proposal that is subject to an appeal against level of assessment, in the event the scoping process does not proceed in conjunction with the appeal - for some 7 to 18 proposals each year. However, it is noted that proponents may appeal between 2 and 8 proposals each year, in which case, the proposal cannot be considered to have been "delayed". The correct figure would seem to be 0 - 16 proposals. The median 'delay' saved could be between three and four months, however this figure is distorted by including delay caused by the proponent and by the fact that issues resolved in the appeal may include issues that required resolution in scoping phase of the assessment in any event;

- of a scheme that is subject to an appeal against instructions as to scope and content of a review - for between none and three each year. No median figures for 'delay' have been provided. It is noted that these appeals have a high percentage of success;

- of a proposal that is subject to an appeal on the declaration that it is a derived proposal - there does not appear to have been any relevant declaration; and

- of the Part V decisions subject to third party appeals on revocation, suspension or amendment of a clearing permit, works approval or licence - the advice is that these appeals have not been utilised.

5.45 However, the Committee notes the contribution of proponent delay in the time taken to resolve appeals.

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373 Submission No 2 from The Western Australian Farmers Federation, 7 January 2010, p2.

5.46 On the basis of the information provided to it, the Committee is unable to conclude that deletion of the relevant appeal rights will result in significant improvements in the time taken to assess any significant number of proposals.

Finding 20: The Committee finds that, on the basis of the information provided to it, it is unable to conclude that deletion of the rights of appeal against the EPA's:

- **decision not to assess a proposal but record a recommendation that the proposal be dealt with under Part V, Division 2, of the EP Act (clause 5(1)(a) of the Bill);**
- **decision on recorded level of assessment (clause 5(1)(b) of the Bill);**
- **instructions as to the environmental review of a scheme (clause 5(1)(b) of the Bill); or**
- **declaration that a proposal is a derived proposal (clause 5(1)(d) of the Bill),**

from the EP Act will have the practical effect of significant reduction in the time taken to assess any significant number of proposals.

WHETHER PROPOSED ADMINISTRATIVE CHANGES MAY HAVE THE PRACTICAL EFFECT OF REDUCING THE OPPORTUNITY FOR MEANINGFUL CONSULTATION

5.47 Noting that:

- the OEPA advice is that the level of assessment of most proposals is determined within the 28 day legislative time limit for that process;
- there is only a seven day period proposed by the Draft Administrative Procedures within which the public may make a comment to the EPA;
- during the time between referral of a proposal and the EPA decision on whether to assess and, if so, the level of assessment, the OEPA liaises with other agencies and the proponent to obtain additional information enabling the

EPA to decide whether to assess the proposal and, if so, at what level which additional information obtained may not be made available to the public;[374]

- the range of matters that the public is expected to address in its comment (see paragraph 5.55); and

- the proposed process is one of self-nomination,

the Committee is concerned that the time for the public to comment, now available by way of appeal, will be compressed as a result of the proposed administrative changes. (See Finding 21.)

5.48 The OEPA did not consider that there was a significant risk of the EPA misreading the public's level of interest in a proposal and, therefore, choosing the wrong level of assessment or period for public review:

> *I think it is both the EPA's and the proponents' view that we have such a transparent process that the risk of something not being identified or a wrong judgement being made around the level of public interest is very, very low.*[375]

5.49 The OEPA's view appears to be that scoping is essentially about the length of any public review, rather than identification of issues:

> *there is very little difference now between the scoping requirements for a public environmental review and an environmental review and management program. Indeed, the current administrative procedures really relate not to the issues to be addressed, but the length of public review. What we are doing with the administrative procedures is saying that a public environmental review can cover the whole period that a PER or ERMP would have, which is effectively a minimum of four weeks out to three months.*[376]

5.50 Even if the scoping of an environmental impact assessment of a proposal is taken to be limited to the period of public review, the Committee notes that third parties have appealed the level of assessment (and EPA recommendations) on the basis of length of time available for public review, and there have been occasions on which a longer period of public review has been directed by the Minister for Environment. The

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374 Ms Michelle Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, pp 15 and 16.

375 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p17.

376 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p16.

evidence of the Office of the Appeals Convenor was that appeals generally involved matters that should have been resolved by scoping.[377]

5.51 The CCWA expressed concern at the limited time available to consider the issues that might arise in a proposal. It noted that the appeal process provided an avenue to more fully explore a proposal and identify issues:

> *Our biggest concern about the loss of appeal right against the level of assessment is not the question of in-house assessment versus external assessment; it is about the time respondents have to deal with a particular proposal. You can imagine the practicalities from our side of things. We see an environmental assessment document that a proponent may have taken months or years to put together. We then have a period of weeks, perhaps, in which to get across that document and to check it, try to get independent advice sometimes on contentious things about whether the material presented is likely to be accurate, and sometimes we even have to do surveys and studies of our own. Those things take a considerable amount of time. If we are unable, as is often the case, to get the amount of time increased for us to deal with it, the likely consequence of that is that the information will never see the light of day in the assessment process. It may first appear only during the appeals process.*[378]

5.52 Dr Dunlop pointed out:

> *if we have administrative procedures that require consultation on just about everything in terms of upfront consultation, we might not have the resources or the people to actually meet our obligations in that process; whereas at least with the appeals process it tends to be limited to those things which are raising significant concerns rather than having to deal with absolutely everything, which, quite frankly, we cannot do … It all sounds great in principle but whether we can service those demands ourselves in practice is a matter of ongoing concern.* [379]

5.53 While there will an opportunity for comment prior to EPA decisions on whether to assess a proposal; the level of assessment**;** scope and content of an assessment; scope; whether a proposal should be declared a derived proposal; and, possibly, whether a

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377 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p15.

378 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p8.

379 Ibid, p9.

proposal should be assessed as a strategic proposal, as currently drafted, the Draft Administrative Procedures in respect of consultation have the practical effect that:

- less information than that available through the appeals proposed to be deleted by the Bill may be available to third parties regarding a particular proposal; and

- there will be less time to consider the information that is made available.

Reduction in time taken to assess uncertain

5.54 The OEPA advised that it was "*very hard to come up with a clear statement*" as how the administrative changes in respect of level of assessment would reduce the time line for finalising an approval and that:

> *The measures as they relate to the Environmental Protection Authority itself, we are not anticipating a significant reduction in time … there is an opportunity to potentially save three months but that time could easily be taken by the proponent for their own reasons for doing work, so we are very cautious about what time line improvement we can actually assume.*[380]

380 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp5-6.

Finding 21: The Committee finds that while there will be a seven day opportunity for comment on notice of referral of a proposal, which will occur prior to EPA decisions on:

- **whether to assess a proposal;**
- **the level of assessment;**
- **the scope and content of an assessment of a proposal;**
- **whether a proposal should be declared a derived proposal; and**
- **possibly, whether a proposal should be assessed as a strategic proposal,**

as currently drafted, the Draft Administrative Procedures in respect of consultation have the practical effect that:

- **less information than that available through the appeals proposed to be deleted by the Bill may be available to third parties regarding a particular proposal; and**
- **there will be less time to consider the information that is made available.**

WHETHER THE BILL WILL RESULT IN INCREASED USE OF LATER AVENUES OF APPEAL AND SECTION 43

Introduction

5.55 As reported in Chapter 4, and above, the Draft Administrative Procedures propose a period of **seven days only** within which to make public comment on:

- whether a proposal should be assessed by the EPA under Part IV of the EP Act (including that it should not instead be assessed under Part V, Division 2);
- the level of assessment;
- the scoping of the level of assessment;
- whether or not a proposal should be declared a derived proposal;[381] and
- possibly, whether or not a proposal should be assessed as a strategic proposal.

[381] This seven day period begins on the application that the proposal be declared a derived proposal and may, or may not, be contemporaneous with referral.

5.56 In Chapter 4, paragraphs 4.333 and 4.334, the Committee set out the concerns of the CCWA that it may not be provided with sufficient time under the proposed administrative procedures to examine the issues arising in a proposal and that, in being expected to comment on all proposals, it may not be able to devote its resources to problematic proposals. (The CCWA had not, at the time of the hearing, seen the period proposed by the Draft Administrative Procedures.)

5.57 Chapter 4, paragraphs 4.304ff recite the information that may be available to the public under the Draft Administrative Procedures for the purpose of public comment on referral (and notes the uncertainty in that respect).

5.58 Chapter 3, paragraph 3.106 sets out the Hawke Review comments in respect of similar concerns raised during its review of the Commonwealth Act and its conclusion that, bearing in mind the need for a speedy assessment process, a minimum period of 11 business days was necessary to comment on proposals that were not to be subject to public review.

5.59 Chapter 4, paragraph 4.12 reports the mining industry peak body view that failure to implement proposals in accordance with community expectations may result in projects being subject to ongoing legal challenge even in the event of regulatory licence by government.

5.60 The CCWA expressed concerns as to the degree of public consultation and rigour of dealing with that consultation under the proposed administrative procedures. It said:

> *We might say that we can speed up the decision making process now under the EP act by removing appeals, but, as I say, we are much more likely to lead to a situation in which community groups are wanting to challenge decisions before the courts.*[382]

Increased use of appeal against EPA report and recommendations to correct errors

Introduction

5.61 In explaining in the Second Reading Speech the deletion of the appeal in respect of level of assessment, the Minister for Environment identified the later appeal against the EPA report and recommendations as a remaining avenue for public comment and/or safeguard in the EP Act in saying:

382 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p19.

> *Third parties can make submission on the public environmental review document and have appeal rights against the report and recommendations of the Environmental Protection Authority.*[383]

5.62 The Office of the Appeals Convenor also pointed to the appeal against the EPA report and recommendations in responding to questions as to remedy available in the event the EPA made an error on community interest.[384]

5.63 The Executive's position is that the proposed administrative procedures will provide for "*adequate and effective*" community participation, which will reduce the prospect of a wrong decision and, therefore, appeal. (It is not the Executive's position that error will not occur.)

5.64 This position does not address the matter of scrutiny of decision through review, with a view to correcting error (see Chapter 6).

5.65 Further, opportunity to make a "*comment*" does not equate with the "*consultation*" available through review, where the different information and views of the parties are conveyed through the agency of the Appeals Convenor and there is an opportunity to respond to the information and concerns of other parties. This is discussed further in Chapter 6.

5.66 The different bureaucratic and community view as to what constitutes consultation is illustrated by the OEPA advice that "*briefings*" after presentation of the Bill constitutes "*consultation*" in respect of the Bill (see Chapter 1, paragraphs 1.19 - 1.21).

5.67 As previously noted, whether or not the community will seek to exercise its objections to prevent a development project proceeding depends on whether its expectations have been met, and its perception as to whether an error has been made, rather than on whether an error has in fact occurred.

Submissions

5.68 In its submission to the Committee, the CCWA stated:

> *The government's strategy for speeding up the process of granting development approvals with respect to the EP Act focuses on removing the early appeal rights that ensure that the level of scrutiny and public engagement for a proposal is appropriate. The resulting errors in the scope of assessments, in the material provided in those*

383 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407 .

384 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p15.

> *assessments and in the demonstrable denial of natural justice will have the effect of shifting the effort of respondents to the remaining appeal point on the final EPA report, by which time a project is well developed and inflexible. The outcome of this is that there will be an increased need for Ministers to make tough, politicised decisions on issues that could have been sorted out earlier in the process when projects are at a flexible stage had there been adequate and effective community consultation.*[385]

5.69 The EDO was also of the view that deletion of the right of appeal against level of assessment would:

> *be counterproductive and lead to greater inefficiencies overall, as the only options left to members of the community to challenge the assessment process will be to commence legal proceedings or to challenge the final EPA report ….*[386]

5.70 Chapter 6 sets out statements made in other submissions to the Committee from the public as to perceived problems with the transfer of opportunity for early public comment from the legislative to administrative arena.

5.71 It has been noted that the EPA Report identified appeal at the EPA's report and recommendations stage as a cause of delay in the environmental impact assessment process.

5.72 At the hearing CCWA made the following points in respect of appeals later in the environmental impact assessment causing additional delay:

> ***The CHAIRMAN****: Is it possible, then, that at the appeal point of the EPA bulletin report, it would actually take the Appeals Convener perhaps longer to assess appeals at that point because he is having to go back and do work or investigation that could have been done during the environmental assessment of the project, but which has been omitted because the first ability to appeal on the level of assessment has been removed?*
>
> ***Dr Dunlop****: We are actually more likely to get a scenario where the minister will eventually just send the whole project back to the start, which is effectively what has just happened with the Straits Salt project. He will never answer these questions, will not make a decision, and the process has to start again. That is the potential loop we get into if we do not cover the ground properly at the start.*

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385 Submission No 8 from Conservation Council of Western Australia Inc, 11 January 2010, p5.

386 Submission No 9 from Environmental Defender's Office Western Australia (Inc), 11 January 2010, p2.

…

> ***Dr Dunlop****: The other concern is that if we really want to streamline the process, we need a system that avoids the need for appeals, particularly near the end of the process, as much as possible.*[387]

Executive response

5.73 The Office of the Appeals Convenor acknowledged that transfer of appeal points to the later appeal against the EPA report and recommendations was problematic:

> ***The CHAIRMAN****: But it is a pretty late stage in the process to be taking issue with anything. By that stage the proponent has invested a lot of time and money undertaking environmental assessments. If there is an issue that could have been resolved at that earlier level of appeal, that is lost once you remove that right of appeal. I would have thought it created more uncertainty and potentially higher cost and higher delay for the proponent.*
>
> ***Mr Sutton****: Potentially, yes. I guess what we see in those early appeal points is that it is primarily to do with the scoping of the project, so that the proponent knows what the key issues are, the community knows what the key issues are and the EPA sets its guidelines for assessment around those key issues. As I have said before, the sooner that is done, the better; I believe in the process. Rather than waiting for it to come further down in the appeals process, if it is done early and done comprehensively, I think it makes good sense.*
>
> …
>
> ***The CHAIRMAN****: So by replacing the appeal on the level of assessment with a consultation process ahead of that decision being made actually removes the ability to review that decision at an earlier stage where, if there is a problem, it can be caught and save the proponent a lot of time and cost that would otherwise be imposed if we are capturing it at the appeal point?*
>
> ***Mr Sutton****: That is possible, yes.*[388]

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387 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p11.

388 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, pp15 and 16.

Increased Resort to section 43 of the EP Act and the Courts

Introduction

5.74 In the Second Reading Speech to the Bill, the Minister for Environment also suggested section 43 of the EP Act provided an avenue for making submissions/a 'safeguard' against bad decisions noting:

> *The minister maintains the power to remit a proposal to the EPA for reconsideration, as well as the power to direct the authority to assess a proposal more fully or publicly.*[389]

5.75 The OEPA also identified section 43 of the EP Act as being available to rectify any error of judgment by the EPA as to the extent of public interest in a proposal.[390]

5.76 The differences between the opportunity to persuade the Minister to exercise the discretionary power to intervene conferred by section 43 of the EP Act and the gravitas of a legislative appeal right are examined in Chapter 6.

5.77 This section reports the advice of stakeholders that, absent the relevant appeals, they will make increasing use of section 43 of the EP Act and recourse to the courts.

Submissions

5.78 The Wilderness Society warned that:

> *Removing the public's appeal right against the setting of the level of assessment for a proposal will force the public to pressure the minister to direct the EPA to more fully or more publicly assess the proposal or else assess the matter through the courts.*[391]

5.79 In addition to predicting increased use of the right to appeal against the EPA report and recommendations, CCWA considered that there would be an increased likelihood of:

> *unprecedented court challenges against decision by the Minister and EPA on both procedural and substantive grounds.*[392]

5.80 As has been noted, this view is shared by the EDO.

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389 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

390 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p16.

391 Submission No 3 from The Wilderness Society WA, 11 January 2010, p2.

392 Submission No 8 from Conservation Council of Western Australia Inc, 11 January 2010, p5.

5.81 The CCWA observed that the section 43 process was a political lobbying process, rather than an evidence based process:

> ***Dr Dunlop:*** *From our perspective, if you were going to convince a minister to utilise those powers, it would be generally the result of an active public campaign. Do active public campaigns increase certainty or uncertainty? I would think the latter.*
>
> ***Mr Verstegen****: The other point to raise there is that if we appeal a level of assessment, the Appeals Convenor then often goes back to the proponent and the proponent is given an opportunity to provide additional material and answer those appeals. But if we have got a situation where we simply have to lobby the minister and the minister then makes a decision as to whether she or he will exercise those powers that you referred to, you have not got a situation where there is a third party going back to the proponent and saying, "Here's some additional information that has been raised by appellants. Can this be dealt with easily? If it can, maybe it is still okay to have a low level assessment." You are going to do away with that process. I would say that that significantly erodes the level of certainty for proponents.*
>
> ***Dr Dunlop****: It will be more overtly political.*[393]

5.82 In respect of this issue raised during its inquiry into the Planning Legislation Amendment Bill 1995, the Standing Committee on Legislation said:

> *Whilst formal public participation is clearly contemplated in the early stages of assessment of a scheme, there is potential in the latter stages for responsible authorities to seek, and Ministers to determine, that the public input into the process be overridden …*
>
> *… Ministers are given wide discretionary powers. However, in the present circumstances this results in the potential to exclude effective public participation in the assessment of a scheme - subject only to political pressures that may be placed on Ministers by lobby groups.*
>
> *Indeed this was a concern expressed by the conservation council - that, for the public to be able to effectively participate in controversial planning matters, it may be necessary for interested groups to lobby responsible authorities and Ministers. This makes the process more political than the conservation council considers*

[393] Mr Piers Verstegen, Director, and Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p14.

> *desirable. It may also detract from the possibility of decisions being made having due regard to scientific or technical consideration.*
>
> *The Committee believes that this is a valid concern. …*[394]

5.83 The South West Environment Centre (Inc) affirmed CCWA's advice that a consequence of the Bill would be challenges in court.[395] Dr Matthews also said:

> *without appeal rights the community will be forced to challenge projects in the courts.*[396]

5.84 The issues that arise in reliance on judicial review are canvassed in Chapter 6.

Executive response

5.85 The OEPA response to the likelihood of increased use of section 43 of the EP Act was that the section was not intended to be used as an appeal substitute. (Although, as noted above, section 43 was identified by the OEPA as an avenue by which the Minister for Environment could intervene in the event the EPA misread the level of public interest in a proposal.)

5.86 The OEPA's response to questions as to whether use of section 43, which was available at any time prior to the final decision, introduced an element of uncertainty, was:

> ***Ms Andrews**: That lack of certainty that you were talking about exists at the moment.*
>
> ***The CHAIRMAN**: But it is very rarely used because of the other milestones for the public to actually have input in the process.*
>
> ***Ms Andrews**: So the framework that has been established by removing this appeal point has been then shifting to earlier in the process the opportunity to identify any of the issues that the EPA might otherwise have missed. So, if you like, that is counterbalancing the concern that you have there.*
>
> …
>
> ***Ms Andrews**: Yes. Clearly, in the briefings that have been provided to the peak bodies representing industry, they do not have that view;*

394 Western Australia, Legislative Council, Standing Committee on Legislation, Report 39, *Planning Legislation Amendment Bill 1995*, 15 May 1996, p15.

395 Submission No 13 from South West Environment Centre (Inc), 31 December 2009, p1.

396 Submission No 6 from Dr Margaret Matthews, 11January 2010, p1.

> *so they are supportive of the amendments that are being proposed and do not see the risks that you are articulating. The information has not come forward … .*[397]

5.87 In responding to a question of whether there was a time limit within which the Minister is to exercise the power conferred by section 43, the OEPA said:

> ***Mr Murray**: The limit is that the minister can do it at any time right up to the point where she issues an approval, which is at the very end of the process. So the minister can apply section 43 while the EPA is assessing or after the EPA is assessing and while it is in the minister's process for making a decision about whether the project can be approved, implemented, or not.*
>
> ***The CHAIRMAN**: Such a decision at a later stage would have quite significant financial implications for a proponent.*
>
> ***Mr Murray**: Correct.*[398]

Proponent challenge

5.88 As found in Chapter 3, proponents also utilise some at least of these appeal rights (See Finding 9).

5.89 A proponent/responsible authority may also seek to use section 43 of the EP Act, or the courts, to challenge EPA decisions as to the level of assessment of a proposal, decision of the EPA that a proposal is not a derived proposal (in the event that appeal is deleted as is the Executive's intention), or instructions as to the scope and content of the review of a scheme, as a result of deletion of the various appeal rights from the EP Act.

Committee's comments and findings

5.90 The views of the stakeholders have been expressed in the absence of the final version of the proposed administrative procedures.

5.91 However, the concern as to opportunity for "*meaningful consultation*", as distinct from limited period in which to make submissions, and lack of statutory imposed rigour in responding to submissions is unlikely, on the information provided to the Committee as to the proposed administrative procedures, to be completely resolved.

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397 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p17.

398 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p16.

5.92 While some submissions to the committee focussed on the deletion of rights of appeals in respect of proposals, and much of the evidence focussed on the impact of deletion of the right of appeal against level of assessment, the concerns raised are applicable to deletion of the right of appeal against instructions as to the scope and content of an environmental review of a scheme (in respect of which there is no OEPA intent to provide additional avenues for submission). (The evidence in respect of deletion of the appeal against the EPA's directions as to the scope and content of environmental review of a scheme is set out in Chapter 7.)

5.93 In the event the Bill is enacted, stakeholders are likely to utilise alternate avenues for challenging the decisions in respect of the appeals deleted by the Bill, resulting in increased use of:

- the later appeal right against the EPA report and recommendations in respect of proposals and schemes;
- judicial review; and
- lobbying the Minister under section 43.

Finding 22: The Committee finds that in the event the Bill is enacted, stakeholders are likely to utilise alternate avenues for challenging the decisions in respect of the appeals deleted by the Bill, resulting in increased use of:

- **the later appeal right against the EPA report and recommendations in respect of proposals and schemes;**
- **section 43 of the EP Act; and**
- **judicial review.**

5.94 The consequence of this finding is that, rather than effect that transfer of the opportunity for public participation in the environmental impact assessment process to an earlier stage of that process as intended, enactment of clause 5(1) of the Bill may have the practical effect of encouraging use of avenues for participation later in the process.

Finding 23: The Committee finds that in the circumstance set out in Finding 22, the practical effect of enactment of clause 5(1) of the Bill may not be to transfer public participation in the environmental impact assessment process to an earlier stage of that process, but to transfer public participation to avenues such as the appeal on the EPA report and recommendations (which occurs later in the process); use of section 43 of the EP Act; or appeals to the courts, which may result in greater uncertainty, lengthier approval times and more cost.

5.95 As seen from paragraphs 5.81 and 5.82 (and Chapter 6), not having the same requirements as to process, section 43 of the EP Act is inherently a political process.

5.96 The right of appeals proposed to be deleted by clause 5(1) of the Bill must be exercised within 14 days of the relevant EPA decision being recorded and, in general, are concluded within the periods set out in paragraphs above. An appeal to the court, or submission presented under section 43 of the EP Act may be made much later in the process. An appeal in respect of the EPA report and recommendations is not commenced until the assessment process has been concluded.

5.97 The practical effect of greater utilisation of the right of appeal against the EPA report and recommendations, section 43 submissions to the Minister and appeal to the courts may be to create greater uncertainty and lead to increased costs and delay.

Finding 24: The Committee finds that the practical effect of greater utilisation of the right of appeal against the EPA report and recommendations, section 43 submissions to the Minister and appeal to the courts as a consequence of enactment of clause 5(1) of the Bill may be to create greater uncertainty and lead to increased costs and delay

Recommendation 8: The Committee recommends that the Minister for Environment provide the Legislative Council with the Executive's remedy in respect of the greater uncertainty and increased costs that may result from stakeholders increased recourse to the right of appeal against the EPA report and recommendations, section 43 submissions to the Minister and appeal to the courts as a consequence of enactment clause 5(1) of the Bill.

CHAPTER 6

APPROPRIATE REVIEW AND DELEGATION OF ADMINISTRATIVE POWER: PRINCIPLES AND EVIDENCE

INTRODUCTION

Parliament's interest in framework for administrative decisions

6.1 The Committee has found that the practical effect of enactment of clause 5(1) of the Bill will be to remove from the EP Act the opportunity (and right) for public review of critical decisions made by the EPA prior to issuing its report and recommendations (see Findings 16 and 25). The Executive proposes that instead, there will be provision for public comment prior to the EPA decision on whether or not to assess a proposal or scheme. This constitutes a transfer of the framework governing public participation in respect of the relevant decisions from the legislative to the administrative realm and from one of review to one of contribution to the decision to be made.

6.2 The MCMPR Vision recognises:

> *governments and government agencies have a direct role in engaging communities on how legislation, policies, programs and industry plans will affect them.*[399]

6.3 As the Commonwealth Ombudsman, Professor John McMillan, observes in his paper *Parliament and Administrative Law*:

> *The discussion of administrative law in Australia typically looks at its implications for the citizen, the Executive or the courts. … If Parliament is mentioned, it is commonly on the basis that Parliament and the Executive share the same interest and speak in a united voice.*[400]

6.4 However, Professor McMillan points out:

> *the Parliament does have a separate and immediate interest in administrative law … In creating the framework of administrative*

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399 Ministerial Council of Minerals and Petroleum Resource, *Vision for Australia's Minerals and Petroleum Industry in 2025* and its *Agenda for Achieving the Vision*, Principles of engagement with community stakeholders, p7.

400 McMillan J, *Parliament and Administrative Law*, *The Vision in Hindsight*: Parliament and the Constitution: Paper No. 11, Department of the Parliamentary Library, 2000, Research Paper No. 13 2000–01, 7 November 2000, p35.

> *law, Parliament is both exercising and asserting its responsibility in a democratic system for creating a framework for resolving disputes between citizen and government. … Nor can it be forgotten that the rationale of the system of responsible government is that the Executive is answerable to the Parliament for the way in which government administration is undertaken. Parliament is therefore conceived as an accountability forum, a role which is exercised vigorously, particularly through the committee system and in* [the upper House].[401]

6.5 In evaluating the role of Parliament in developing the system of administrative law in Australia, the Commonwealth Ombudsman said:

> *a few points stand out. An obvious point - but the most important - is that* ***the rights that people can now exercise against government administration are rights that were largely created by legislation***.[402]
>
> (Committee's emphasis)

6.6 The questions posed by FLP 1 - *Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?* and FLP 3 - *Does that Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?* - are central to the function of the Parliament as a separate, and the primary, arm of government.

Appeal process

6.7 The appeals process has been set out in Chapter 4, paragraphs 4.249ff.

Executive intent

6.8 In considering FLPs 1 and 3, it is important to note that enactment of the Bill is not intended to reduce "*the rigour of environmental impact assessment and regulation*" under the EP Act.[403]

6.9 As referred to in Chapter 4 (see paragraphs 4.41), the Second Reading Speech states that the deleted appeals are "*duplicative or unnecessary*"[404] in the context of the "*enhanced*" (seven day) opportunity for the public to make a comment to the EPA prior to a decision being made and the later, or alternative, opportunity for merits

401 Ibid, p35.

402 Ibid, p4.

403 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406.

404 Ibid.

review of some decisions at the stage of the EPA report and recommendations and Ministerial intervention under section 43 of the EP Act. The Committee has also considered the availability of judicial review.

6.10 This Chapter considers whether the appeals that the Bill proposes be deleted from the EP Act are duplicative or unnecessary having regard to the purposes of administrative review from the perspective of administrative law and the legal principles as to the appropriate review of administrative decision-making.

Information on some appeals in other Chapters

Appeal against EPA recommendations as to scope and content of assessment of a scheme

6.11 It does not appear that an opportunity to make comment to the EPA in respect of referral of a scheme will be part of the proposed EPA administrative procedures (see Chapter 4, paragraph 4.325).

6.12 The explanation for deletion of the appeal against the instructions of the EPA as to the scope and content of the environmental review of a scheme is that there is no equivalent appeal in the environmental impact assessment process for a proposal (see Chapter 4, paragraph 4.58). Whether this arises from the fact that the Bill will delete the equivalent appeal (the appeal against level of assessment of a proposal) or from the argument that the appeal against level of assessment is not an appeal against 'scoping' (see paragraphs 4.59ff) is not clear.

6.13 However, as observed in Chapter 4, paragraph 4.70 the evidence of the Office of the Appeal Convenor[405] clarified that both appeals are primarily about scoping and the Committee finds in Finding 8 that the appeals against level of assessment of a proposal and content are used to challenge the scope of an assessment. It follows that the appeal against the EPA's decisions as to level of assessment of a proposal and instructions as to the scope of review of a scheme are equivalent appeals.

6.14 There are nonetheless, in the Committee's view, facts and circumstances that suggest the right of appeal conferred by section 100(1)(c) of the EP Act should be retained in the event the right of appeal conferred by section 100(1)(b) is deleted. These are set out in Chapter 7.

405 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, at p17 said: "*We particularly see that middle level of appeal, which is either the instructions or level of assessment, as I think I said before. It is primarily about scoping and I can see that in many cases, when we go out on site and have a look at the issues, they are fairly blatant and sometimes one wonders how they have come all the way through the system in a formal appeals process*".

6.15 The DEC advice is that these appeal rights have never been exercised.[406]

6.16 The proposed deletion of third party appeal rights in respect of the revocation, suspension and cancellation of clearing permits, works approvals and licences is not addressed in this Chapter. This is dealt with in Chapter 8.

RECOGNITION OF PUBLIC INTEREST IN *ENVIRONMENTAL PROTECTION ACT 1986* AND ENVIRONMENTAL REGULATION

Introduction

6.17 Although the process by which a decision is made may influence the type of review that is appropriate, the initial question is whether the exercise of administrative power (the relevant decision) is of a nature that should be subject to review. Relevant to this is whether, as a matter of law, the decision is of a type that should be reviewed (for example, is it sufficiently final) and the nature of the rights/interests and obligations it affects.

Environmental impact assessment a matter of public interest

6.18 In this analysis, it is important to recognise that environmental impact assessment regulation is not simply directed at protecting individual rights. The purpose of the Part IV environmental impact assessment and the pollution control provisions of Part V of the EP Act, is to protect:

> *the wellbeing of the community at large* …[and] *allow for the continued conservation of important elements of the environment.*[407]

6.19 Section 4A of the EP Act provides for principles of "*intergenerational equity*" and "*biological diversity and ecological integrity*", with the object of protecting "*the environment of the State*". The Minerals Council Enduring Values and MCMPR speak of the mining and resource industry's "*social licence to operate*" that involves a compact with the community at large, not simply those directly affected by a development (see Chapter 4, paragraphs 4.12 and 4.13).

6.20 The ESAG Appeal Report identified one of the principles underlying the provision for appeals in the EP Act as being:

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406 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p5.

407 Hon Kay Hallahan MLC, Minister for Community Services, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 November 1986, p3935.

> *to ensure that no section of the community is disadvantaged by environmental conditions on new developments or through the setting of unreasonable emissions or discharges.*[408]

6.21 The appeal provisions of the EP Act recognise community (third party) interest in environmental impact assessment by conferring a right to appeal on "*any person that disagrees with*" the relevant decision, not just the persons directly affected by the decision. (See paragraphs 6.125ff for discussion of the issue of 'standing' to bring an action at common law.)

Third party appeal rights conferred in the context of reliance on industry self-management

6.22 Further, the third party appeals in the EP Act play a particularly important role in the context of the EP Act's reliance on industry self-management.

6.23 In its submission to the Standing Committee on Legislation's 2009 Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal, DEC said:

> *Environmental regulation in Western Australia is achieved by way of a combination of industry self-monitoring and management and government regulation.* ***Third party appeals are fundamental to the transparency and operation of industry self-management.*** *Third party appeals afford those people in the immediate community and in the broader community an opportunity to challenge decisions made under the EP act and bring to the attention of the regulator issues that may not otherwise be known to the regulator, simply through local knowledge and experience of dealing with those premises.*[409]
>
> (Committee's emphasis)

6.24 While the Draft Administrative Procedures propose that the OEPA will play a greater role in preparation of the scoping documentation for some proposals,[410] the assessment process as a whole remains "*proponent-driven*":

> *We are dependent on proponents, but we are effectively trying to help them do their job better. As you know, Adele, it is a proponent-driven*

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408 Environmental Stakeholder Advisory Group, *The Appeals Process*, 21 September 2009, p2.

409 Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, *Transcript of Evidence*, 30 April 2008, pp5-6 quoted in Western Australia, Legislative Council, Legislation Committee, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, 20 May 2009, pp341-2.

410 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p5. See Chapter 4, paragraph 4.78 for the uncertainty as to the proposals that the OEPA will scope.

> *process; they drive the environmental impact assessment process. We are trying to set up a framework for it, so it works efficiently and that we are confident about the outcomes.*[411]

6.25 In the Second Reading Speech to the Bill, the Minister for Environment said:

> *The right to challenge decision making is fundamental to the transparency and accountability of decision making under the EP act.*[412]

6.26 In the Second Reading Speech to the Environmental Protection Bill 1986, Hon Kay Hallahan MLC, then Minister for Community Services identified one of "*the major principles underlying*" the EP Act as being:

> *(7) To provide a clear appeals mechanism whereby **the results of** environmental assessment are open for public **scrutiny**, and, where appropriate, an appeal to the Minister can be lodged. Similarly appeal can be made in the pollution control area.*[413]

(Committee's emphasis)

APPROPRIATE REVIEW OF ADMINISTRATIVE DECISIONS

Introduction

6.27 Historically, the main form of review of administrative decision-making was by way of judicial review.[414]

6.28 Professor John McMillan observed:

> *The idea that there should be a legal process to constrain unlawful government activity was a concept that was well-established in English common law, and transported to the colonies.*[415]

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411 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p6.

412 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406.

413 Hon Kay Hallahan MLC, Minister for Community Services, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 November 1986, p3935.

414 Although merits review had been available in respect of particular administrative decisions, such as certain taxation matters, since the 1920s. (Crane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance*, Oxford University Press, Melbourne, 2008, p219. See also Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p28ff.)

415 McMillan J, *Parliament and Administrative Law, The Vision in Hindsight*: Parliament and the Constitution: Paper No. 11, Department of the Parliamentary Library, 2000, Research Paper No. 13 2000–01, 7 November 2000, p1.

6.29 However, concern that there be 'appropriate' review of administrative decisions in Australia grew through the late 1960s and the 1970s in the context of an increasingly bureaucratic state and recognition of the limitations of judicial review.[416] In 1968, the Commonwealth set up the Commonwealth Administrative Review Committee, which conducted a pivotal inquiry into the federal administrative review system, tabling its *Report of the Commonwealth Administrative Review Committee* in 1971 (**Kerr Committee Report**).[417]

6.30 In respect of the common law system of judicial review of administrative decisions, the Kerr Committee Report found:

> *The basic fault of the entire structure is … that review cannot as a general rule … be obtained 'on the merits' – and this is usually what the aggrieved citizen is seeking.*[418]

6.31 As Brennan J pointed out in *Attorney General (NSW) v Quin*:

> *The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration enforcing the law which determines the limits and governs the exercise of the repositories' power. If, in doing so, the Court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action* [are] …, *subject to political control, for the repository alone.*[419]

6.32 The Kerr Committee Report concluded:

> *it has been universally accepted that judicial review by the courts … must be supplemented by provision for review … on the merits of administrative decisions affecting the rights and property of the citizen.*[420]

6.33 An enforceable right to merits review is dependent on legislative obligation to provide that review. As the Commission on Government observed in respect of merits review:

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416 Ibid, pp3-4.

417 Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p27.

418 *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971, paragraph 58, quoted in Minogue M, *Internal Review of Administrative Decisions,* Admin Review No 54, p54 at 61.

419 1990 170 CLR 1 at paragraph 17, quoted in Lindsay R, 'Procedural Fairness in the Decision-Making Process', Paper presented at *Legalwise Seminars*, 25 March 2010, p3.

420 *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971, paragraph 5, quoted in Crane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance,* Oxford University Press, Melbourne, 2008, p216.

> *If legislation specifically provides for it, there may be an administrative appeal, that is, a review of the appropriateness of the decision. The appropriateness of a decision is determined on its own merits and not on a technical or legal basis.*[421]

6.34 As noted in paragraph 6.5, the rights persons exercise against government are largely those conferred by legislation, not the common law.

6.35 The political nature of the appeals in respect of the EPA decisions made under Part IV of the EP Act (see Western Australia, Legislative Council, Legislation Committee, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, 20 May 2009, p343) render those decisions particularly unsuitable to judicial review. The other issues arising in relying on judicial review of the decisions the subject of the appeals that it is propose to delete by enactment of clause 5(1) of the Bill are discussed in paragraphs 6.115ff.

Rationale for Merit Review of Administrative Decisions

Underlying principles of administrative law

6.36 Australian administrative law is underpinned by three broad principles:

- administrative justice - in administrative decision-making the rights and interests of individuals should be protected;
- executive accountability - ensuring those who exercise the executive powers of the state can be called upon to explain and justify the exercise of that power; and
- good administration - administrative decision-making should conform to accepted standards such as rationality, fairness, consistency and transparency.[422]

6.37 Assuring the public that the rule of law is safeguarded is a central objective of administrative law.[423]

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421 Quoted in Western Australia, Legislative Council, (former) Standing Committee on Legislation, Report 24, *State Administrative Tribunal Bill 2003 and the State Administrative (Conferral of Jurisdiction) Amendment and Repeal Bill 2003*, 27 October 2004, p9. The other options were judicial review and review by Ombudsman.

422 McMillan J, *Parliament and Administrative Law, The Vision in Hindsight*: Parliament and the Constitution: Paper No. 11, Department of the Parliamentary Library, 2000, Research Paper No. 13 2000–01, 7 November 2000, p2.

423 Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p34 (referring to the Kerr Committee Report).

6.38 In the article *The Impact of External Administrative Law Review: Tribunals'*, Pearson observes that more is expected of the administrative review system than delivering justice to an individual:

> *There is an expectation that tribunal decisions and decision-making have a role to play in ensuring that there is fairness and consistency in the treatment of individuals by government; that there is an improvement in the quality and consistency of agency decision-making beyond the individual case; and that there is an improvement in administration generally through the adoption of the values inherent in administrative review.*[424]

6.39 The Commonwealth of Australia Administrative Review Council (**ARC**)[425] identified the "*principal objective*" of merit review as being to ensure administrative decisions were:

- correct - "*in the sense that they are made according to law*"; and
- preferable - "*in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts*".[426]

Correction of error/substitution of preferable decision

6.40 The necessity of review for correction of error, and holding a balance between the bureaucracy and the state, was the focus of the Kerr Committee Report.[427] The Kerr Committee Report stated:

> *In formulating our proposals we have concluded that there is an established need for review of administrative decisions. We have not thought this to be a matter of real debate … In coming to that conclusion we do not suggest that there is any propensity to err in the*

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424 Pearson, L (2007), *'The Impact of External Administrative Law Review: Tribunals'*, University of New South Wales Faculty of Law Research Series, Paper No 53, 2007, p4. (Available World Wide Web URL: http://law.bepress.com/cgi/viewcontent.cgi?article=1055&content=unswwps (viewed 4 March 2010)).

425 An independent statutory body, established under the *Administrative Appeals Tribunal Act 1975*, that provides advice to the Commonwealth Attorney General on administrative law matters.

426 Commonwealth of Australia Administrative Review Council, *What Decisions Should be Subject to Merit Review?*, 1999, paragraph 1.3 (Available World Wide Web URL: http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#reco viewed 4 March 2010).

427 Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p32.

> *administrative process … It is the possibility of error that demonstrates the need for review.*[428]

6.41 As Pearson summarises:

> *Review of administrative decisions by an external, independent, tribunal which would have the power to substitute the "correct or preferable" decision was seen by the Kerr Committee in 1971 as the key to correcting "error or impropriety in the making of administrative decisions affecting a citizen's rights."*[429]

6.42 In her submission to the Committee, Hon Giz Watson MLC noted:

> *it may be that a 'good' EPA would in all cases avoid the issues I have raised. But Parliaments, communities and the principles of administrative law assume that even good administrators make occasional mistakes. Good governance should not be reliant on the existence of, say, a strong EPA Chair - good governance demands structures and accountability mechanisms that can provide remedies if the need arises.*[430]

6.43 In pointing to the reasons for introduction of administrative opportunity for public comment, and identification of section 43 of the EP Act as a safeguard against EPA error in identifying the level of public interest in a proposal, the OEPA acknowledged that the proposed administrative changes had potential to reduce the prospect of error rather than eradicate it.[431]

6.44 The CCWA saw what it characterised as the lack of rigour in the proposed administrative procedures as increasing the prospect of error:

> *If we are going to go down that road and make decisions very quickly and not to have a high degree of community input and rigour in relation to dealing with that community input, then we can certainly construct an assessment process that delivers that outcome. But we definitely then need a review process after the decision because that*

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428 *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971 (referred to as the "Kerr Committee Report") paragraph 10, quoted in Minogue M, *Internal Review of Administrative Decisions*, Admin Review No. 54.

429 Pearson, L (2007), '*The Impact of External Administrative Law Review: Tribunals'*, University of New South Wales Faculty of Law Research Series, Paper No 53, 2007, p1. (Available World Wide Web URL: http://law.bepress.com/cgi/viewcontent.cgi?article=1055&content=unswwps (viewed 4 March 2010)).

430 Submission No 1 from Hon Giz Watson MLC, 18 December 2009, p3.

431 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p14.

> *will create a situation in which it is much more likely that mistakes will be made in that decision-making process.*[432]

Transparency and accountability

6.45 In his article *Outsourcing Accountability: Is it a Political Option?*, Hon Robert Lawson QC MLC said, quoting the Commonwealth Government Management Advisory Board and Commonwealth Government Management Improvement Advisory Committee *Accountability in the Commonwealth Public Sector*:

> *Accountability is fundamental to good governance in modern, open societies. Australians rightly see a high level of accountability of public officials as one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms they enjoy, but of efficient, impartial and ethical public administration.*[433]

6.46 The importance of transparency was recognised in the Second Reading Speech, when the Minister for Environment stated:

> *the government is committed to transparent decision making and the public "right to know" whilst facilitating an administratively more efficient appeal regime.*[434]

6.47 The OEPA advised:

> *improved timeliness and efficiency without reducing transparency and accountability and environmental outcomes* [has been] *the overriding objective around these reforms;*[435]

and

> *None of those reports specifically develops the recommendations that led to the amendments in this amendment bill, but the general direction that was being taken in all of those reports about looking for efficiencies in process while maintaining transparency and*

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432 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p19.

433 Commonwealth Government Management Improvement Advisory Committee *Accountability in the Commonwealth Public Sector* (1993), p3 quoted in Lawson, R, '*Outsourcing Accountability: Is it a Political Option?*', in Finn C (Ed), *Administrative Law for the New Millenium*, Australian Institute of Administrative Law Inc, 2000, p49.

434 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9406.

435 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p5.

> *accountability was broadly consistent with where those reports were all going.*[436]

6.48 In his article *Participation in Environmental Decisions*, Parnell observes:

> *If citizens are to have confidence in administrative decisions affecting the environment, then they need to know that these decisions are based upon sound information, have canvassed all the relevant issues and have been subjected to a methodical, transparent and accountable decision-making process.*[437]

6.49 This view has been reflected in industry submissions to the various reviews of the environmental approval process. For example, the submission by Iluka Resources to the Keating Report stated:

> *the success of the approval system will depend, in part, on the credibility of the system. Both government and industry have a common interest in improving public confidence …*[438]

6.50 The Hawke Review observed:

> *Decision-making outcomes will often differ depending on the proportionate weighting afforded to environmental, social or economic considerations in each case. As much of the decision-making under the [EPBC] Act involves weighting of these considerations and value judgements, a high degree of transparency is needed if the public and proponents are to have trust in the system.*[439]

6.51 Third party rights of appeal against the decisions of the EPA made under Part IV of the EP Act are integral to the transparency and accountability of the framework legislative scheme underpinning the industry self-management philosophy of that Act.

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436 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p21.

437 Parnell M, 'Public Participation in Environmental Decision-Making' in Finn C (Ed), *Administrative Law for the New Millenium*, Australian Institute of Administrative Law Inc, 2000, p335 at 339.

438 Independent Review Committee, Final Report - '*Review of the Project Development Approvals System*', April 2002, p52.

439 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p53

Finding 25: The Committee finds that the third party rights of appeal against the decisions of the EPA made under Part IV of the EP Act are integral to the transparency and accountability of the framework legislative scheme underpinning the industry self-management philosophy of that Act.

6.52 The submissions and evidence to the Committee were that community stakeholders see erosion in accountability and transparency resulting from enactment of the Bill. See the CCWA evidence at paragraph 4.256, which was bracketed by the following opening and closing remarks:

> *Specifically, in relation to less transparency and accountability … We do not know what level of detail or rigour the EPA is likely to apply in relation to this.*[440]

6.53 See also the CCWA evidence set out at in Chapter 4, paragraphs 4.333 - 4.335 and Chapter 5, paragraphs 5.60 and 5.68.

6.54 When stakeholder concern as to erosion of transparency in decision-making was put to the OEPA, its response was:

> *The administrative procedures will commit the EPA. As part of the chairman of the EPA making a decision on whether to assess or not, we have to provide him with that very information, which is: who made comments, what was the nature of the comment and what is the recommendation. The commitment in the administrative procedures is that that statement will also be part of the decision, and the decision is made public, so that statement would also be made public.*[441]

6.55 However, as set out in paragraph 4.306, the information required to be provided by the Draft Administrative Procedures is in fact narrower. Further, as explained in Chapter 4, the extent to which information will be provided in respect of a decision to assess a proposal as a strategic proposal is uncertain.

6.56 Accountability for compliance with the Draft Administrative Procedures is, in the OEPA's view, ensured by publication of the proposed information on its website and

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440 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p5

441 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p19

appeal at the EPA report and recommendation stage.[442] However, the Committee notes, this is at the end of the environmental impact assessment process.

6.57 The efficacy and appropriateness of relying on review at the EPA report and recommendations stage is discussed in paragraphs 6.182ff.

Better-decision making

6.58 The Kerr Committee Report noted that a formal process for correction of errors leads to better decision-making. In rejecting suggestions that increased scrutiny would lead to inefficiency, the Kerr Committee Report observed:

> *It does not follow that a more comprehensive review of … decisions will lead to inefficiency in the administrative process … Indeed the very existence of machinery for review … is likely to produce a greater efficiency and correctness in the making of those decisions*.[443]

6.59 Improved decision-making has been identified as an important objective, in particular, of internal merit review.[444] Pearson observes:

> *By the time of the ARC Better Decisions report in 1995, improving the quality and consistency of agency decision-making was seen as one of four specific objectives of the merits review system, the others being providing the correct and preferable decision in individual cases, providing an accessible mechanism for merits review, and enhancing the openness and accountability of government.*[445]

6.60 Review has an important normative function - the fact that decisions are open to review encourages decision-makers to make decisions on the basis of evidence. This point was made by Parnell:

> *… third party appeal rights is that such rights promote better decision-making by environmental authorities. If every decision was made in the knowledge that it could be reviewed by a higher Court or tribunal, then this would impose considerable discipline on the*

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442 Ms Michelle Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp13-4

443 *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971 (referred to as the "Kerr Committee Report"), quoted in Minogue M, *Internal Review of Administrative Decisions*, Admin Review No. 54, p 12.

444 Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p33.

445 Pearson, L (2007), '*The Impact of External Administrative Law Review: Tribunals'*, University of New South Wales Faculty of Law Research Series, Paper No 53, 2007, p1. (Available World Wide Web URL: http://law.bepress.com/cgi/viewcontent.cgi?article=1055&content=unswwps (viewed 4 March 2010))

> *decision-maker to properly consider both the decision-making criteria and the best available evidence.*[446]

6.61 The prospect that a decision may be required to be justified encourages clarity in decision making.

6.62 Successful appeals send a message to decision-makers that their criteria may need altering or to be applied in a different way. The Hawke Review refers to the ARC observation that the:

> *central purpose of the system of merits review is improving agencies' decision-making generally by correcting errors and modelling good administrative practice.*[447]

Mechanism to resolve conflict and disputes over issues which arise during the process

6.63 The Environment IGA requires the State to provide mechanisms to resolve conflicts and issues that arise during the assessment and approval of development processes. This is a separate obligation to the obligation to provide appropriate opportunities for public "*consultation*" in these processes (see Chapter 3, paragraph 3.28).

6.64 The CCWA raised the necessity for a process to resolve the positions of the different stakeholders:

> *One is that we are talking about all the stakeholders here, and we are likely to not get agreement between different stakeholders. There is no transparency here, so how it is going to deal with the different points of view is something that is not clear to us at all. The proponent is in this mix. The proponent is likely to have a very different view about what the content of an environmental assessment should be than some public interest groups may have.*
>
> *How that conflict resolution process can occur in an environment which is not going to be transparent is a matter of concern.*[448]

6.65 The Minerals Council Enduring Values caution that unless community concerns have been resolved in the process of development of a project has equal application to the necessity for resolution of concerns in the regulatory process.[449]

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446 Parnell M, 'Public Participation in Environmental Decision-Making' in Finn C (Ed), *Administrative Law for the New Millenium*, Australian Institute of Administrative Law Inc, 2000, p335 at 343.

447 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p258.

448 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p12.

Purposes of review go beyond providing an opportunity for public participation

6.66 The object of public participation through early consultation and third party appeals is not simply to generate a sense of engagement with the process but to produce concrete outcomes in terms of correct decisions and acceptance of decisions through confidence in the environmental impact assessment process.

6.67 In answering the Committee's question as to what the practical consequence would be in the event of error early in the assessment process and no opportunity to identify that error until the EPA report and recommendations stage, the OEPA said:

> *The administrative procedures are there to run a process; they do not of themselves guarantee an outcome.*[450]

6.68 The purpose of the review is to guarantee outcome.

DECISIONS THAT SHOULD BE SUBJECT TO MERIT REVIEW

Introduction

6.69 The OEPA's position that merit review of the particular decisions is "*unnecessary*" is, in part, explained on the basis that:

- an appeal against the EPA's decision not to assess when a recommendation is made that a proposal be dealt with under Part V, Division 2 of the EP Act is duplicative of the CEO's decision in respect of native clearing permits under Part V, Division 2; and

- the other deleted appeals are not "*fundamental"* to the environmental impact assessment process (see quote from transcript of hearing at paragraph 6.75).

6.70 The DEC position as to the role of third party appeals in the EP Act, as expressed to the Standing Committee on Legislation in its Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal was noted above (paragraph 6.23) and the Committee has found the third party appeals are integral to the legislative scheme of the EP Act.

6.71 It is important to recall that the provisions that it is proposed to delete confer appeal rights on proponents and decision-makers as well as third parties.

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449 "*Communities may seek to block project developments … projects may be subject to ongoing legal challenge, even after regulatory permits have been obtained, potentially halting project development*". (The Minerals Council of Australia, *Enduring Value - Australian Minerals Industry Framework for Sustainable Development* (Summary Booklet), June 2005, p2.

450 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p14.

6.72 The Committee finds in Chapter 7 that the appeal against the EPA's decision not to assess when a recommendation is made that a proposal be dealt with under Part V, Division 2 of the EP Act is not a duplicate of the appeal against the CEO's decision in respect of native clearing permits under Part V, Division 2 (see Findings 40 and 41 for the differences).

6.73 The sections below refer to the balance of the relevant appeals and the evidence as to whether those appeals are integral to the legislative scheme as it will be in the event the Bill is enacted. (The Committee found that enactment of the Bill will, in concert with the Draft Administrative Procedures, change the framework of the regulatory scheme - see Chapter 4, Finding 16.)

Appeal rights fundamental to the EP Act

6.74 During the hearing, the Committee put to the OEPA the proposition (made to it in submissions and noted in the various reviews) that the third party appeal rights the Bill proposed to delete were:

> *a right that has been greatly hailed and copied around the world and is highly regarded. In fact, we have even got industry saying that they think that is an important part of the process because it provides an opportunity for the public to be involved in the process and reduces the level of angst in relation to projects. They actually see it as a very positive aspect of engaging the community with their projects.*[451]

6.75 The OEPA response was:

> *Around the general principle about the appeals and the value of them, you are absolutely right. We get those messages coming through to us on a regular basis. This amendment bill does not tamper with the critical appeal points and the process around those, which we see utilised far and away more than anything. The decision of the EPA to not assess proposals at the front end and the appeal on the EPA's report and recommendations when the EPA is finished its assessment, aside from the area you have already been exploring around the clearing regulations, are, I think, really quite fundamental to the environmental impact assessment process.* [452]

6.76 The submission of the EDO, however, was that:

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451 Hon Adele Farina MLC, Chairman, Standing Committee on Uniform Legislation and Statutes Review, *Transcript of Evidence,* 8 February 2010, p7

452 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p7.

> *the setting of the level of assessment is critical to determining how thoroughly the impacts of a proposal are assessed. An inadequate level of assessment set at the beginning of the process is likely to lead to an incomplete picture of the impacts a risks associated with the proposal and therefore could lead to important impacts being overlooked or underestimated.*
>
> *…if the level of assessment is not appropriately set, then public participation later in the process becomes less helpful, because members of the public are not armed with sufficient information to form the basis for informed submission.*[453]

6.77 This submission is based on the appeal against level of assessment being primarily about the 'scoping' of an assessment. As noted in Chapter 3, the OEPA's view is that scoping occurs after the level has been set. The evidence of the Office of the Appeal Convenor, however, was that this appeal is primarily about scoping.[454]

6.78 The Office of the Appeal Convenor said:

> *I went back to the second reading speech of the 1986 act. What was clear in there for the appeals process, it was supposed to be a clear and easy appeals process. I think perhaps over the years, with amendments to the act, we have made it more cumbersome and more complex than what it needs to be. For some projects there can be three appeal points moving through that process.*[455]

6.79 However, merit appeals against the EPA decision not to assess, levels of environmental assessment and the EPA's report and recommendations in respect of proposals were part of the "*appropriate*" appeal mechanism put in place in enacting the EP Act.[456]

6.80 When the provisions relating to environmental impact assessment of schemes were introduced in 1996, merit appeals against the scope and content of an environmental impact review of schemes and the EPA report and recommendations in respect of schemes were introduced. Similarly, when the EP Act was amended to provide for permits to clear native vegetation and derived proposal, appeal rights were conferred in respect of decisions identified as appropriately subject to that review.

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453 Submission No 9 from the Environmental Defender's Office Western Australia (Inc), 11 January 2010, pp1-2.

454 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p15.

455 Ibid.

456 Hon Kay Hallahan MLC, Minister for Community Services, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 November 1986, p3937.

6.81 Before considering the evidence in respect of the importance of the particular decisions in the scheme of the EP Act, the Committee queries whether the decisions are of the nature that as a matter of administrative law, require review.

Decisions that require review under administrative law

Decision goes beyond mere fact-finding and made under statutory authority

6.82 In administrative law, the key to identifying a decision that is reviewable is that the decision goes beyond mere fact-finding and is made under statutory authority. While there is a question as to the degree of finality required for a decision to be reviewable, it is clear that review is not restricted to 'final' decisions.[457]

6.83 The *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) provides for judicial review of the following decisions:

> *a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1.*

6.84 Sections 3(3) and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) also respectively provide:

- "*where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law', the definition of 'decision' for the purposes of review is deemed to include the making of such a report or recommendation*"; and

- that conduct engaged in for the purposes of making a decision is subject to judicial review.

6.85 The *State Administrative Tribunal Act 2004* does not define the decisions that may be referred to that tribunal for merit review. However, the *Administrative Appeals Tribunal Act 1975* (Cwlth) provides, in section 3(3):

> *Unless the contrary intention appears, a reference in this Act to a decision* ***includes*** *a reference to:*

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457 Mason CJ in *Australian Broadcasting Tribunal v Bond* held that for both merits and judicial review, a reviewable decision is: "*…a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, in the words of Deane J, [in Director-General of Social Services v Chaney (1908) 31 ALR 571 at 590] 'a determination effectively resolving an actual substantive issue*." (Quoted in Minogue M, *Internal Review of Administrative Decisions*, Admin Review No. 54, pp57-8.)

> *(a) making, suspending, revoking or refusing to make an order or determination;*
>
> *(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
>
> *(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
>
> *(d) imposing a condition or restriction;*
>
> *(e) making a declaration, demand or requirement;*
>
> *(f) retaining, or refusing to deliver up, an article; or*
>
> *(g) doing or refusing to do any other act or thing.*
>
> (Committee's emphasis)

6.86 In responding to questions asked by the Standing Committee on Legislation in its *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, the then Appeals Convenor advised that Committee:

> *The Part IV appeals include:*
>
> - *The decision of the EPA not to assess a proposal,*
> - *The level of assessment set by the EPA when it decides to assess a proposal,*
> - *The EPA report and recommendations - including draft conditions, and*
> - *The final Ministerial Statement.*
>
> *…*
>
> *The most common appeal type - against the EPA report and recommendations - is, arguably, not a 'true' appeal but a submission to the Minister on the EPA assessment. The appeal process is really one of providing further information to the Minister as part of his section 45 considerations. …*

> *The other appeal types, including the Part V appeals, are 'true' appeals in that the appellant's are objecting to an actual decision.* …[458]

6.87 In its report *What Decisions Should be Subject to Merit Review*?, the ARC was of the view that, in the context of a further assumed external review:

> *an administrative decision that will, or is likely to affect the interests of a person should be subject to merits review.*[459]

6.88 The Committee is of the view that each of each of the relevant decisions made under Part IV of the EP Act currently subject to a right of appeal is a decision that affects the interests of persons and of the nature generally regarded, as a matter of administrative law, as requiring appropriate review.

Finding 26: The Committee finds that each of the following decisions made under Part IV of the EP Act, currently subject to a right of appeal that clause 5(1) of the Bill proposes to delete, is a decision that affects the interests of persons and is of the nature generally regarded, as a matter of administrative law, as requiring appropriate merit review. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (clause 5(1)(d) of the Bill).**

458 Letter from Mr Gary Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p5.

459 Commonwealth of Australia Administrative Review Council, *What Decisions Should be Subject to Merit Review?*, 1999, paragraph 2.1 (Available World Wide Web URL: http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#reco viewed 4 March 2010).

6.89 The Hawke Review of the EPBC Act noted that under that Act:

> *Merits review is not available for any of the key decisions about environmental impact assessment and project approval.*[460]

6.90 The Hawke Review considered that that the decisions preliminary to the Minister's decision as to project approval - being the "*controlled action decision*" (that is, that the action is one that should be assessed) and the "*assessment approach decision*" (that is, the decision as to level of assessment) - should be open to merits review.[461] The Hawke Review identified these decisions as:

> *vital to the workings of the Act in terms of proper environmental scrutiny and public participation in the project assessment and approval regime.*[462]

6.91 In the Committee's opinion, a decision as to whether or not a proposal is a derived proposal, and a decision as to the scope and content if the environmental review of a scheme, are decisions about the assessment approach.

6.92 The intent to stimulate use of the strategic assessment provisions of the EP Act by deletion of the right of appeal against the EPA declaration that a proposal is a derived proposal has been reported in Chapters 3 and 4. The CCWA submission notes this trend and expresses concern that the:

> *'strategic assessment' provision in the Act [will be] used as a back-door means by which developers might escape proper scrutiny of their proposals.*
>
> *… the conservation Council would have to reconsider its support for strategic environmental assessment if the safeguards against poor EPA judgements on what constituted a derived proposal were removed.*[463]

6.93 This concern was reflected in other submissions.

6.94 The resource industry report, the Jones Report, considered reform of the EP Act appeal process. That report recommended that the appeal process be made more

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460 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p256

461 Ibid, p259.

462 Ibid, p258.

463 Submission No 8 from the Conservation Council of Western Australia (Inc), 11 January 2010, pp2-3

accountable and transparent by reference of a merit review to SAT, not the Minister.[464] The Jones Report identified no 'unnecessary' appeals.

6.95 The earlier Keating Report had recommended introduction of a new appeal in the approval process, that third parties be able to appeal the level of assessment of a notice of intention to mine (relevant to section 78 of the *Mining Act 1978*).[465]

6.96 It is apparent from the submissions to the Jones and Keating Reports, that industry sees value in a transparency and accountable assessment processes - both in terms of presenting it with an option to review decisions and conferring public confidence in developments.

6.97 None of the EPA Report, Bowen Report or CNV Report made recommendations that any appeal rights be deleted from the EP Act. (The recommendations of the CNV Report are reported in Chapter 7.)

6.98 The OEPA explained the absence of recommendations from the EPA Report:

> *There were no recommendations relating to appeals in the EPA's report last year, and that really is because the scope of their review did not extend to the appeals and ministerial conditions setting phase of the environmental impact assessment process. The EPA's review was very much focused on its processes — that is, its part of the overall process. It was never intended for it to go into appeals and the ministerial condition setting.*[466]

6.99 The EPA Report did, however, report:

> *On the positive side, submissions indicated that the aspects of the current assessment process that should be retained were:*
>
> …
>
> • *appeals process as it is of public benefit.…*[467]

6.100 Subsequent to the hearings, the Committee was provided with a copy of the ESAG Appeal Report. This report was prepared at the request of the Minister for Environment for advice on how best to improve the appeal process while ensuring

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464 Industry Working Group, *Review of the Approval Processes in Western Australia,* April 2009, p55.

465 Independent Review Committee, Final Report - '*Review of the Project Development Approvals System*', April 2002, p5.

466 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p3.

467 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2010, p7.

strong environmental outcomes.[468] The ESAG Appeal Report is framed in terms of its response to the question of whether the Minister for Environment should retain the role of determining appeals.

6.101 The ESAG Appeal Report was "*strongly of the view*" that assessments and actions taken pursuant to the EP Act should conform to a number of principles, including:

> *allow for third party appeals*
>
> *reduce the potential for duplicative appeals on the same subject matter*
>
> *reduce as far as possible the desire for parties to appeal EPA reports*
>
> *provide for a coordinated appeal system.*[469]

6.102 On appeals against level of assessment, the ESAG Appeal Report said:

> *Decisions by the EPA on the level of assessment are an integral part of the assessment of proposals process. Accordingly, appeals against decisions by the EPA on levels of assessment should be determined by the appellate body decided upon following consideration of section 3.2.*[470]

6.103 With respect to the appeal against instruction on scope and content of the environmental review of schemes, the ESAG Appeal Report said:

> *Appeals under s48(1)* [sic] *and 48D should be treated similarly to appeals against the EPA report on assessment of a proposal under s44.*[471]

(Section 48(1) of the EP Act deals with monitoring the implementation of a proposal. The correct reference is to section 48B(1), the appeal that clause 5(1)(b) of the Bill proposes to delete.)

6.104 Ten of the thirteen submissions received by the Committee opposed (or did not support) deletion of the rights of appeal as proposed by the Bill.

6.105 The EDO considers that:

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468 Environmental Stakeholder Advisory Group, *The Appeals Process*, September 2009, p1.

469 Ibid, pp6-7.

470 Ibid, p8.

471 Ibid.

> *The public has a right to be concerned about and participate in environmental decision-making, and the Environmental Protection Act 1986 has been designed to enable third party input at critical stages of the process.*[472]

6.106 Dr Wajon's submission also identifies the appeal process as adding value from a scrutiny perspective.[473]

6.107 The CCWA submission refers to changing values in respect of the environment over the past 20 years and a growing interest in environmental issues in Western Australia. It notes that this has been reflected in amendments to the EP Act to enhance transparency and accountability, including the appointment of an Appeals Convenor, third party appeal provisions and consultation. It identifies the provisions which the Bill is directed at as important.[474]

6.108 The CME submission is somewhat guarded. It makes no comment on the role of the relevant individual appeals (its comment on deletion of the appeal against the decision not to assess where a recommendation is made that a proposal be dealt with under Part V, Division 2, of the EP Act were set out in Chapter 4, paragraph 4.192) and advises that the CME:

> *generally supports the reforms proposed in terms of appeals and the expedition of approvals processes, whilst still ensuring strong environmental outcomes. CME considers it essential any appeals mechanism supports effective and timely decision-making; is transparent; and provides for procedural fairness.*[475]

6.109 The submission from DMP simply repeats the government's policy position:

> *The Department is of the view that these reforms will streamline environmental assessment processes in this State while maintaining environmental standards and community expectations for transparency and accountability.*[476]

6.110 The basis for DMP's view is not revealed. The Bill has not undergone a public consultation process (see Chapter 1, paragraphs 1.19ff). The submissions made to the Committee do not support the DMP assertion as to public expectations.

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472 Submission No 9 from Environmental Defender's Office Western Australia (Inc), 11 January 2010, p1.

473 Submission No 5 from Dr J E Wajon, 10 January 2010, p2.

474 Submission No 8 from the Conservation Council of Western Australia (Inc), 11 January 2010, p2.

475 Submission No 11 from the Chamber of Minerals & Energy, Western Australia, 11 January 2010, P1.

476 Submission No 4 from the Department of Mines and Petroleum, 7 January 2010, p1.

Committee findings

Finding 27: The Committee finds that that the rights of appeal that it is proposed to delete by enactment of clauses 5(1)(b), (c) and (d) of the Bill:

- **have not been found to be unnecessary in any recent review of environmental impact assessment/approval processes;**
- **have been found to be necessary in certain reviews; and**
- **are considered to be necessary by community stakeholders.**

Caveats in the remarks of the Hawke Review

6.111 The Hawke Review noted that "*there might be concerns*" that a single project could be the subject of two merit reviews. It recommended that "*if this potential is regarded as a major concern*", so that just one decision were to be subject to merit review, the decision subjected to review should be the assessment approach decision.[477]

6.112 In making its recommendations, the Hawke Review observed that the decision as to assessment approach is not open to public comment under the EPBC Act. The Committee notes that although the EPBC Act makes no specific provision for comment on this matter, there is provision for opportunities to comment on referral information and reports prepared by the proponent and Secretary of DEWHA at which time - as with the publication of notice of referral and EPA report and recommendations - comment can be made.

6.113 The Hawke Review's explanation of the need for merit review was not the opportunity it presented for provision of additional information, identification of issues, or public participation but that:

> *Allowing the assessment approach decision to be subject to merits review would increase the decision-maker's accountability and could create a further incentive for the decision-maker to get the level of assessment 'right'. It should also promote consistency in decision-making.*[478]

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477 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999,* October 2009, pp258-9.

478 Ibid, p259

6.114 The Committee does not believe that the caveats in the Hawke Review derogate from its findings.

DIFFERENCES BETWEEN JUDICIAL AND MERIT REVIEW OF DECISIONS MADE UNDER THE EP ACT

Introduction

6.115 The Executive's position is that the rights of appeals that it is proposed to delete by enactment of clauses 5(1)(b), (c) and (d) of the Bill are unnecessary due to the:

- earlier opportunity for public comment;
- remaining, later, merits review of the EPA report and recommendations; and
- the power of Ministerial intervention conferred by section 43 of the EP Act.[479]

6.116 The Committee has also considered the avenue of judicial review.

6.117 The Committee has found that each of the relevant decisions is of the nature appropriately subject to merits review (Finding 26). In part, its finding is based on the limited facts and circumstances in which judicial review is available and the limited remedies which may be obtained from judicial review. This has been briefly introduced. The Committee explains its reasons further in the section below before proceeding to consider the evidence as to whether the matters set out in paragraph 6.116 constitute appropriate review.

Judicial review

6.118 In summary, in Australia judicial review is anchored in the principle of *ultra vires* and is primarily concerned with whether an administrative decision has been made in accordance with law:

> *Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.*[480]

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479 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, pp9406-7.

480 Brennan J in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.

6.119 Its questions are: whether there has been a breach of the law in making the decision; whether the decision is one authorised by the law; and whether the decision was beyond the scope of the power conferred on the decision maker by the law.[481]

6.120 The Law Reform Commission of Western Australia describes judicial review as follows:

> *It is important to emphasise that the judicial review of administrative decisions is concerned only with the legality of those decisions. Judicial review is not concerned with the general merits of the decision under review, in the sense of whether the decision was the correct or preferable decision. The court will only be concerned with factual issues to the extent that a breach of the law is said to have occurred in the determination of the facts. Further, in conducting a judicial review, the court will only consider policy to the extent that it is said that the application of any particular policy contravened the law. If the decision maker complied with the law in arriving at his or her conclusion, the court has no power to intervene. Judicial review is, therefore, very different to the review of administrative decisions on their merits.*[482]

6.121 General criticisms of judicial review are that it is: too technical, too lengthy, and too expensive.[483]

Deference to administrative discretion

6.122 A particular criticism of judicial review in the Kerr Committee Report relevant to the decisions the subject of the right of appeal deleted by Bill was that:

> *the vast majority of administrative decisions involve the exercise of a discretion by reference to criteria that do not give rise to a justiciable issue.*[484]

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481 Lindsay R, 'Procedural Fairness in the Decision-Making Process', Paper presented at *Legalwise Seminars*, 25 March 2010, p2.

482 Law Reform Commission of Western Australia, '*Judicial Review of Administrative Actions'*, Report No 95, December 2002, p2.

483 See Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p 29. See Crane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance*, Oxford University Press, Melbourne, 2008, p219. See also Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, pp220-3 for a response to these criticisms.

484 *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971, paragraph 68 quoted in Crane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance*, Oxford University Press, Melbourne, 2008, p219. See also Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p217.

6.123 The courts are generally reluctant to interfere with discretionary decisions on the ground of "*unreasonableness*". The test being that the decision:

> *is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* [485]

6.124 The Hawke Review endorsed the following criticism in stating that judicial review is rarely a substitute for merits review:

> *Judicial review is typically of little use for environmental litigation where it is the poor nature of an administrative decision that needs to be redressed. If the Minister or their delegate has 'ticked all the right boxes' and been careful in writing their reasons for decision under the EPBC Act, then what is essentially a very poor decision allowing highly damaging development may not be challenged.*[486]

Locus standi

6.125 A further particular problem with judicial review of environmental decisions is 'standing' - establishing the right to bring the decision to the court for review.

6.126 Traditionally, judicial review is concerned to protect the rights of individuals, rather than protecting the 'public interest'. Generally a person or organisation must demonstrate a 'special interest' in the result of the decision to require the courts to undertake a judicial review of an administrative decision:

> *Because the applicant has no special interest in the subject matter of the action over and above that enjoyed by the public generally, it has no locus standi to obtain an injunction.*[487]

6.127 As a consequence, the circumstances in which any person other than the proponent of a proposal/owner of land affected by a proposal or scheme can make an application for judicial review of a decision made under Part IV or Part V of the EP Act is

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485 Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950-1 quoted in Blades D, 'The Rule of Proportionality in Administrative Decision-Making', Paper presented at *Legalwise Seminars*, 25 March 2010, p4.

486 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p256

487 *Prevelly Wilderness Progress Association Inc v Department of Environmental Protection & Ors* [2000] WASC 51 (3 March 2000), referring to *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 per Gibbs J at 530 - 531 and per Mason J at 547 - 548.

limited.[488] Texts on administration law generally use environmental law cases to illustrate the issues arising with standing.

6.128 In the 1980 High Court case, *Australian Conservation Foundation v The Commonwealth* (***Australian Conservation Foundation* case**) , Gibbs J said:

> *I would not deny that a person may have a special interest in the preservation of a particular environment. However, an interest for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds, or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.*[489]

6.129 Much of the current environmental impact assessment legislation has been passed subsequent to the *Australian Conservation Foundation* case and the purpose of legislation is relevant to the issue of standing to apply for judicial review of decisions made under it.

6.130 Industry and MCMPR acceptance of the concept of a "*social licence to operate*" also recognises the need to go beyond protecting individual rights in environmental impact assessment (see Chapter 4, paragraphs 4.12 and 4.13).

6.131 However, as the *Australian Conservation Foundation* case illustrates, that is not always sufficient to confer standing to apply for judicial review of decisions made under the EP Act.

6.132 The EPBC Act (which does not currently have a merits review process for the equivalent decisions) expressly confers a legislative right on "*any aggrieved person*" to appeal to a court in respect of a decision of the Minister.[490] There is no such provision in the EP Act in respect of judicial review.

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488 In its Report No 32 *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*: "*150 Thus, for example, the performance by an officer of the Commonwealth of preliminary fact-finding functions not provided for by statute would be unlikely to attract the operation of the prerogative writs. Those functions would not satisfy the Atkin test for applicability of the writs that was mentioned in chapter 1 (para.46), namely, that the body concerned must have legal authority to determine questions affecting the rights of an individual (see R v Fowler: ex parte McArthur and Murray [1958] Qd R 41 for an example of a case where the court held that the writ of certiorari did not lie to a person exercising purely fact-finding and reporting functions). Accordingly, the exercise of like functions would be unlikely to be amenable to review under the AD(JR) Act if it were to cover officer decisions. 151 Other facultative or preliminary decisions of various kinds made in the ordinary course of administration which are not provided for by statute and which do not in themselves have a relevant effect on the interests of a person would also be unlikely to provide the basis for a successful challenge under the Act*"(pp38-9).

489 (1980) 146 CLR 493 quoted in Creyke R and McMillan J, *Control of Government Action: Text, Cases & Commentary*, 2nd edition, LexisNexis Butterworths, 2009, p1158.

490 Section 487 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth) .

6.133 There is a line of legal authority for the proposition that a member of the public who has a right to make a submission, has the right to have that submission dealt with according to legal principles.[491]

6.134 However, the Committee observes that the opportunity to make comments in respect of the decisions the subject of the appeals the Bill proposes to delete is an opportunity afforded by administrative procedures and may not, therefore, be a legally enforceable right. Further, there is no legal obligation for the EPA to take any comment into account when making a decision.

6.135 In explaining its submission that removal of the appeal rights would increase the likelihood of court challenges on procedural and substantive grounds, CCWA said:

> *The current act is underpinned by strong principles of natural justice. If you take those away you increase the ability to argue that it needs to go somewhere else to be resolved. The mere removing of those elements of natural justice will mean that things are much more likely to be heard somewhere else*.[492]

6.136 Unless Parliament clearly indicated otherwise, it is presumed that decision makers must apply the principles of good administration drawn from the common law.[493]

6.137 The law in this area is complex.

6.138 For current purposes, it is sufficient to note that availability of judicial review for all persons currently possessing a right to require merits review of the relevant decision under the EP Act is uncertain; that judicial review will not be available in all of the same circumstances; and that judicial review will not provide the same range of remedies as available under section 101 of the EP Act. (As seen in Chapter 4, paragraphs, 4.104 and 4.105 the remedies available include a direction from the Minister for Environment to consider a proposal or consider it at a different level.)

Merits review

6.139 Merits review is primarily concerned with the question of whether the 'right' decision has been made and considers whether there is, on the facts, a preferable outcome.

6.140 The Law Reform Commission of Western Australia describes merits review as follows:

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491 See the judgment of Murphy J, dissenting, in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 and *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473.

492 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p19.

493 Lindsay R, 'Procedural Fairness in the Decision-Making Process', Paper presented at *Legalwise Seminars*, 25 March 2010, p4.

> *"Merits review" will not ordinarily be concerned with the legality of the decision under review because, unlike a court, the jurisdiction of the merits reviewer to intervene is not dependent upon the establishment of legal error. The merits reviewer will be concerned with the identification of the legal principles governing the decision under review. The primary focus of merits review, however, will be other factors relating to the decision under consideration. These other factors include the identification of relevant facts relating to the decision, the elucidation of any policy or policies appropriately applied in the administration of the power being exercised in the making of the decision and the application of that policy or policies to the facts as determined.*[494]

6.141 The inquiry into an appeal is to be conducted:

> *according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms; shall not be bound by any rules of evidence; and may conduct its inquiries in what manner it considers appropriate.*[495]

6.142 On appeal against level or assessment, the Minister for Environment has power to remit a proposal to the EPA for the making of a decision or a fresh decision as to whether to assess or the level of assessment or to require that the EPA further asses or reassess, the proposal or assess it more fully or more publicly.[496] The outcome of an appeal in respect of the scope and content of review of a scheme is dependent on negotiation with the Minister responsible for the scheme (or decision of the Governor in the event agreement is not reached).[497] On an appeal against the declaration that a proposal is a derived proposal, the Minister may remit the proposal to the EPA for a fresh decision as to the request that the proposal be declared a derived proposal, as well as remitting it for assessment or further assessment or reassessment with or without section 43 directions.[498]

Merits review not quality control or complaints handling

6.143 Internal Review is not quality assurance or complaints handling. As Minogue explains (in the article *Internal Review of Administrative Decisions*):

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494 Law Reform Commission of Western Australia, '*Judicial Review of Administrative Actions'*, Report No 95, December 2002, p2.

495 Section 109(1)(b) of the *Environmental Protection Act 1986.*

496 Section 101(1)(b) and (c) of the *Environmental Protection Act 1986.*

497 Section 100(2a), (2b) and (2c) of the *Environmental Protection Act 1986.*

498 Section 101(1)(c) and (dc) of the *Environmental Protection Act 1986.*

> *Both are activated by applicants dissatisfied with their dealings with the agency, and both are directed (in part at least) to improving the agencies' performance and in doing so make it more accountable. The principles underpinning good complaint handling and internal review may be similar (for example fairness and efficiency). However, they are not the same.* ***Importantly, complaint handling gives no specific enforceable rights to applicants, which is the heart of administrative decision making, and administrative review****.*[499]
>
> (Committee's emphasis)

Development of merits review has influenced judicial review

6.144 As a result of the development of merits review, judicial review has expanded and given more emphasis to regard to natural justice and that all relevant, and no extraneous, matters have been taken into account, in deciding whether a decision has been "*lawfully*" made.[500]

6.145 However, the fundamental distinction that, provided a decision has been lawfully made, a court will not intervene regardless of its views as to whether a 'better' decision could have been made: whereas a merits review tribunal will substitute a 'preferable' decision, remains.

499 Minogue M, *Internal Review of Administrative Decisions,* Admin Review No. 54, p61.

500 McMillan J, *Parliament and Administrative Law, The Vision in Hindsight*: Parliament and the Constitution: Paper No. 11, Department of the Parliamentary Library, 2000, Research Paper No. 13 2000–01, 7 November 2000, p7.

Finding 28: The Committee finds that the following rights of appeal that it is proposed to delete by enactment of the Bill confer on third parties, decision-making authorities and responsible authorities a right to challenge a decision of the EPA in circumstances that may not give rise to a right to challenge that decision through judicial review. The rights of appeal are those against the EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (section 100(1)(a) of the EP Act amended by clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (section 100(1)(b) of the EP Act to be deleted by clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (section 100(1)(c) of the EP Act to be deleted by clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (section 100(1)(f) of the EP Act to be deleted by clause 5(1)(d) of the Bill).**

Finding 29: The Committee finds that the merits review process available by way of the appeals that it is proposed to delete by enactment of the Bill (see Finding 28 for those appeals) provides (by reason of sections 101(1)(b) and (1)(c), 101(2a) to (2c) and 101(1)(dc) of the EP Act) the remedy of substitution of a better, correct or preferable decision, which remedy is not available by way of judicial review.

Need for Merits review to be based in Statute

6.146 It has been noted that there is no common law right to a merits review of administrative decision-making. An enforcable **right** to merits review must be founded in legislation.

6.147 Administrative procedures allowing for comment to be made (or for merits review) can be contrasted with statute-based merits review in the following respects.

6.148 Statutory provision for review protects against concerns as to *functus officio* - the argument that the need for certainty in administrative decision-making prevents an official from revisiting a decision once made. The evidence of the OEPA in respect of the EPA's ability to revisit a decision on level of assessment was:

> *Once the EPA has made a decision, the EPA's decision is locked in. The EPA cannot revisit it on the proposal that was referred.*[501]

6.149 Minogue noted that statue-based review:

- gives an applicant **a guaranteed right** to review, which is **legally enforceable**;
- allows for **formal delegation** of power to review officers, specification of conditions under which review will occur and delineation of the categories of cases amendable to review; and
- clarifies the external review of decisions internally reviewed.[502]

6.150 The existence of a legally enforceable right confers a *gravitas* on what would otherwise be a complaint or comment, requiring an administrative response. This lack of gravitas underlies the CCWA's point that:

> *if a local community or the broader public interest community have a major issue with a certain type of proposal, they are going to have a major issue with the proposal whether there has been a strategic assessment or not. If they are not provided an opportunity for a formal channel of transparent and accountable input into decision making, it is much more likely we will see campaigns being formed that will bring to bear pressure in the political arena.*[503]

6.151 The importance of a statutory process to the perception of transparency and accountability was also evident in the CCWA evidence:

> *community groups and members of the public will focus their effort on the appeal at the end of the EPA reporting process and their ability to comment then because they will not feel like they have got a statutory ability and a statutory process to comment earlier on in the process. We are taking the process away from being a statutory process, we are embedding it into the bureaucracy of an agency ….*[504]

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501 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p4

502 Minogue M, *Internal Review of Administrative Decisions,* Admin Review No. 54, p61.

503 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p18

504 Ibid, p9

6.152 As the *Better Decisions* Report (a report of the ARC)[505] cautioned, pressures for efficiencies and savings might hinder acceptance of merits review and the objective of cost effective decision-making could be seen as incompatible with improving the quality of decisions.[506] The Kerr Committee Report observed:

> *although administrative efficiency is a dominant objective of the administrative process, nevertheless the achievement of that objective should be consistent with the attainment of justice to the individual*.[507]

6.153 Enshrining review rights in legislation protects against cost-driven administrative imperatives not to indulge in a review process.

Finding 30: The Committee finds that a legally enforceable right to merits review is dependent on legislative provision.

THE EVIDENCE AS TO WHETHER MERITS REVIEW OF THE EPA REPORT AND RECOMMENDATIONS, SECTION 43 PROCESS AND JUDICIAL REVIEW TOGETHER CONSTITUTE 'APPROPRIATE' REVIEW

Introduction

6.154 In the Second Reading Speech, the Minister for Environment explained that the appeal against level of assessment was unnecessary as:

> *Third parties can make submissions on the public environmental review document and have appeal rights against the report and recommendations of the Environmental Protection Authority. It is also my expectation that the EPA will provide for the publication of referral information and the opportunity for level of assessment in its revised administrative procedures, as well as providing the outcomes of its decision to ensure that transparency and accountability are retained. … The minister maintains the power to remit a proposal*

505 Commonwealth of Australia Administrative Review Council, Report No 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, 1995, p112. (Available World Wide Web URL: http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_NO.39 viewed 4 March 2010).

506 Minogue M, *Internal Review of Administrative Decisions*, Admin Review No. 54, p13.

507 *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971 (referred to as the "Kerr Committee Report"), quoted in Minogue M, *Internal Review of Administrative Decisions*, Admin Review No. 54, p 7.

back to the EPA for reconsideration, as well as the power to direct the authority to assess a proposal more fully or more publicly. [508]

6.155 This part analyses the evidence, most of which has been set out earlier in this report, in respect of the Executive's position to determine whether the practical effect is that the relevant appeals are unnecessary in light of the purposes of review of administrative power set out above.

6.156 In this discussion, the Committee assumes that the Draft Administrative Procedures will be implemented. However, as found in Chapter 3, there is no certainty that this will be the case (Finding 3) and noted in Chapter 4, there are some differences between the OEPA evidence as to what will occur under the Draft Administrative Procedures and the text of those procedures (see for example, paragraphs 4.317 to 4.323).

Relevant appeals

6.157 Although the explanation in the Second Reading Speech was directed specifically at the appeal against the EPA's decision on level of assessment of a proposal, the evidence of the DEC and OEPA make it clear that the opportunity for public comment on referral is also an opportunity to comment on:

- whether a proposal should be assessed by the EPA under Part IV or CEO under Part V, Division 2 of the EP Act; and
- the 'scoping' of an assessment of a proposal;
- whether a proposal should be declared a derived proposal,

and that reliance is placed on this opportunity as providing appropriate public participation in the those decisions (either alone - in respect of the decision as to whether a proposal should be assessed by the EPA under Part IV or CEO under Part V, Division 2 of the EP Act - or in conjunction with the later appeal and section 43 process).[509]

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508 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407 .

509 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p7. Ms Michelle Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp5, 16, 24 and 26.

Draft Administrative Procedures - early opportunity for public comment

Introduction

6.158 The relevant provisions of the Draft Administrative Procedures are set out in Chapter 4, paragraphs 4.267ff. Those paragraphs set out the main evidence in respect of the proposed administrative changes. Further information and relevant evidence in respect of the proposed administrative changes is set out in Chapter 5, paragraphs 5.47ff.

Lesser contribution to "better decision" being made and no contribution to "correct" or preferable "decision"

6.159 There is consensus between the government departments and stakeholders that early opportunity for community input is desirable and beneficial to the efficacy of the environmental impact assessment process.

6.160 However, as the Office of the Appeal Convenor pointed out, the expected benefits are dependent on the scoping of proposals being "*comprehensively*" addressed at that early stage.[510]

6.161 Without being aware that only a seven day period for comment was proposed, the CCWA raised concerns as to whether it, or other third party stakeholders, such as indigenous communities,[511] would have sufficient time to properly consider a proposal and present the information that could be presented through the appeal process:

> *You can imagine the practicalities from our side of things. We see an environmental assessment document that a proponent may have taken months or years to put together. We then have a period of weeks, perhaps, in which to get across that document and to check it, try to get independent advice sometimes on contentious things about whether the material presented is likely to be accurate, and sometimes we even have to do surveys and studies of our own. Those things take a considerable amount of time. If we are unable, as is often the case,*

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510 "*I guess what we see in those early appeal points is that it is primarily to do with the scoping of the project, so that the proponent knows what the key issues are, the community knows what the key issues are and the EPA sets its guidelines for assessment around those key issues. As I have said before, the sooner that is done, the better; I believe in the process. Rather than waiting for it to come further down in the appeals process, if it is done early* ***and done comprehensively****, I think it makes good sense*". (Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p15.)

511 "*Just to maybe summarise that, certainly the advertisement of proposals as they are referred is a good thing; make no question about that. That is going to increase the level of community awareness of these sorts of things, notwithstanding the fact that you are often dealing with Aboriginal communities in remote areas that do not have internet access and do not have newspapers and those sorts of things. If you lay that aside for a minute, yes, you potentially, in theory, increase the ability to get a better project for having better community involvement early and up-front*." Mr Piers Verstegen, Director Conservation Council of Western Australia Inc, *Transcript of Evidence,* 15 February 2010, p12.

> *to get the amount of time increased for us to deal with it, the likely consequence of that is that the information will never see the light of day in the assessment process. It may first appear only during the appeals process.*
>
> …
>
> *If a proposal was actually highly controversial, it usually means not only is it the time of volunteers, often for years going through a process like this, but it is also community resources. Sometimes they have to pay people or experts to provide them with advice. I can remember the campaign that has just finished — to get a consultant's report on a particular project it took us basically beyond the time that we had available to make submissions. That is a common problem. There is another related factor, that is both in the community and with us, if we have administrative procedures that require consultation on just about everything in terms of upfront consultation, we might not have the resources or the people to actually meet our obligations in that process; whereas at least with the appeals process it tends to be limited to those things which are raising significant concerns rather than having to deal with absolutely everything, which, quite frankly, we cannot do. Our community groups are also hard pressed, with people who have got day jobs, to keep up with those sorts of things as well. It all sounds great in principle but whether we can service those demands ourselves in practice is a matter of ongoing concern.*[512]

6.162 The Hawke Review found a 10 business day period for comment insufficient and recommended an increase to 11 business days to ensure two weekends (see Chapter 3, paragraph 3.106). Relevant to that recommendation was the fact that many stakeholder organisations relied on volunteers for their effectiveness.

6.163 While reliance is placed on the opportunity to make comment at the public review of an assessment, this will only apply for those proposals that are publicly reviewed. (See Chapter 4, paragraphs 4.303ff for the information that will be made available)

6.164 The OPEA and Office of Appeals Convenor's response to this concern was that matters could be raised at the stage of the EPA report and recommendations. However, that is **later** stage of the assessment process and relying on that appeal appears contrary to the evidence that early identification of issues, and provision of information in respect of them, is important.

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512 Ibid, p9.

6.165 In Chapter 5, the Committee found that while there will a seven day opportunity for comment on notice of referral of proposal, which will occur prior to EPA decisions on:

- whether to asses a proposal;
- the level of assessment;
- the scope and content of an assessment of a proposal;
- whether a proposal should be declared a derived proposal; and
- possibly, whether a proposal should be assessed as a strategic proposal,

as currently drafted, the Draft Administrative Procedures in respect of consultation have the practical effect that:

- less information may be available to third parties regarding a particular proposal than that available by way of the appeals proposed to be deleted by clause 5(1) of the Bill; and
- there will be less time to consider the information that is made available. (Finding 21)

6.166 The opportunity for public comment prior to a decision being made does not allow for early review as to whether the correct decision has been made - in both senses described in paragraph 6.39.

6.167 This was put to the Office of the Appeals Convenor:

> ***The CHAIRMAN****: But I put my question again: what is the check and balance that is in the system that is being proposed that will ensure that there is a check and balance that the EPA got that assessment right once you remove the appeal process, at that point?*
>
> ***Mr Sutton****: Other than the administrative procedures, there is no other check and balance. The administrative procedures, I guess, are just providing that opportunity for people to feed into the process early.*
>
> ***The CHAIRMAN****: The administrative procedure is not really a check and balance, because it occurs before a decision is actually made.*

***Mr Sutton**: Correct.*[513]

6.168 The Office of Appeals Convenor's response was that this review could occur later, at the EPA report and recommendation stage.[514]

Less transparency and accountability

6.169 It is not clear whether the Draft Administrative Procedures will provide sufficient information to be made available to the public at the time that they are required to comment for that comment to be comprehensive or meaningful. (See Finding 21)

6.170 CCWA raised concerns that the proposed administrative procedures would result in a less transparent and accountable process than that available by way of appeal, being:

- lack of transparency in the way the different stakeholder concerns are resolved;[515]
- lack of rigour in dealing with issues; and
- transfer of ultimate responsibility for the decisions from the Minister to the EPA. For example:

> *The Appeals Convenor writes a report, reports on every element that is raised which is relevant to the appeal, and the minister then makes the decision and the minister is accountable for that decision. With these administrative procedures we may see a case where we put in our submission and we never see that again; we never see any response to that. We do not know whether there is going to be a response mechanism. Certainly there will be the case where the minister will not be accountable for the decisions that are being made. In our view it is a great reduction in accountability in terms of the decision-making process.*[516]

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513 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p4

514 "***The CHAIRMAN**: The only other aspect in relation to consultation versus the appeals option is that the appeals option provides an opportunity to review a decision that has been made as to whether it was appropriately made. The consultation ahead of that decision being made does not actually provide that review function. Would you agree with that statement? **Mr Sutton**: I think it is as the Chair said before — particularly for the ones that are non-public review, so not until we get down to the report and recommendations do people get a look at how the issues were dealt with and what the decisions were, and get a chance to appeal, so they do not have that middle opportunity. The Chair is correct in that.*"(Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p16).

515 See paragraph Chapter 4, paragraph 4.290.

516 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p 9. See also paragraph 4.247.

6.171 The Committee put these concerns to the OEPA:

> *In terms of the information that the EPA receives in a consultation process with various parties, what process is in place for making that information available to the public so that the public actually knows, "The EPA consulted with all these bodies and this is the advice that they have received"? Currently that information would be made available at the end of the appeal process because there would be a report of those appeals, so that members of the community can assess for themselves the level of community concern with the proposal and whether that was adequately dealt with in the final decision made. Where you are doing that process up-front through an informal consultation process, is there a mechanism in place to then advise the community, "This is who we consulted and this is what they said to us"?*[517]

6.172 The OEPA's response was that:

> *The administrative procedures will commit the EPA. As part of the chairman of the EPA making a decision on whether to assess or not, we have to provide him with that very information, which is: who made comments, what was the nature of the comment and what is the recommendation. The commitment in the administrative procedures is that that statement will also be part of the decision, and the decision is made public, so that statement would also be made public*.[518]

6.173 However, as observed in Chapter 4, the Draft Administrative Procedures do not require that information to be made public.

6.174 The appeal process involves transferral of information between the various stakeholders and opportunity to respond to additional information provided. An opportunity to make "*comment*" does not include this process of "*consultation*", which necessarily involves opportunities to ascertain and comment on the way in which the competing claims are being resolved.

6.175 The Draft Administrative Procedures provide for less transparency and accountability than the appeals it is proposed to delete by clause 5(1) of the Bill.

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517 Hon Adele Farina MLC, Chairman, Standing Committee on Uniform Legislation and Statutes Review, during the Committee's hearing with the Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p19.

518 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p19.

Lesser contribution to better decision-making

6.176 Provision of information prior to a decision being made increases the prospect of a better decision being made. This is subject to the concerns noted above as to whether in some instances less satisfactory information will be provided.

6.177 However, the opportunity for public comment makes no provision for the normative role of an appeal and its contribution to better decisions in the sense of setting bench marks and consciousness of the prospect of review improving the rigour of the decision-making process.

Not a mechanism to resolve disputes arising in the process

6.178 The Draft Administrative Procedures do not provide a mechanism for resolving conflicts and disputes on the way the perspectives of the different stakeholders, and the different tensions inherent in environmental impact assessment, have been resolved (see paragraph 6.64 for CCWA evidence in respect of those tensions).

Finding 31: The Committee finds that the Draft Administrative Procedures provide for:

- **a lesser contribution to a "*better decision*" being made and no contribution to "*correct*" or "*preferable*" decision; and**
- **less transparency and accountability in decision-making,**

than the rights of appeal that it is proposed to delete by enactment of clause 5(1) of the Bill and that the Draft Administrative Procedures do not provide a mechanism for resolution of conflicts and disputes arising during the assessment process, which is provided by the relevant appeals.

Finding 32: The Committee finds that as the public comment occurs prior to the following decisions of the EPA, the opportunity to make public comment does not constitute a "*review*" of those decisions. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (review deleted by clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (review deleted by clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (review deleted by clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (review deleted by clause 5(1)(d) of the Bill).**

6.179 Whether there will be "a*ppropriate*" review of the relevant decisions as a consequence of enactment of clause 5(1) of the Bill, therefore, depends on whether the right of appeal against the EPA report and recommendations, section 43 process and judicial review provide appropriate review in the context of the changes proposed by the Draft Administrative Procedures. (Bearing in mind also the Committee's Findings as to the uncertainty as to whether the Draft Administrative Procedures will be implemented in their current terms - Findings 2, 3, 4 and 17 - and Recommendation that the Bill should not be considered until the replacement bilateral agreement has been finalised - Recommendation 6.)

Appeal against EPA report and recommendations

6.180 Reliance on this right of appeal is accompanied by reliance on the opportunity to contribute to any public review conducted in respect of a proposal. The Committee first notes that not all proposals will be subject to public review. It also notes the limited circumstances in which the ESD will be made public under the Draft Administrative Procedures. The ESAG Appeal Report states:

> *Before preparing its report the EPA is informed by the environmental review documents provided by the proponent as well as by inputs/advice from the general public through release of the proponent documents for public comment. However, neither the proponent nor third parties have the opportunity to understand how their advice has been taken into account until the EPA report is released*

and, earlier:

> *The current arrangements for the preparation of reports adopted by the EPA do not readily provide an avenue for presentation o these views.*[519]

6.181 The process for an appeal against the EPA report and recommendations is that set out in Chapter 4, paragraphs 4.249ff. Unlike the situation in respect of reliance on public comment and section 43 of the EP Act, concerns as to transparency and accountability, normative function and opportunity to correct a wrong decision or resolve conflicts arise, not out of the process for "*review*" itself, but the late stage of the environmental impact assessment process that the review will occur.

6.182 The evidence was that early identification of issues and public interest in a proposal is desirable. The Draft Administrative Procedures are intended to ensure early identification of issues and public interest (see Chapter 4, paragraph 4.271). This is seen to be preferable to later identification by way of appeal. The Office of the Appeal Convenor, for example, said that the "*middle level*" appeal (that is the appeals in respect of level of assessment of a scheme and scope and content of an environmental review of a scheme) were primarily about scoping - an issue that should be dealt with as early as possible in the assessment process, without getting to the stage of the current "*formal*" review through those middle levels of appeal (see Chapter 5, paragraph 5.73):

> *To be inclusive — yes, definitely, and to be as early as possible in the process. We see those as the major advantages. If we can deal with those issues upfront, rather than coming through further down in the appeals process, it makes better sense to us.*[520]

6.183 The Minerals Council Enduring Values, provides the following guidance for good industry citizenship:

> *Engage at the earliest practical stage with likely affected parties to discuss and respond to issues and conflicts concerning the management of social impacts.*[521]

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519 Environmental Stakeholder Advisory Group, *The Appeals Process*, September 2009, p3.

520 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p16. See also the evidence of the OEPA: "*So there is a package of reforms that are focused on helping proponents do their job better, particularly in the scoping phase, getting issues resolved early*". (Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p6.)

521 The Minerals Council of Australia, *Enduring Value - the Australian Minerals Industry Framework for Sustainable Development* (Summary Booklet), June 2005, pp16 and 19

6.184 However, when it was put to the government departments that the Draft Administrative Procedures did not constitute a review function, the response was that review at the conclusion of the assessment, the EPA report and recommendation stage, was sufficient.

6.185 In part this response rested on assumptions that the EPA was unlikely to make an error[522] and that the transparency and accountability of the process proposed by the Draft Administrative Procedures met community expectations. In part it relied on section 43 of the EP Act to remedy any error made by the EPA in respect of the extent of public interest in a proposal.

6.186 The Committee has found that the relevant decisions are of the nature that should be subject to merits review. Appropriate review of administrative power involves appropriate response in the regulatory framework for the possibility of error in the exercise of that power.

6.187 The Committee has found that the practical effect of the Bill will be increased use of the right of appeal against the EPA report and recommendations (as well as section 43 and judicial review - see Finding 22). The Committee has noted that the community may seek to block projects and halt developments notwithstanding regulatory approval based on their perception of the approval process, regardless of the fact of a proper process. Although, there are in fact real questions as to the transparency of the process proposed under the Draft Administrative Procedures.

6.188 Appeal at the EPA report and recommendation stage raises a number of issues:

- ability to remedy an omission:

> ***The CHAIRMAN*** *… The EPA and the minister are saying that they believe that retaining the right to lodge an appeal at the EPA bulletin report stage will pick up any issues that there might have been at the level of assessment point, so removing the appeal right at that level of assessment point is of no great consequence, because it can be picked up at the later appeal point. …*

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522 See, for example: "*Where the EPA is doing the scoping itself — firstly it is for the less complex, more predictable proposals. We have assessed them before, there is no new technology involved, it is in an environment where we are confident about the predictions and so on. It is a process which identifies those things fairly quickly upfront and then you are setting some conditions fairly quickly — confident about the environment, the technology, the proposal; just need to get the conditions in place*" (Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p10); and "*I think it is both the EPA's and the proponents' view that we have such a transparent process that the risk of something not being identified or a wrong judgement being made around the level of public interest is very, very low*" (Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p17).

> ***Dr Dunlop**: The sorts of issues that are very difficult to pick up at that point are the areas of omission — what we do not know. When we get to the Appeals Convener, we still do not know, because we will not get a definitive answer from the Appeals Convener and in the absence of information we will be back in the loop, going round in the same circle again.*[523]

- at that stage of the process a proposal has become more entrenched and less flexible:

  > ***The CHAIRMAN**: The minister and also the office of the EPA have indicated that the appeal on the level of assessment is not really needed because those issues that you would raise at that point you can raise at the point of the appeal on the EPA report. Do you agree with that statement?*
  >
  > ***Mr Verstegen**: I have a serious issue with that statement being made because the whole nature of the review of the EPA that has already been undertaken, and some consultative processes that have been employed to seek input in respect of those issues, have all pointed towards the need to increase the level of accountability and input from the community at the early stages in the decision-making process. We know that by the time a project gets to the end and by the time the EPA has done its final report, yes, we can appeal; but we know that if fundamental issues have been overlooked in respect of that, a project is virtually locked in by then. Then it relies on a minister making a tough decision often between whether this project is going to go ahead or not, when in actual fact if there was an accountable process to raise those issues earlier on, you might have had a situation where there could have been a project which could have been defined and implemented which was much more environmentally acceptable. … There is very little ability to implement anything at that point that can mitigate those environmental impacts. I really take exception to a view that you can replace a consultation stage early in a process with a consultation stage late in the process and still have as good, if not better, environmental outcomes;*[524] and

- additional expense, delay and uncertainty for a proponent:

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523 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p11.

524 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p10.

> ***The CHAIRMAN****: But it is a pretty late stage in the process to be taking issue with anything. By that stage the proponent has invested a lot of time and money undertaking environmental assessments. If there is an issue that could have been resolved at that earlier level of appeal, that is lost once you remove that right of appeal. I would have thought it created more uncertainty and potentially higher cost and higher delay for the proponent.*
>
> ***Mr Sutton****: Potentially, yes. …*
>
> *…*
>
> ***Mr Sutton****: I think it is as the Chair said before — particularly for the ones that are non-public review, so not until we get down to the report and recommendations do people get a look at how the issues were dealt with and what the decisions were, and get a chance to appeal, so they do not have that middle opportunity. The Chair is correct in that.*
>
> ***The CHAIRMAN****: So by replacing the appeal on the level of assessment with a consultation process ahead of that decision being made actually removes the ability to review that decision at an earlier stage where, if there is a problem, it can be caught and save the proponent a lot of time and cost that would otherwise be imposed if we are capturing it at the appeal point?*
>
> ***Mr Sutton****: That is possible, yes.*[525]

6.189 The last point is particularly a concern for a proponent wishing to lower the level of assessment through appeal (see Finding 10). Having incurred the expense of a public review (or public review on a wider range of issues) or a delay due to a longer public review period than may have been necessary, a proponent would take little comfort in the Minister for Environment's decision that the public review should not have occurred or should have been less extensive.

6.190 The issues arising were put to the OEPA after it had made the point that any concern as to application of the EPA's proposed administrative procedures could be raised at the time of the EPA report and recommendations:

> ***The CHAIRMAN****: Although that is very late in the process and it could result in a significant cost to the proponent if it is found that there was an error perhaps in the scoping and the environmental*

[525] Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p15-6.

> *assessment was too narrow, and therefore all the aspects of the project were not properly identified and therefore had not been properly dealt with by the proponent's environmental assessment, and therefore the EPA's bulletin report; by that stage a huge amount of time has been invested in developing that project to that stage and a decision at that point in time that an error was made in terms of the breadth of the scoping document will have huge ramifications for the proponent.*[526]

6.191 The OEPA responded:

> *If there is a significant matter that is missed in the EPA's assessment, I would suggest that that is not necessarily a problem of itself with the application of the administrative procedures that could have come about through some other reason, and obviously I hope it does not. It is not necessarily compliance with the administrative procedures that might lead to something like that. The administrative procedures are there to run a process; they do not of themselves guarantee an outcome. It is how we go about it.*[527]

6.192 However, the cost consequences that might follow late intervention under section 43 of the EP was acknowledged:

> ***Mr Murray**: The limit is that the minister can do it at any time right up to the point where she issues an approval, which is at the very end of the process. So the minister can apply section 43 while the EPA is assessing or after the EPA is assessing and while it is in the minister's process for making a decision about whether the project can be approved, implemented, or not.*
>
> ***The CHAIRMAN:** Such a decision at a later stage would have quite significant financial implications for a proponent.*
>
> ***Mr Murray**: Correct.*[528]

6.193 The Committee also observes that deleting the relevant appeals may significantly increase the range of issues that will be raised at the EPA report and recommendation

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526 Hon Adele Farina MLC, Chairman, Standing Committee on Uniform Legislation and Statutes Review, during the Committee's hearing with the Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p14

527 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p14

528 Mr Colin Murray, Director, Assessment and Compliance Services Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p16.

stage in the context that the EPA Report found that it was that appeal that caused delay in the assessment process due to significant workload.

6.194 In Chapter 5, the Committee found that the practical effect of clause 5(1) of the Bill might be to lead to greater uncertainty and to additional costs and delay.

Finding 33: The Committee finds that the right of appeal at the conclusion of the EPA assessment process, being against the EPA report and recommendations, is problematic as an appropriate review of the EPA's decisions on level of assessment of a proposal, the scope of the environmental impact of a proposal and whether a proposal should be declared a derived proposal as:

- **government departments and stakeholders agree that early identification and resolution of issues is important;**
- **reliance on an appeal at that stage to raise issues that arise early in the environmental impact assessment process creates greater uncertainty for proponents;**
- **there is difficulty in identifying omission at that stage and remedying identified omission may cause delay and expense and may be less likely to occur by reason of the matters in the bullet points below;**
- **by the time of completion of the environmental impact assessment process the proposal has become more developed and is less flexible, with the consequence that there is less scope to implement environmental improvements;**
- **appeal at the stage of EPA report and recommendations is likely to have significant adverse financial implications for a proponent (even in the event the appeal is not successful).**

Section 43 of the EP Act

Introduction

6.195 The powers conferred on the Minister for Environment by section 43 of the EP Act are set out in Chapter 4, paragraph 4.96ff.

No power to make a fresh decision

6.196 It was noted in Chapter 4 that power to remit a proposal to the EPA for the purposes of making a "*fresh decision*" (which may include reconsideration as to whether to assess the proposal or to impose a lower level of assessment) is conferred by section

101(1)(b) of the EP Act and is not available to the Minister under section 43 of the EP Act.

Use of section 43

6.197 The evidence was that the powers conferred by section 43 are currently used "*once every year or two*":

> ***The CHAIRMAN****: Such a decision at a later stage would have quite significant financial implications for a proponent.*
>
> ***Mr Murray****: Correct.*
>
> ***The CHAIRMAN****: So it is not likely to be used very frequently, is it?*
>
> ***Mr Murray****: It is used now.*
>
> ***The CHAIRMAN****: How often has it been used?*
>
> ***Mr Murray****: Not often.*
>
> ***Ms Andrews****: Once every year or two or something like that.*
>
> ***Mr Murray****: For instance, the minister has remitted back to the EPA after the EPA has assessed and reported several times. It is not something that happens every day, certainly, but the capacity for the minister to remit to ask the EPA to further assess or more fully assess exists and has been used.*[529]

6.198 The evidence that the Bill will lead to increased use of section 43 is set out in Chapter 5, paragraphs 5.74ff.

6.199 That section 43 is not seen by the EPA as a review process, but as a process relating to possible EPA misjudgement of the public interest in a proposal has been noted. The OEPA's evidence was that:

> *The Minister's power* [under section 43] *is not to guard against abuse or poor decision making but to acknowledge that the level of public interest may not always be apparent at the time of the EPA's decision on the level of assessment.*[530]

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529 Ms Michele Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010trans pp16-7.

530 Written Answers to the Committee's Questions for Hearing on 8 February 2010, p1, tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p13.

6.200 In this respect, public perception of the transparency and worth of the environmental impact assessment process for a proposal has an importance regardless of the reality of the rigour of that process.

No process to request Minister to exercise section 43 powers - no legal right to request intervention and lack of transparency

6.201 There is no formal process in the EP Act or regulations, nor is there a gazetted administrative procedure, by which a person may require the Minister to exercise the powers conferred by section 43 of the EP Act;

> ***The CHAIRMAN****: In what circumstances would the minister currently exercise the discretion conferred on the minister under section 43? Are there a set of guidelines that the minister uses to make an assessment?*
>
> ***Ms Andrews****: There are no criteria.*
>
> ***Hon HELEN BULLOCK****: It is purely discretionary?*
>
> ***Ms Andrews****: Yes.*[531]

6.202 There is, therefore, no right to request the Minister to exercise the section 43 powers: nor is there any obligation for the Minister to accept or respond to a submission to do so. From the perspective of the other parties, there is no right to be advised of an intention or request to exercise the section 43 powers, or respond to the allegations or concerns triggering the exercise of the power. There is no obligation for the Minister to publish the reasons for the exercise, or decision not to exercise, the section 43 powers.

6.203 The difference in process as raised by the CCWA:

> ***The CHAIRMAN****: Do you think that the section 43 power for the minister to actually ask the EPA to review its level of assessment is a sufficient substitute for the appeal on the level of assessment?*
>
> ***Mr Verstegen****: I do not think it is. It relies on —*
>
> ***Dr Dunlop****: Convincing the minister.*
>
> ***Mr Verstegen****: — third parties bringing evidence to bear that — exactly — convinces the minister in a way that does not have the public scrutiny applied to it that an appeals process has. We may*

531 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p20.

> *write to the minister with the same sort of appeal grounds that we would write to the Appeals Convenor, but there is no requirement for the minister to respond to each appeal ground and then put that response on the public record. I think it still does take away that transparency and accountability, and I think it is extremely unlikely that you are going to have a situation where the minister requires the EPA to increase their level of assessment without having gone through a public process to determine why that should be the case.*[532]

Prospect of late intervention - uncertainty and expense

6.204 As reported in Chapter 5, paragraph 5.87, the OEPA's response to the question of whether reliance on section 43 to correct EPA error introduced greater uncertainty, and expense in the event that the Minister did intervene, was that the uncertainty and risk of expense currently existed.

6.205 The OEPA's response to the proposition that the uncertainty and risk of expense might militate against intervention was:

> *I think it is both the EPA's and the proponents' view that we have such a transparent process that the risk of something not being identified or a wrong judgement being made around the level of public interest is very, very low. So I think in terms of looking at that risk, both the EPA and the proponents are reaching the view that it is a very low risk. We have a very transparent process — a very consultative process. There are also good proponents who treat their project well and treat the community with respect, who are out there talking way before their proposal comes into the EPA formally and is referred.*[533]

Section 43 a political process, not a review process

6.206 Chapter 5, Paragraph 5.82 sets out some of the evidence from the CCWA as to the political nature of the section 43 process. As seen in the quote from the transcript above, the CCWA submitted that the political nature of section 43 precluded that section from being a substitute for the appeal process:

> ***Mr Verstegen**: The other point to raise there is that if we appeal a level of assessment, the Appeals Convenor then often goes back to the proponent and the proponent is given an opportunity to provide*

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532 Mr Piers Verstegen, Director, and Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p13

533 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p17

additional material and answer those appeals. But if we have got a situation where we simply have to lobby the minister and the minister then makes a decision as to whether she or he will exercise those powers that you referred to, you have not got a situation where there is a third party going back to the proponent and saying, "Here's some additional information that has been raised by appellants. Can this be dealt with easily? If it can, maybe it is still okay to have a low level assessment." You are going to do away with that process. I would say that that significantly erodes the level of certainty for proponents.

***Dr Dunlop**: It will be more overtly political.*[534]

Finding 34: The Committee finds that the powers conferred on the Minister by section 43 of the EP Act do not confer any rights on a proponent, decision-maker or third party to request or require the Minister to respond to a view that the relevant EPA decision is incorrect. Ministerial intervention under section 43 of the EP Act is a matter for Ministerial discretion.

Finding 35: The Committee finds that there is no formal process for Ministerial intervention under section 43 of the EP Act and the exercise of Ministerial discretion under section 43 is not as transparent a process as that required under the EP Act in respect of appeals made under section 100(1) of the EP Act.

Finding 36: The Committee finds that section 43 of the EP Act is a provision directed at the inherently political nature of environmental impact assessment. It allows the Minister to intervene on the ground of public interest in a proposal rather than merit *per se*.

534 Mr Piers Verstegen, Director, and Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p14.

Finding 37: The Committee finds that section 43 of the EP Act does not provide for review of the following EPA decisions, which are the subject of the rights of appeal it is proposed to delete by clause 5(1) of the Bill. The EPA's decision:

- **not to assess a proposal where there is a recommendation that the proposal be dealt with under Part V, Division 2 (review deleted by clause 5(1)(a) of the Bill);**
- **as to the recorded level of assessment of a proposal (review deleted by clause 5(1)(b) of the Bill);**
- **as to instructions regarding the scope and content of an environmental review of a scheme (review deleted by clause 5(1)(b) of the Bill); and**
- **to declare that a proposal is a derived proposal (review deleted by clause 5(1)(d) of the Bill).**

Findings applied in Chapter 7

6.207 The Committee has applied its findings in respect of appropriate review to the individual subclause of clause 5(1) of the Bill in Chapter 7.

WHETHER RECOMMENDATIONS OF STANDING COMMITTEE ON LEGISLATION REPORT 14 HAVE ANY RAMIFICATIONS FOR THE BILL

6.208 The mining industry group report, the Jones Report, considered the role of appeals and recommended transfer of appeals in respect of EPA Part IV and CEO Part V decisions from the Minister to the SAT.[535] The explanation for this was that the review committee was of the opinion that the appeal process required greater transparency, accountability and alignment with principles of administrative law. The ESAG Appeal Report also expressed the view that:

> *as far as it is practicable, the Minister for Environment should not undertake the role of an appellate body.*[536]

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535 Industry Working Group, *Review of the Approval Processes in Western Australia*, April 2009, pp51, 52 and 55. "*This recommendation arose from the circumstance that: There is concern that the whole appeal system is an appeal from 'Caesar unto Caesar'. That is, appeals are made from decisions or advice from the EPA or the DEC, to an appeals convenor that tends to be ex-DEC staff. The Minister then decides on appeals from the EPA (that the Minister appoints) and the DEC (that the Minister oversees). … To address the areas of concern associated with the present appeals process, and to bring procedural integrity and transparent accountability it is recommended that the responsibility for the appeal process be transferred to the State Administrative Tribunal*". (P55)

536 Environmental Stakeholder Advisory Group, *The Appeals Process*, September 2009, p6.

6.209 In its Report 14, the Standing Committee on Legislation has recommended, for the reasons set out in that report, that the Part IV appeals remain with the Minister for Environment but that the Part V appeals be transferred to SAT.[537]

6.210 Whether or not appeals should be made to SAT or the Minister is not an issue raised by the Bill. Pursuant to Standing Order 230B, the Committee expresses no view on the various arguments put forward. The Committee did, however, enquire whether there would be any ramifications for enactment of the Bill in the event the recommendations of the Standing Committee on Legislation were adopted by the Parliament.

6.211 DEC advised the Committee that the amendments proposed by the Bill in respect of the Part 5 appeals were independent of the identity of the appellant body.[538] In the event the Bill is enacted in its current terms, the relevant appeals will be deleted and not, therefore, among the appeals referred to SAT.

WHETHER THE BILL ALLOWS DELEGATION OF ADMINISTRATIVE POWER ONLY IN APPROPRIATE CASES

Introduction

6.212 It is not only the framework for early public participation in the environmental impact assessment process, but control of the framework, that will be transferred from the legislative (Parliamentary) realm to the administrative (Executive) realm. The EPA's proposed administrative procedures may be altered without Parliamentary scrutiny.

6.213 Where deletion of the legislative right of appeal conferred by primary legislation is justified on the basis of provision of opportunity for public comment and transparency and accountability being assured by administrative procedure only, the question of whether the delegation of administrative power in section 122 of the EP Act would be rendered inappropriate by enactment of the Bill arises.

6.214 FLP 3 asks the question:

> *Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?*

6.215 While this question is framed in terms of the broader question of whether the Bill has sufficient regard to the rights and liberties of individuals, it is also relevant to the

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537 Western Australia, Legislative Council, Standing Committee on Legislation, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, 20 May 2009, Recommendation 47, p351.

538 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p4.

question of whether the Bill has sufficient regard to the rights and privileges of Parliament

Administrative procedures used as matter of historical practice

6.216 The Committee queried why the changes were being introduced by way of administrative procedure rather than regulation, which would subject them to Parliamentary scrutiny. The OEPA's response was:

> *It has always been the practice that the EPA's administrative procedures are produced and gazetted in this way. There is the opportunity to make them regulations but that has never been taken up. There was not a push for that through the reform process. In the consultation process we have undertaken, I think there is a general level of comfort around these administrative procedures being gazetted.*[539]

6.217 Historically the Parliament has required merits review of the relevant EPA decisions, which the Bill proposes now be deleted.

Submissions

6.218 The CCWA was of the view that the administrative procedures should be in legislation:

> *We have a situation whereby the administrative procedures are not in legislation, so the community does not have the certainty that those procedures will be maintained. It is very easy for a government to change those procedures at any time if they are not put into legislation.*[540]

Mechanism for ensuring compliance

6.219 The Committee enquired what mechanism was in place to ensure that gazetted administrative procedures were complied with. The OEPA responded:

> *If the EPA has not actually followed its administrative procedures in getting to that point, it may be a point that the public or anyone raises with the minister on appeal. There is a requirement for the EPA to be transparent about how it administers its administrative procedures on an assessment, and there is also the opportunity for someone to raise*

539 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp12-3.

540 Mr Piers Verstegen, Director, and Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p5.

> *the matter with the minister through the appeal process at the time of the EPA report.*[541]

No certainty procedures will be maintained

6.220 The Committee enquired as to the process of altering administrative procedures. The OEPA advised that the procedures could be altered by the EPA independent of any view of the Minister or the public.[542]

Comments in reports

6.221 The Committee notes that the Hawke Review recommended that specific criteria should be developed in regulations to clarify when assessment by preliminary documentation would apply under the EPBC Act and when it should be by EIS.[543] The Committee also notes that the minimum periods for consultation, and requirement for provision of information in respect of that consultation in respect of the Commonwealth environmental impact assessment process are also set out in the EPBC Act.

Importance of proposed administrative procedures

6.222 The evidence of the OEPA was that it is the proposed administrative changes, not the Bill, that are expected to deliver the significant improvements in certainty and timelines. The OEPA advised the Committee:

> *We certainly saw the amendment bill as being, as you suggest, not one of the things that is going to deliver the most significant reforms or improvements to the process; it is one element of it. It was very much seen as relatively straightforward changes and amendments to appeals to remove duplication. That was the flavour of this amendment bill. It was never seen as being something that was the major component to the reforms required to the environmental impact assessment process; in fact, those are administrative reforms that we are in the process of implementing. This is just a component of it sitting next to it.*[544]

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541 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p14.

542 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p13.

543 Commonwealth Minister for Environment independent review: *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p70.

544 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p7.

Committee's conclusion

6.223 The Committee is of the view that implementing the proposed administrative changes through administrative procedures, rather than through provision in the EP Act or regulations, when accompanied by enactment of clause 5(1) of the Bill could have the practical effect of derogating from the ability of the Parliament to set the framework for environmental impact assessment in the State.

6.224 In forming this view, the Committee notes that the Executive's position is that the EP Act mechanisms for public input into the environmental impact assessment process - the various appeal provisions proposed to be deleted by enactment of the Bill - are replaced by administrative mechanisms for that input. While changes to the EP Act and regulations made pursuant to it are subject to the scrutiny of the Parliament, administrative procedures made pursuant to section 122 of the EP Act are not.

Finding 38: The Committee finds that the proposed administrative procedures said to render the appeal rights conferred by sections 100(1)(b), (c) and (f) of the EP Act unnecessary - in providing for public comment prior to the relevant decision being made - may be altered or withdrawn by the EPA without the input, or agreement, of the Parliament or the Minister.

Finding 39: The Committee finds that the replacement of statutory appeal rights with administrative opportunity for comment removes an element of legislative certainty, and an important check and balance, from the framework of the environmental impact assessment process.

Recommendation 9: The Committee recommends that the Minister for Environment provide the Legislative Council with the Executive's explanation as to why it is appropriate for prescription of the:

- **period for public comment; and**
- **information to be made available to the public,**

in respect of the environmental impact assessment of a proposal to be by way of administrative procedure, rather than in regulation.

6.225 The Committee has observed in Chapter 4, paragraphs 4.57, 4.298 and 4.299, and that some issues arising in its consideration of the Bill appear to be the consequence of insufficient detail and guidance in the EP Act.

Recommendation 10: The Committee recommends that, subject to the response of the Minister for Environment to Recommendation 9, in the event clause 5(1) of the Bill is passed by the Legislative Council, the Legislative Council seek an assurance from the Minister for Environment that the Executive will exercise the powers conferred on the Governor by section 123 of the EP Act to make regulations prescribing guidelines for the environment impact assessment processes of the EPA, which guidelines will include:

- **appropriate minimum periods for public consultation;**
- **measures to ensure sufficient information is made available prior to the period for public consultation for that consultation to be meaningful; and**
- **appropriate transparency and accountability for EPA treatment of public comment in its decision making.**

CHAPTER 7

APPLICATION OF FINDINGS TO CLAUSE 5(1) OF THE BILL

CLAUSE 5(1)(a): AMENDMENT OF SECTION 100(1)(a) OF THE EP ACT: AMENDMENT OF APPEAL AGAINST EPA DECISION NOT TO ASSESS

Introduction

7.1 As previously noted, clause 5(1)(a) of the Bill proposes amending section 100(1)(a) of the EP Act to provide that there will be no appeal against the decision of the EPA not to assess a proposal in the event the EPA's decision not to assess:

> *includes a recommendation that the proposal be dealt with under Part V, Division 2.*

7.2 Part V, Division 2 of the EP Act contains provisions regulating the clearing of native vegetation, which have been set out in Chapter 4, paragraphs 4.174ff.

7.3 The explanation given in the Second Reading Speech for amendment of section 100(1)(a) is that:

> *There are currently two appeal points if the recorded decision of the Environmental Protection Authority is not to assess a proposal when the proposal also requires a clearing permit … this amendment eliminates an unnecessary appeal point and acknowledges that clearing permit processes are robust, transparent and accountable with their own comprehensive appeal provisions.*[545]

7.4 Chapter 4, paragraphs 4.190ff also set out the different views of the conservation groups and DEC as to whether the Part V, Division 2 process is equivalent to the Part IV process of assessment. Conservation groups are of the view that there is a qualitative difference in the two assessment processes, with the EPA process being more thorough and rigorous. (See, in particular the evidence and submissions set out in paragraphs 4.204 to 4.207).

7.5 Submissions drew attention to the fact that under section 100(1)(a) a person is able to appeal on the basis that they do not agree that a proposal should be assessed as a clearing permit only and that it should be assessed by the EPA. Once the proposal moves to the clearing permit process, it is not possible to appeal a clearing permit

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545 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, pp9406-7.

decision on the ground that it should have been considered by the EPA and fully assessed, rather than simply assessed for issue of a clearing permit.

7.6 The Committee notes a trend of an increasing proportion of proposals not assessed by the EPA on the basis that clearing of native vegetation should be dealt with under Part V, Division 2 (See Table 1).

Evidence at hearing

7.7 The Office of the Appeal Convenor and DEC initially identified the Part IV and Part V appeals as duplicative, respectively saying:

> *The change is that, at the moment, the EPA would say, "Not assessed; can be managed under Part V". That is appealable; and if the appeals were dismissed, for example, it can then go into the clearing process and be appealed again. The bill is looking at removing one of those - this one here - appeal points.*[546]

and:

> *So the intent is that the government is looking to remove the situation where exactly the same proposition is subject to appeal two points and reduce to having that appeal at one point simply for efficiency and streamlining. There is no loss of appeal right to anyone, either applicant or third party; it is simply doing it once rather than twice.*[547]

7.8 The Office of the Appeal Convenor and DEC respectively gave the following examples of situations sought to be prevented:

> *one of them there is the Donnybrook sandstone quarry to illustrate this — there was an appeal process on the quarry, then there was one on the clearing permit, and appeals were dismissed, so it went across to the clearing regulations; and now we have an appeal on the clearing regulations. I guess that illustrates that you can have two appeals on the same proposal in the EPA system, and then in the DEC system, quite quickly, within six months.*[548]

and:

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546 Mr Anthony Sutton, Appeals Convenor and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p2.

547 Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p8.

548 Mr Anthony Sutton, Appeals Convenor and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p4.

> *An example of that is a few years ago with the South Street station for the Perth to Mandurah railway. The EPA decided not to assess the creation of the station. That was appealed by the community and then subsequent clearing permit decision was appealed on exactly the same grounds with exactly the same issues again, and that created quite a lot of delays in being able to get a final decision.*[549]

7.9 The CNV Report, however, noted that in the event of a groundless or vexatious appeal under the clearing permit appeal provisions:

> *the opportunity for appeals to be dismissed quickly if considered groundless or vexatious.*[550]

7.10 The Office of the Appeal Convenor confirmed that the grounds on which the rights of appeal conferred by the EP Act in respect of clearing permit applications could be exercise are narrower than those on which the right of appeal can be exercised under section 100(1)(a):

> ***The CHAIRMAN****: … once* [a proposal] *hits the clearing permit system, is it the case that the basis of the appeal is narrowed?*
>
> ***Mr Sutton****: Correct; it is really regarding the conditions of the permit. There can be a refusal of the permit, if it is refused; the conditions of the permit; and then, as you may be aware, when DEC is doing its assessment, it would be looking at the principles that are under the Environmental Protection Act. So same issue — more narrow assessment …*[551]

7.11 The following passage occurred:

> ***Mr Sutton****: I guess what would happen is the EPA looks at a proposal and says, "Look, the issues here are primarily biodiversity and native vegetation issues" and then says rather than the EPA looking at those, it is better managed through the Department of Environment and Conservation, under the clearing permit system.*
>
> ***The CHAIRMAN****: Yes, however, at the first point of appeal a person is actually able to appeal on the basis that they do not agree that it should be assessed as a clearing permit only and it should be*

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549 Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p8.

550 Expert Committee, *Regulation Review: Clearing of Native Vegetation*, April 2009, p23.

551 Mr Anthony Sutton, Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p4.

> *assessed by the EPA. Once it moves to the clearing permit process, you cannot actually appeal on the grounds that it should have been considered by the EPA and fully assessed rather than simply a clearing permit.*
>
> ***Mr Sutton**: That is correct. I guess if the EPA had said "Not assessed; can be managed under a clearing permit", you would presume that it was just to do with native vegetation issues.*
>
> …
>
> ***The Chairman:** … I think to say that you have got two points of appeal which are virtually duplicates of each other is an incorrect statement.*
>
> ***Mr Sutton**: I guess it very much depends on making sure the EPA gets that assessment correct, that it is a proposal that is just to deal with native vegetation, hence they are comfortable that it can be managed under part V, but I hear exactly what you are saying.*
>
> …
>
> ***The CHAIRMAN**: But I put my question again: what is the check and balance that is in the system that is being proposed that will ensure that there is a check and balance that the EPA got that assessment right once you remove the appeal process, at that point?*
>
> ***Mr Sutton**: Other than the administrative procedures, there is no other check and balance. The administrative procedures, I guess, are just providing that opportunity for people to feed into the process early.*
>
> ***The CHAIRMAN**: The administrative procedure is not really a check and balance, because it occurs before a decision is actually made.*
>
> ***Mr Sutton**: Correct.* [552]

7.12 The DEC also acknowledged that the two appeals are essentially about different issues:

> ***The CHAIRMAN**: If a recommendation has been made for a proposal to be dealt with under part 5, division 2, can a person appeal a decision not to assess?*

[552] Ibid, pp 2 and 4.

> ***Ms McEvoy**: No, they cannot if that is the recommendation of the EPA, under this bill.*
>
> ***The CHAIRMAN**: Is that the case regardless of the grounds on which they might want to appeal?*
>
> …
>
> ***Ms McEvoy**: That is the case. It is the EPA's choice whether they want to make that recommendation. The point of having the administrative procedures amended to create an opportunity for public submissions on the level of assessment and whether the proposal should be assessed is to make sure that the EPA is aware of all of the issues that may be of public concern and the level of public concern that there may be. It is open to the EPA not to report a recommendation that it be managed under part 5, division 2. Then the appeal would remain on that and on **any permit** that was later required after the appeal period is finished under part 4.*[553]

7.13 The proposition put forward by DEC appears to be that the EPA may decide not to assess a proposal without **reporting** a recommendation that the proposal be managed under Part 5, Divison2 and that, in that event, there would be both an appeal against the EPA decision not to assess and any subsequent permit application. The Committee does not, however, find any assurance in the apparent proposition that the EPA will control the circumstances in which a person might be entitled to appeal against its decision not to assess by reporting, or not reporting, that its decision was based on a view that the proposal should be deal with under Part 5, Division 2.

Finding 40: The Committee finds that the rights of appeal conferred by sections 102(1) (applicant), (3) and (4) (both third party) of the EP Act in respect of the CEO's decision to grant a clearing permit, or the conditions imposed on grant of a clearing permit, is a narrower right of appeal than that conferred by section 100(1)(a) of the EP Act.

553 Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p8.

Finding 41: The Committee finds that if enacted, clause 5(1)(a) of the Bill will delete the current right to appeal against the EPA decision not to assess a proposal:

- **on grounds unrelated to the issue of a permit to clear native vegetation; and**
- **on the ground that the proposal should be subject to Part IV assessment, rather than being dealt with under Part V, Division 2,**

in the event the EPA makes a recommendation that a proposal be dealt with under Part V, Division 2, and that there is no equivalent appeal process available under Part V, Division 2.

Whether EPA decision not to assess on the basis that a proposal be dealt with under Part V, Division 2, of the EP Act is subject to "*appropriate*" review

Executive identifies section 100(1)(a) appeal as fundamental and EPA decision as appropriately subject to early review

7.14 The right of appeal against the EPA's decision not to assess a proposal was identified by the OEPA as one of the rights of appeal fundamental to the environmental impact assessment process of the EP Act.[554]

7.15 The Executive's responses to the Committee's questions as to why the right of appeal is unnecessary in the circumstance that the EPA makes a recommendation that a proposal be dealt with under Part V, Division 2, of the EP Act appear predicated on the assumption that the EPA will not make an error in determining the Part of the EP Act under which a proposal should be assessed.

7.16 However, as reported in Chapter 4, this is a contested area in which a discretionary judgement is made. As observed in Chapter 6, appropriate review of administrative decisions does not respond to propensity to err but the possibility of error (see paragraphs 6.40).

Opportunity to comment prior to EPA decision

7.17 As with the other rights of appeal that it is proposed to delete by clause 5(1) of the Bill, DEC's position was that the administrative opportunity to make public comment (seven days after publication of notice of referral - see Chapter 4, paragraph 4.287) is a substitute for the right of appeal:

554 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p7.

> *The EPA's administrative procedures are being revised to create the opportunity for a public comment period on referrals where a person can raise issues other than the clearing of native vegetation and which the EPA must take into account in making its decision on whether to assess the proposal.*[555]

and:

> *The point of having the administrative procedures amended to create an opportunity for public submissions on the level of assessment and whether the proposal should be assessed is to make sure that the EPA is aware of all of the issues that may be of public concern and the level of public concern that there may be.*[556]

7.18 The Committee found in Chapter 6 that administrative opportunity to comment prior to a decision being made did not constitute review of the decision after it is made (Finding 32).

No later review

7.19 As the decision of the EPA is not to assess the proposal, there is no assertion of a 'safeguard' in a later review against the EPA report and recommendations.

CNV Report comments and recommendations

7.20 The CNV Report noted submissions in respect of 'duplication' of appeal rights:

> *Concern was also expressed that in some circumstances, two appeal rights exist which further delays any approval: this is where a proposal is initially referred to the EPA and it chooses to 'not assess' the proposal relying on Part V of the EP Act to consider the application on its merits. Appeal rights exist on this decision and on DEC's decision.*[557]

7.21 The CNV Report response to the issue was that:

> *In relation to the "double" appeal opportunities in cases where a referral is made to the EPA prior to a final decision by DEC, the*

555 Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p7.

556 Ibid, p8.

557 Expert Committee, *Regulation Review: Clearing of Native Vegetation*, April 2009, p23.

> *recommendations in Section 3.3 go a considerable way to addressing this concern.*[558]

7.22 The CNV Report recommendations in section 3.3 relevantly included:

> *The Committee noted that sometimes confusion is created when the EPA chooses to not assess a proposal to clear significant native vegetation and that this confusion arises partly because the EP Act requires that the EPA make an appealable decision regarding the assessment of significant proposals.*
>
> *These concerns can be addressed to some extent through the development of an MOU between the EPA and DEC as discussed above*.[559]

7.23 There was no recommendation in the CNV Report that the appeal against the decision not to assess be deleted when there is a recommendation that a proposal be dealt with under Part V. Division 2 of the EP Act.

7.24 The DEC response to the CNV Report did not address this aspect of the report. DEC said:

> *The committee's finding was that it supports the retention of existing appeal provisions associated with applications to clear native vegetation and notes the opportunity for appeals to be dismissed quickly if considered groundless or vexatious. The committee's finding is that existing appeal rights under part 5, division 2, should not be reduced. The amendments proposed in the bill do not materially affect any rights that are currently exercised by applicants, approval holders or third parties.*[560]

Finding 42: The Committee finds that in the event clause 5(1)(a) of the Bill is enacted, the decision of the EPA not to assess a proposal, when there is a recorded recommendation that the proposal be dealt with under Part V, Division 2, of the EP Act, will not be subject to appropriate review.

558 Ibid, p24.

559 Expert Committee, *Regulation Review: Clearing of Native Vegetation*, April 2009, pp17-18.

560 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p4.

Recommendation 11: The Committee recommends that subclause 5(1)(a) of the Bill be deleted from the Bill. This may be effected in the following manner.

Page 3, lines 13-17 - To delete the lines.

LATER RECOMMENDATIONS NEED TO BE TAKEN INTO ACCOUNT IN DECIDING WHETHER TO EFFECT RECOMMENDATIONS IN THE MANNER SUGGESTED IN THOSE RECOMMENDATIONS

7.25 In considering the other subclauses of clause 5(1) of the Bill, the Committee has recommended deletion of each subclause. If all of the Committee's recommendations are adopted, each of clauses 4 to 8 of the Bill will be deleted.

7.26 The Committee has, therefore, provided at the end of this Chapter a simpler, alternate means of effecting all of its recommendations.

CLAUSE 5(1)(b) - DELETION OF SECTION 100(1)(B) OF THE EP ACT: APPEAL AGAISNT EPA DECISION ON LEVEL OF ASSESSMENT OF A PROPOSAL

Introduction

7.27 The number and proportion of referred proposals assessed by the EPA is set out in Table 1 and Finding 7.

7.28 The provisions of the EP Act in respect of setting the level of the environmental impact assessment of a proposal, and the current EPA administrative levels of assessment, are set out in Chapter 4, paragraphs 4.47 - 4.52.

7.29 Paragraphs 4.57 - 73 set out the different views of the government departments and community stakeholders as to whether the right of appeal conferred by section 100(1)(b) of the EP Act involves an appeal against the 'scoping' of the assessment of a proposal. In Finding 8, the Committee found that the right of appeal conferred by section 100(1)(b) of the EP Act against the decision of the EPA as to the recorded level of assessment of a proposal is used to challenge not only the level designated by the EPA in accordance with its gazetted administrative procedures but also the 'scoping' of the assessment. (Paragraph 4.53 describes the 'scoping' stage of assessment, which the EPA says occurs after the level of assessment has been set but which appears to be inherently related to the exercise of setting that level.)

7.30 Paragraphs 4.105 - 4.110 set out the evidence relating to the statement in the Second Reading Speech that:

> *There is also no benefit for the proponent in appealing the level of assessment as the outcome is restricted to increasing it.*[561]

The Committee found that proponents do utilise the right of appeal conferred by section 100(1)(b) of the EP Act.

7.31 While that right appears to have been mainly utilised for the purpose of increasing the level of assessment of a proposal from PUEA to a public level of assessment, in the event the Minister for Environment remits a proposal to the EPA for a fresh decision, a lower level of assessment may be imposed as a consequence of the appeal. (The limited use by proponents of their right of appeal against the EPA's decision as to the level of assessment of a proposal is largely due to the EPA's interpretation and application of the appeal provisions of the EP Act.

7.32 Chapter 4, paragraphs 4.119ff note the uncertainty as to whether the right of appeal conferred by section 100(1)(b) is available in respect of the SEA 'level' of assessment of a strategic proposal (and thus whether there is an appeal against the EPA's acceptance of a proposal as a strategic proposal) and in respect of a derived proposal. The Committee has recommended that this uncertainty be clarified by the Minister for Environment (Recommendation 2).

7.33 In part, the Executive asserts that the right of appeal conferred by section 100(1)(b) is unnecessary as the EPA proposes reducing the number of its gazetted administrative levels of assessment from five to two - one level of public assessment and one level of non-public assessment. It also argues that that appeal is unnecessary in the context of the opportunity for public comment prior to the EPA's decision as to the level of assessment, which opportunity will be provided in the proposed administrative procedures.

7.34 Chapter 4, paragraphs 4.263ff, and Chapter 5, paragraph 5.49-54 set out the content of, and issues arising from, the Draft Administrative Procedures. These include:

- provision of only seven days after notice of referral for public comment;
- uncertainty as to the information that will be made available for public comment;
- the evidence of the OEPA as to what will occur under the Draft Administrative Procedures differing in some important respects from the requirements of those procedures;

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561 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

- uncertainty as to the extent to which the Draft Administrative Procedures represent the procedures that will be gazetted and when, and if, procedures will be gazetted in light of the process for negotiation of a replacement bilateral agreement with the Commonwealth; and

- the fact that the Parliament is asked to consider enactment of the Approvals and Related Reforms (No.1) Environment Bill 2009 at a time when the administrative changes said to render some of the appeals deleted by that bill unnecessary (either in tandem with other factors or solely) have not yet been put in place and may not be implemented in their current terms.

7.35 The Committee concluded that the practical effect of the timing and period for public comment set out in the Draft Administrative Procedures may be that:

- not all of the information necessary for a proper consideration of a proposal, and available on the appeals proposed to be deleted by the Bill, will be available to the public; and

- there is a more limited time for stakeholders to determine whether referral information in respect of a proposal addresses, or adequately addresses, all environmental impact issues and gather, and present, information to the EPA in respect of those issues than is available on the appeal proposed to be deleted by the Bill. (See Chapter 4, paragraph 4.311 and Finding 21.)

7.36 Much of the evidence presented, and submissions made, to the Committee is couched in terms of the right of appeal against the EPA decision as to the level of assessment of a proposal. This part of the report draws on that information as it has previously been set out in this report.

Practical Effect of Deletion of section 100(1)(b)

7.37 The Joint Written Answers of DEC and OEPA state:

> *The removal of the right of appeal on the EPA's decision as to the level of assessment could remove up to several months from the overall process time as both the proponent and the EPA await the final appeal decision.*[562]

7.38 No basis for that assertion was provided. In fact, in answer to the Committee's questions as to the numbers, outcome and length of time taken to resolve appeals

[562] Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority to the Committee's Questions for Hearing on 8 February 2010 tabled during hearing with Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p8.

made under the various provisions that it is proposed be deleted by the Bill, the Joint Written response of DEC and OEPA was:

> *This information was not available from the Office of the Appeals Convenor within the time available. These data can be provided within one week of the Hearing.*[563]

7.39 In their Amended Joint Written Answers, DEC and OEPA relied upon median times for determining appeals on level of assessment of between 62 days (2005) and 130 days (2008), to support their assertion as to time saved.[564] The Committee points out that it can place little reliance on assertions which are later justified on the basis of information not available to the asserters at the time that the assertions are made.

7.40 The Office of the Appeal Convenor had serious reservations as to whether the Committee could regard average or median figures as indicating the time that might be saved by removing the right of appeal. (See Chapter 5, paragraphs 5.15 and 5.16) These concerns with reliance on "*statistics*" were reflected in the oral evidence of the OEPA, which was unable to "*isolate*" a time that might be saved by deletion of this appeal.[565] The proposed administrative changes are identified as delivering more significant reforms than the Bill.[566]

7.41 The Committee's comments as to the time that may be saved by deletion of this appeal are set out in Chapter 5, paragraph 5.44.

Relevance of proposed reduction in number of levels of assessment

7.42 As part of the explanation of the proposed deletion of section 100(1)(b), the Minister for Environment said:

> *The Environmental Protection Authority is reducing the number of levels of assessment from five to two.*[567]

7.43 The Written Answers of the Office of the Appeals Convenor also identify reduction in the number of administrative levels of EPA assessment as a reason why the appeal against the decision as to the level of assessment is no longer necessary.[568]

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563 Ibid, pp2, 3, 4 and 5.

564 Amended Joint Written Answers of the Department of Environment and Conservation and the Office of the Environmental Protection Authority, provided with letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, and Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 15 February 2010, p11.

565 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p10.

566 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p7.

7.44 The relevance of this to the right of appeal appears to be based on the view that that right of appeal does not involve scoping and/or that scoping is limited to determining the time for public review:

> ***The CHAIRMAN****: Yes, but in terms of appeals on the level of assessment — for example, if there is an appeal that the level of assessment should not be set at a PER, it should be set at an ERMP under the current process — you are actually going to ask questions about the scoping document about how stringent that level of assessment should be, and that is being removed. The capacity for input on that particular aspect is being significantly removed with the proposed amendments.*
>
> ***Mr Murray****: If I may, as I said earlier to the committee, there is very little difference now between the scoping requirements for a public environmental review and an environmental review and management program. Indeed, the current administrative procedures really relate not to the issues to be addressed, but the length of public review. What we are doing with the administrative procedures is saying that a public environmental review can cover the whole period that a PER or ERMP would have, which is effectively a minimum of four weeks out to three months.*[569]

7.45 The Office of the Appeal Convenor explained how scoping falls within the relevant appeal and how it would still be relevant to the Draft Administrative Procedures:

> *It may not reach the threshold to go to the higher level, so it might be an issue of a similar magnitude and geographical location, so it does not meet the threshold to go to the next level; it stays within that level. JP just mentioned a good example: the EPA might have said eight weeks public consultation, but, if through the appeals process, people say that they have not had enough time to have a look this; it might go up to 10 weeks.*[570]

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567 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p4706.

568 Written Answers of the Office of the Appeals Convenor tabled during the hearing with Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, 15 February 2010, p9.

569 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, pp15-6

570 The Committee notes that appeals seeking a higher level of assessment have been accepted against the current ERMP level of assessment despite the fact that Office of the Appeals Convenor considers that that level is the highest level of assessment: "*You can validly appeal the level of assessment, notwithstanding it is the highest level*." (Mr Anthony Sutton, Appeals Convenor and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence,* 15 February 2010, p7)trans

7.46 The proposal to reduce the number of levels of assessment is in accord with the recommendations of the EPA Report and has the support of conservation groups.[571] However, that this has implications for the necessity of the appeal against the EPA decision as to the level of assessment is contested. The EDO, for example, said:

> *The fact that the number of levels of assessment is being reduced to two does not reduce the importance of this right of appeal. There is still as much difference as there ever was between a public assessment process and a non-public assessment process, and in our view this is a key point on which third parties should be able to challenge the EPA's decision.*[572]

Finding 43: The Committee finds that the EPA's proposal to reduce the number of levels of assessment of a proposal stipulated in its gazetted administrative procedures does not impact on the necessity for section 100(1)(b) of the EP Act.

Whether EPA decision as to level of assessment is subject to "*appropriate*" review

Introduction

7.47 The Committee found in Chapter 6 that each of the decisions the subject of the appeals that it was proposed to delete by clause 5(1) of the Bill was of the nature that should be subject to merits review (Finding 26).

7.48 The Executive's view that: administrative provision of opportunity for public comment prior to the EPA being made; later opportunity to appeal against the EPA report and recommendations; and the potential for Ministerial intervention under section 43 of the EP Act constitute appropriate review of the decision, has been discussed in Chapter 6. The evidence referred to in that Chapter is focussed on deletion of the right of appeal conferred by section 100(1)(b) of the EP Act.

7.49 The Committee found in Chapter 6 that administrative opportunity to comment prior to a decision being made did not constitute review of the decision after it is made (Finding 32). Similarly, the Committee found that section 43 of the EP Act does not provide for a review (Finding 37).

7.50 The main question for the Committee in respect of clause 5(1)(b) of the Bill is, therefore, whether the later, right of appeal against the EPA report and

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571 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p7.

572 Submission No 9 from Environmental Defender's Office Western Australia (Inc), 11 January 2010, p1.

recommendations constitutes appropriate review in the context of the proposed administrative changes.

Whether right of appeal against the EPA report and recommendations constitutes appropriate review

7.51 In Finding 33, the Committee sets out a number of facts and circumstances that render review at the stage of EPA report and recommendation problematic.

7.52 The view of the OEPA is that the decision as to the level of assessment of a proposal is not "*critical*" to the assessment.[573]

7.53 However, the Committee notes that the decision as to level of assessment dictates the nature and scope of the assessment.

7.54 In particular, it determines whether or not there will be community input to the EPA in respect of the assessment. Under the Draft Administrative Procedures there is a considerable gap in the information that will be made available to the public in respect of a proposal that is to be publicly reviewed and one which is not. The submissions to the Committee illustrate the fact that the ability to participate in the assessment of a proposal, not simply be the recipient of the EPA's determinations, is highly valued by the community.

7.55 The Committee also notes that the ESAG Appeal Report recommended that, in addition to retention of the section 100(1)(b) right of appeal - which was identified as "*integral*" to the assessment process - the EPA implement steps to engage in consultation with the proponent and third parties at earlier stages of the assessment process.[574]

7.56 The ESAG Appeal Report identified the appeal process as an important way to advise the **Minister for Environment** of issues relevant to the Minister's decision.

7.57 The Committee has not found the explanations put forward by the Executive for deletion of section 100(1) of the EP Act, proposed by clause 5(1)(b) of the Bill, in accord with the weight of the evidence.

Finding 44: The Committee finds that the EPA decision as to the recorded level of assessment of a proposal will not be subject to appropriate review in the event of enactment of clause 5(1)(b) of the Bill.

573 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p7.

574 Environmental Stakeholder Advisory Group, *The Appeals Process*, September 2009, pp7-8.

Recommendation 12: The Committee recommends that subclause 5(1)(b) of the Bill be amended to delete the reference to section 100(1)(b) of the EP Act. This can be effected in the following.

Page 3, line 19 - To delete "(b) and"

Consequential amendments to the Bill

7.58 Amendment of clause 5(1)(b) of the Bill to delete the reference to section 100(1)(b) of the EP Act has the consequence that the reference to sections 100(10(b) of the EP Act in other clauses of the Bill, proposing deletion of references to section 100(1)(b) in sections of the EP Act setting out:

- the time for lodging an appeal - clause 5(2) of the Bill;
- the Minister for Environment's powers on an appeal - clause 6(1)(a) of the Bill; and
- the effect of lodging of an appeal - clause 6(3)

should also be deleted.

Recommendation 13: The Committee recommends that references to section 100(1)(b) of the EP Act be deleted from clauses 5(2) and 6(1) of the Bill. This can be effected in the following manner.

Page 4, line 2 - To delete "(b),"

Page 4, line 15 - To delete "or (b)"

Page 4, line 20 - To delete ", (b)"

Page 5, line 1- To delete ", (b)"

Page 5, lines 7-11 - To delete the lines

CLAUSE 5(1)(b) - DELETION OF SECTION 100(1)(c) OF THE EP ACT: APPEAL AGAINST CONTENT OF EPA INSTRUCTIONS AS TO SCOPE AND CONTENT OF ENVIRONMENTAL REVIEW OF A SCHEME

Introduction

7.59 The provisions of the EP Act governing the environmental review of schemes are set out in Chapter 4. To a large extent they mirror the provisions in respect of the environmental impact assessment of a proposal.

7.60 However, an important difference between the two regimes is that assessment of a scheme under the EP Act means that a proposal made under that scheme can only be referred to the EPA for assessment by a proponent or by a responsible authority in the circumstances set out in paragraph 7.68.

7.61 Chapter 4, Paragraphs 4.23 to 4.25 contain the OEPA evidence as to the type of schemes referred to the EPA and Table 2 sets out the number of schemes referred annually and the number of appeals on the scope and content of a review. It can be seen from Table 2 that only one appeal was made before 2007. In 2007 to 2009 there have been 2, and on one occasion, 3 appeals each year.

7.62 The outcome of an appeal against the EPA decision as to the scope and content of review of a scheme depends on negotiation between the Minister for Environment and the Minister responsible for the scheme (see Chapter 4, paragraph 4.114 for the relevant sections of the EP Act). Of the eight appeals lodged against the EPA instructions on review of a scheme, five resulted in an increased scope of the review (see Table 2 and Chapter5, paragraph 5.27). The Office of the Appeals Convenor's evidence as to the time taken to resolve such appeals is at Chapter 5, paragraph 5.26.

7.63 Chapter 4, paragraphs 4.149ff discuss the uncertainty surrounding the distinction between "*strategic schemes*" and "*strategic proposals*" and the consequences for assessment of a proposal by the EPA.

Explanation for deletion of section 100(1)(c)

7.64 The Office of the Appeals Convenor's evidence that the middle level of appeal is primarily about scoping is set out in Chapter 4, paragraph 4.69. In being asked to expand on that comment, the Office of the Appeals Convenor said:

> *I guess if one takes the instructions for scheme, there are very few appeals, and it is really to do with how many issues are being dealt with. My comment is that that could be dealt with early in the process so that the EPA gets to hear what the community is saying about those issues. I would have thought that there would not be too many problems, including most of those issues, so it really is the fact that*

> *there are not that many, in the instructions for example, and they could be dealt with earlier.*[575]

7.65 The OEPA explanation of deletion of the right of appeal was, as with the explanation in respect of the use of the appeal against level of assessment, based on a false premise - in this case that the appeal was only open to proponents:

> ***The CHAIRMAN**: What is the rationale for deleting the right to appeal in respect to the scope of assessment of the scheme, and how does this reduce the time for finalising approvals?*
>
> ***Ms Andrews**: In a practical sense the right of appeal is only open to the proponent, and the proponent for schemes is always the local authority or the planning authority. This appeal right has rarely had to be used. You might suggest that it has been used, so probably the process has not run as well as it should have been. The sort of issues that have come up where a planning authority has decided to appeal have been around an issue that should have been dealt with through normal interaction, discussion and negotiation between the Office of the EPA and the planning authority. It is an appeal right that was generally felt was rarely used* ***and there should be other processes in place to resolve any disagreement there might be, let us say, at officer level and about escalation around the instructions and what the scope of the assessment needs to be.*** *That is what we are talking about here. It is getting agreement around a document that lays out what needs to be covered within the assessment.*
>
> ***The CHAIRMAN**: I find it interesting that you say it is an appeal right that has rarely been used. I would have thought, with major scheme amendments, you receive quite a few appeals.*
>
> ***Ms Andrews**: **Remember who the appeal right is open to; it is only open to the proponent** — to the planning authority.*[576]
>
> (Committee's emphasis)

7.66 After this passage, Mr Murray of the OEPA advised that it was his recollection that a third party does have a right of appeal against the EPA instructions as to the scope and content of the review of a scheme.[577]

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575 Mr Anthony Sutton, Appeals Convenor and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, *Transcript of Evidence*, 15 February 2010, p17.

576 Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, pp21-2.

7.67 In fact, section 100(1)(c) of the EP Act confers a right of appeal on any person who disagrees with the EPA's decision.

Significance of review of a scheme

7.68 The Committee put to the OEPA the proposition that the scope of an environmental impact review of a scheme has wider ramifications than ascribed level of assessment of a proposal, as the assessment of a scheme applies (possibly) to all proposals made under that assessed scheme, with the consequence that the proposals may not be subject to independent EPA assessment.

7.69 The OEPA's response was:

> ***Ms Andrews****: No. It is important to appreciate that the process for dealing with "schemes" under the Environmental Protection Act is quite different to "proposals". Fundamentally, all schemes are required to be referred. The first quite critical difference from other proposals is that significance test under section 38. It does not come into play in the same way. I will ask Colin to give some more detail around this. He is more familiar with the procedures that are used within the EPA around assessment schemes.*
>
> ***Mr Murray****: Most of the schemes that are referred relate to just the change of zoning of an independent property to allow for an additional use, or something like that. The vast majority of schemes that are referred to the EPA through the management provisions under the Planning and Development Act have little, if any, environmental consequence. At the other end, there certainly can be major scheme amendments, particularly metropolitan region scheme amendments — we are now going to other regions — and the Bunbury region scheme, and there are others. Some of those can have fairly significant implications, but I would not say that is greater than a large proposal assessment under 38.*[578]

7.70 The evidence of the OEPA was also that a proposal could be assessed even if made under an assessed scheme:

> ***The CHAIRMAN****: I am just trying to get the terminology clarified. Would a proposal made under a strategic scheme be considered possibly a derived proposal?*

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577 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p22.

578 Ms Michelle Andrews, Acting General Manager, and Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p21.

> ***Mr Murray**: No, because the provisions under the planning act say that once the EPA has assessed a scheme, implementation of that scheme cannot be reassessed by the EPA unless there are matters that are in addition to those which the EPA has already assessed. That is what we call "deferred factors". If all of the issues that development under a scheme raised had been assessed by the EPA, the EPA has no right to reassess a proposal. We do not call them proposals because we try to distinguish between them. A proposal is defined under section 38; a scheme is defined under section 48, so we would normally refer to it as a development or a subdivision, or whatever is the specific instrument.*
>
> ***The CHAIRMAN**: If you assessed a scheme that provided for an industrial area and then you had a development proposal for an industry within the industrial area, there would still be circumstances in which the EPA would assess that proposal?*
>
> ***Mr Murray**: Correct. That would be on the basis that there would be matters that clearly would not have been addressed through the scheme, so they would still be outstanding and the EPA could assess that as a proposal.*[579]

7.71 Section 38(2) of the EP Act provides:

> *In the case of a proposal under an assessed scheme, only the proponent can refer the proposal to the Authority under subsection (1).*

and section 3 defines "*proposal under an assessed scheme*" as:

> *an application under the assessed scheme or an Act for the approval of any development or subdivision of any land within the area to which the assessed scheme applies.*

7.72 However, section 38(5)(a) requires a decision-making authority to refer a significant proposal subject to section 48I, which requires a responsible authority to refer a proposal under an assessed scheme if, in the opinion of the responsible authority, that proposal raises one or more environmental issues that were not assessed in any assessment of the assessed scheme or the proposal does not comply with the assessed scheme.

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579 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p22.

7.73 There is no provision in the EP Act for public comment, or appeal, on the decision not to refer (or to refer) a proposal under an assessed scheme to the EPA. There is no provision to refer a proposal in the event the environmental issues raised by the proposal were not fully addressed in the assessment of the scheme or circumstances or scientific knowledge have developed since that assessment.

7.74 The ESAG Appeal Report stated:

> *appeals under s48(1)* [sic] *and s48D should be treated similarly to appeals against the EPA report on assessment of a proposal under s44.*[580]

7.75 Section 48(1) of the EP Act deals with control of implementation of a proposal. The reference in the ESAG Appeal Report appears to be to section 48B(1).

Whether EPA decision as scope and content of environmental review of a scheme is subject to "*appropriate*" review

Introduction

7.76 The powers conferred on the minister by section 43 of the EP Act may only be exercised in respect of the environmental impact assessment of a proposal. As noted in paragraph 4.103, section 48E of the EP Act confers an equivalent power on the Minister for Environment to - with the consent of the Minister responsible for the scheme - to order the EPA to assess or re-assess a scheme more fully or more publicly.

No administrative procedure in respect of consultation/opportunity for public comment

7.77 The OEPA's response speaks of the need for "*other processes*" to resolve disagreements in respect of the scope of the review of a scheme and the Written Answers of the Office of the Appeals Convenor states:

> *The EPA's proposed amendments to the Administrative Procedures will allow early input by all parties.*[581]

7.78 However, as set out in Chapter 4, the Draft Administrative Procedures state, in respect of schemes:

> *The intent of the 1996 amendments to the Environmental Protection Act 1986 and the planning legislation was to ensure environmental*

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580 Environmental Stakeholder Advisory Group, *The Appeals Process*, September 2009, p8

581 Written Answers of the Office of the Appeals Convenor tabled during the hearing with Mr Anthony Sutton, Appeals Convenor, and Mr Jean-Pierre Clement, Deputy Appeals Convenor, Office of the Appeals Convenor, 15 February 2010, p10.

> *factors are considered early in the planning process, as part of the scheme formulation or rezoning process. …*
>
> *The EPA will develop detailed procedures for the assessment of schemes in consultation with the relevant planning authorities.*[582]

7.79 This does not appear to contemplate an opportunity for public comment to, or consultation with, the EPA.

Review at EPA report and recommendations

7.80 An appeal at the later stage of EPA report and recommendations raises the same issues as the appeal at that stage in respect of the EPA report and recommendations in respect of the level of assessment of a proposal. The distinction is that the extra expense, uncertainty and delay, is experienced by the entity proposing the scheme, not a proponent.

Section 48E process

7.81 Section 43 of the EP Act does not confer power on the Minister for Environment in respect of a scheme. Section 48E of the EP Act, however, provides an equivalent power in respect of schemes, subject to that power being exercisable only with the agreement of the Minister responsible for the scheme (see paragraph 4.103).

Finding 45: The Committee finds that the content of any EPA instructions set out in the public record under section 48B(1) of the EP Act in respect of the scope and content of the environmental review of a scheme will not be subject to appropriate review in the event of enactment of clause 5(1)(b) of the Bill.

582 'Final Draft Environmental Impact Assessment Administrative Procedures 2010' provided with letter from Ms Michelle Andrews, Acting General Manager, Office of the Environmental Protection Authority, 30 March 2010, p13.

Recommendation 14: The Committee recommends that subclause 5(1)(b) of the Bill be amended to delete the reference to section 100(1)(c) of the EP Act. This can be effected in the following.

In the event Recommendation 12 is adopted

Page 3, line 19 - To delete the line

In the event Recommendation 12 is not adopted

Page 3, line 19 - To delete "and (c)"

Consequential amendments to the Bill

7.82 Amendment of clause 5(1)(b) of the Bill to delete the reference to section 100(1)(c) of the EP Act has the consequence that the reference to sections 100(1)(c) of the EP Act in other clauses of the Bill, proposing deletion of references to section 100(1)(c) in sections of the EP Act setting out:

- the time for lodging an appeal - clause 5(2) of the Bill;
- the Minister for Environment's powers on an appeal - clause 6(2) of the Bill;
- the effect of lodging an appeal - clause 6(3) of the Bill;
- providing that certain requirements in respect of preliminary actions of the Appeals Convenor do not apply to appeals under section 100(1)(c) - clause 7; and
- providing certain obligations impose don the EPA do not apply to appeals under section 100(1)(c) - clause 7,

should also be deleted.

Recommendation 15: The Committee recommends that references to section 100(1)(c) of the EP Act be deleted from clauses 5(2), 6(2) and 6(3) of the Bill. This can be effected in the following manner.

Page 4, line 2 - To delete "(c),"

Page 5, line 6 - To delete the line

Page 5, line 8 to 15 - to delete the lines

Page 5, lines 21 to 30 - to delete the lines

CLAUSE 5(1)(d) - DELETION OF SECTION 100(1)(f) OF THE EP ACT: APPEAL AGAISNT EPA DECLARATION THAT A PROPOSAL IS A DERIVED PROPOSAL

Introduction

7.83 The provisions of the EP Act, and evidence, in respect of strategic and derived proposals are set out in Chapter 4, paragraphs 4.114ff. In summary, if the EPA declares a proposal to be a derived proposal, it is declaring that the environmental impacts of a proposal have been adequately assessed under the strategic assessment process. The EPA is only to assess a derived proposal for the purposes of conducting an inquiry as to whether any implementation conditions should be changed (section 39B of the EP Act).

7.84 The evidence was that the strategic assessment provisions have been little used. They were not well explained by the government departments.

7.85 The Committee found that there is uncertainty amongst stakeholders as to what constitutes:

- a strategic proposal as distinct from a strategic assessment of a scheme; and
- a strategic proposal as distinct from a proposal,

and, where a scheme has been subject to strategic assessment, what constitutes:

- a proposal under the assessed scheme as distinct from a proposal that requires referral to the EPA under section 38 of the EP Act; and
- a proposal under the assessed scheme as distinct from a derived proposal

7.86 The Committee recommended that the Minister clarify that SEA is a "*level of assessment*" for the purposes of section 100(1)(b) of the EP Act; and if not, the relationship between designating a proposal referred to the EPA pursuant to section 38 of the *EP Act* as one that will be subject to "*strategic environmental assessment*" and section 39(1)(b) of the *EP Act.* (Recommendation 2)

7.87 The Committee also found that the appeals against EPA decisions:

- as to level of assessment of a strategic proposal;
- in respect of the instructions as to the scope and content of an environmental review of a scheme; and
- declaration that a proposal is a derived proposal,

provide a critical mechanism for public and proponent comment, and Ministerial review, of the validity of the distinctions drawn by the EPA between schemes, strategic proposals, proposals under an assessed scheme and derived proposals in the circumstances of uncertainty set out in Finding 12.

7.88 Chapter 4, paragraphs 4.142ff set out the evidence as to the period for which a strategic assessment may apply. It can be seen that the OEPA contemplates that strategic assessments will have a longer period of operation than the "*normal*" five years and that the CCWA expresses concern that there could be a situation:

> *where up to five years later, or even 10 years later, a proponent comes with a very significant project, and things have dramatically change din the way the community perceives these issues* (see paragraph 4.145),

yet there is no appeal against the EPA decision that a proposal is a derived proposal.

Explanation for deletion of appeal

7.89 The Second Reading Speech explained deletion of the right of appeal against the EPA decision to declare a proposal a derived proposal as:

> *intended to streamline the administrative process for declaring a proposal a derived proposal and encourage greater use of strategic assessments. Strategic proposals are subject to the same appeal rights as other proposals, and the notice declaring a proposal to be a derived proposal must be published. The EPA's administrative procedures will state that the reasons for the declaration are to be*

> *included in the published notice. These measures should safeguard expectations for accountability and transparency.*[583]

7.90 The OEPA evidence as to primary reason for lack of use of the strategic proposal provisions was:

> *My discussions with industry about trying to encourage them to use the strategic proposal more has been: they are interested, but in recent years they have not been ready. The reason they are not ready is their development proposals are on very tight time frames and there is a "just-in-time" approach that industry has been taking for that.*[584]

7.91 The second reason provided was a desire for certainty about the process and obligations in view of the fact that the provisions had been little used.[585]

7.92 The Committee enquired how deleting the appeal would increase the utilisation of strategic assessments. The OEPA's response was:

> *It gives them more certainty. You raised the point earlier about certainty. They believe that the EPA is a body that is competent and capable to be able to make that decision. Provided they fit the framework, which really is set by the minister and the statement that is issued, they believe that that gives them more certainty about what a derived proposal can be. It is the implementation of a derived proposal that is really important to them.*[586]

7.93 Commenting on the Urban Development Institute of Australia WA Division Inc's advice as to developers' desire for certainty in the planning process, the Standing Committee on Legislation said, in its Report 39 *Planning Legislation Amendment Bill 1995* (which inserted the provisions relating to the environmental review of schemes into the EP Act):

> *6.2 To put it bluntly, there is no such thing as absolute certainty. Human society, human knowledge and human needs are dynamic. They are not fixed and capable of being determined with certainty. … At the turn of the century roads had to be planned for horses and buggies; now they have to be planned to take into account automobile traffic, congestion and*

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583 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, pp9406-7.

584 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence,* 8 February 2010, p23.

585 Ibid.

586 Ibid.

> *pollution. Yesterday's toxic waste dump is today's residential development (eg Love Canal in North America). To seek absolute certainty and security for a desired land use may be illusory.*
>
> *6.3 The best that can be achieved in terms of certainty is **reasonable** certainty.*[587]
>
> (Original emphasis)

7.94 The Committee endorses this statement.

Submissions

7.95 The EDO's view that the criteria stipulated in section 39B of the EP Act for declaration of a proposal as a derived proposal are subjective is set out in chapter4, paragraph 4.148. It also noted the stakeholder consensus that there be greater use of strategic assessments and said:

> *Therefore this process, and the appeal rights attached to it, are likely to be increasingly significant in the future.*
>
> *… If the EPA declares that a project constitutes a derived proposal, it is effectively saying that the impacts of a proposal have already been adequately assessed under a strategic assessment process, there fore the project itself does not require an environmental assessment. In our view this is a very significant decision for the future determination of the project, which should be subject to a right of appeal.*
>
> *...*
>
> *The decision that a proposal is a derived proposal means that the proposal will not need further assessment under Part IV, regardless of how significant the proposal may be. In our view it is the kind of decision which should be the subject of a third party right of appeal.*[588]

7.96 The Committee notes that section 39B in fact provides for a limited assessment of a derived proposal to be carried out under section 46(4) of the EP Act. However, this would not meet the EDO's concerns.

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587 Western Australia, Legislative Council, Standing Committee on Legislation, Report 39, *Planning Legislation Amendment Bill 1995*, 15 May 1996, p14.

588 Submission No 9 from Environmental Defender's Office Western Australia (Inc), 11 January 2010, p3

7.97 The Busselton-Dunsborough Environment Centre also submitted:

> *This proposed amendment removes the community's right to appeal a decision that a project is a 'derived proposal' which would suggest that the impacts of a proposal have already been assessed under a strategic environment assessment and require no further environmental assessment. This could be disputed by the community but no avenue will exist for this to be clarified.*[589]

7.98 Dr Matthews said;

> *It is suggested that strategic assessment processes are adequate to ensure the impacts of a particular proposal have been thoroughly assessed. This is unlikely to be the case as a strategic assessment is by its nature high level and often across a wide region. The strategic assessment may also be undertaken several years before specific proposal are developed. A strategic regional assessment cannot consider all of the impacts of any possible future proposal to the interests of stakeholders affected by particular proposals.*[590]

7.99 The Committee is of the view that these are valid points.

Whether EPA decision to declare a proposal a derived proposal is subject to "*appropriate*" review

Introduction

7.100 The Committee found in Chapter 6 that each of the decisions the subject of the appeals that it was proposed to delete by clause 5(1) of the Bill was of the nature that should be subject to review (Finding 26).

7.101 The Executive's view that: administrative provision of opportunity for public comment prior to the EPA being made; later opportunity to appeal against the EPA report and recommendations; and the potential for Ministerial intervention under section 43 of the EP Act constitute appropriate review of the decision, has been set out in Chapter 6. (Findings 32, 33 and 37.)

Section 43 power may not be available in respect of proposal declared a derived proposal

7.102 Once a proposal has been declared a derived proposal, section 39B(6) of the EP Act provides that the EPA is not to assess the proposal except for the purposes of conducting an inquiry under section 46(4). That section limits the EPA's inquiry to

589 Submission No 10 from the Busselton-Dunsborough Environment Centre, 11 January 2010, p2

590 Submission No 6 from Dr Margaret Matthews, 11 January 2010, p1

one of whether the implementation conditions relating to the proposal should be changed. Section 46(1) of the EP Act confers power on the Minister to request the EPA to inquire into any implementation condition that the Minister considers should be changed.

7.103 In these circumstances, it is questionable whether section 43 of the EP Act empowers the Minister to direct the EPA to assess a derived proposal more fully or more publicly. The OEPA's evidence was:

> ***The CHAIRMAN****: However, will not the power of the minister under section 43 still apply?*
>
> ***Mr Murray****: Once the minister has issued the statement that the strategic proposal can be implemented, section 43 may or may not be limited. I must say, that is a point that I have not looked at. I would be quite happy to take that one on notice.*[591]

7.104 No additional information was provided by the OEPA.

No review of decision at EPA report and recommendation stage

7.105 As noted above, section 39B of the EP Act provides that in the event the EPA declares a proposal to be a derived proposal, the EPA is not to assess the proposal except for the purposes of conducting an inquiry under section 46(4).

7.106 The right of appeal against the EPA report and recommendations on its inquiry conducted under section 46(4) of the EP Act will not, therefore, address the question of whether the proposal should have been declared a derived proposal but will be restricted to the ambit of the inquiry permitted by section 46(4).

7.107 It is notable that section 45A of the EP Act provides that on a section 39B declaration being final (in recognition of the current appeal rights), the implementation agreement or decision previously made under the strategic assessment takes effect. There is no requirement to wait for the EPA report and recommendations in respect of its section 46(4) inquiry.

Committee's conclusions and findings

7.108 All stakeholders would like to see greater use of strategic assessments. They are anticipated to provide greater certainty for proponents and for broad-scale consideration of environmental impacts.

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591 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p23.

7.109 However, there are is a considerable amount of uncertainty surrounding the circumstances in which the EPA is to exercise its discretion as to whether to declare a proposal a derived proposal. This is a critical decision which is not subject to merits review by reason of the later appeal against the EPA report and recommendation and is not amenable to rectification by exercise of powers conferred on the Minister by section 43 of the EP Act.

Finding 46: The Committee finds that the EPA decision to declare a proposal a derived proposal will not be subject to appropriate review in the event of enactment of clause 5(1)(d) of the Bill.

Recommendation 16: The Committee recommends that that subclause 5(1)(d) of the Bill be deleted from the Bill. This recommendation may be effected in the following manner:

Page 3, line 24 - To delete the line

7.110 Amendment of clause 5(1)(d) of the Bill to delete the reference to section 100(1)(f) of the EP Act has the consequence that the reference to sections 100(1)(f) of the EP Act in other clauses of the Bill, proposing deletion of references to section 100(1)(f) in sections of the EP Act setting out:

- the obligation to await the time for lodging of an appeal under section 100(1)(d) of the EP Act, or the dismissal of an appeal, before the EPA declaration that a proposal is a derived proposal becomes "*final*" - clause 4 of the Bill;
- the time for lodging an appeal - clause 5(2) of the Bill;
- the Minister for Environment's powers on an appeal - clause 6(1)(b) and (d) of the Bill; an
- the effect of lodging of an appeal - clause 6(3)(a)

should also be deleted.

Recommendation 17: The Committee recommends that the following consequential amendments be made to the Bill on deletion of subclause 5(1)(d). This can be effected in the following manner

Page 3, lines 3-10 - To delete the lines

Page 3, lines 25-27 - To delete the lines

Page 4, line 2 - To delete "or (f)"

Page 4, line 20 - To delete "or (f)"

Page 4, lines 26 to 30 - To delete the lines

Proponent's remaining right of appeal against EPA decision not to declare a proposal a derived proposal

7.111 In Chapter 4, the Committee found that in order to give effect to the stated intent of the Executive, the Bill required amendment to provide for: deletion of section 100(2) of the EP Act; and consequential amendments to sections 100(3a)(d), 101(1), 101(1)(dc), 101(2) and 101(3) (Finding 14).

Recommendation 18: The Committee recommends that, in the event the Legislative Council passes clause 5(1)(d) of the Bill it amend the Bill to provide for deletion of section 100(2) of the EP Act and consequential amendments to sections 100(3a)(d), 101(1), 101(1)(dc), 101(2) and 101(3). This can be effected in the following manner

Page 4, line 10 - To insert

(3) In section 100 delete paragraph (2)

(4) In section 100(3a) delete paragraph (d)

Page 4, 14 - To insert after line 14

(aa) delete ", (2)"

Page 4, lines 26 to 30 - To delete the lines and to insert

(d) delete (dc)

Page 5, line 10 - To delete "or (2)"

Simplified Recommendations

7.112 In the event the Legislative Council accepts the Committee's Recommendations11 to18 , clauses 4 to 8 of the Bill require deletion. This can be done in a simplified manner, which avoids unintended remnants of the clauses remaining after deletion of the references to particular provisions.

Recommendation 19: The Committee recommends that the Legislative Council give effect to the deletion of clauses 4 to 8 of the Bill in the following manner

Page 3,lines 1 to 28 - To delete the lines

Page 4, lines 1 to 30 - To delete the lines

Page 5, lines 1 to 30 - To delete the lines

CHAPTER 8

CLAUSES 9 AND 10 - APPEALS IN RESPECT OF PERMITS TO CLEAR NATIVE VEGETATION, WORKS APPROVALS AND LICENCES

INTRODUCTION

8.1 Clauses 9 and 10 of the Bill propose the following amendments to Part VII of the EP Act:

- section 101A - reduction of the time within which to appeal against the refusal of a permit to clear native vegetation, or amendment of a condition on which the clearing permit was granted, from 28 to 21 days; and
- section 102 - deletion of third party appeal rights in respect of the refusal, revocation, suspension or cancellation of a clearing permit, works approval or licence.

8.2 The relevant provisions of the EP Act have been set out in Chapter 3.

CLAUSES 9(1) AND (2) - REDUCTION OF TIME TO APPEAL IN RESPECT OF CLEARING PERMITS

Purpose of amendments

8.3 The Committee clarified at the hearing that the Second Reading Speech advice that Part VII of the EP Act was being amended by the Bill to "*align appeal periods across environmental regulation processes*"[592] was directed at clauses 9(1) and (2), which reduce the time within which to appeal against the grant or refusal of a permit to clear native vegetation, or a condition on which the clearing permit was granted, from 28 to 21 days.[593]

8.4 The Second Reading Speech gave the following additional explanation for these clauses:

> *the appeal periods for various clearing permit appeal types were set at 28 days in the 2003 EP Act amendments as a result of concern*

592 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9407.

593 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p2. (Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p5)

> *about inadequate mail service in regional areas. As the appeal period does not commence until the applicant has been notified, the appeal period for clearing permit decisions will be reduced from 28 days to 21 days to align with other environmental regulation functions under part V of the EP Act.*[594]

Evidence of DEC

8.5 At the hearing, the Committee noted that while the period for making an appeal would not commence to run until receipt, by registered mail, of the CEO's decision, there might be delay in the Department's receipt of the appeal due to inadequate mail service. DEC's response was:

> *It is usual practice for most appeals to be made electronically by either fax or email. It is very unusual for an appeal, in this day and age, to be made using old-fashioned snail mail.*[595]

8.6 DEC advised that no problems were experienced with the 21 day period for appeals against decisions in respect of works approvals and licences. DEC also pointed to the fact that appeals against the EPA's decisions on whether to assess a proposal, and recommendations in its assessment report, are to be commenced within 14 days.[596]

Submissions and evidence of CCWA

8.7 None of the submissions addressed this amendment.

8.8 The Western Australian Farmers Federation made a global statement that none of the amendments proposed by the Bill appeared to benefit its members.[597] CME and DMP made general statements supporting the intent to streamline the approval process.

8.9 CCWA's response to the proposed amendment was:

> *my advice is that is bringing it into accord with some of the other time frames that are prescribed in the act. Certainly, it does reduce the amount of time that we have to comment on these things. As Nick has outlined, that is a substantial issue. In our view, ideally, these things*

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[594] Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p9407.

[595] Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010, p5.

[596] Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010, p5.

[597] Submission No 2 from The Western Australian Farmers Federation, 7 January 2010, p2.

should be extended rather than shortened, but I do not think that is the most important or impactful part of this amendment bill.[598]

Practical effect of clauses 9(1) and (2)

8.10 Country Members of the Committee have personal experience of the vagaries of electronic methods of communication in rural Western Australia.

8.11 However, it is noted that current time within which to appeal clearing permit decisions is in excess of that allowed in respect of other appeal periods under the EP Act.

8.12 To the extent that it reduces or restricts the clearing or method of clearing permitted by the permit, a decision made in respect of the amendment of a condition of a clearing permit has effect regardless of an appeal by a third party.[599] It would seem to follow that where a less onerous condition results from the amendment, the decision does not have effect pending an appeal.

8.13 Reduction of the period of time within which to lodge a third party appeal against amendment of a condition has, therefore, potential to reduce delay and uncertainty for the permit holder.

8.14 Where there is an applicant appeal against refusal of a clearing permit, the decision has effect regardless of the lodging of the appeal.[600] Reduction of the period in which to appeal against refusal has, therefore, potential to reduce uncertainty for those objecting to grant of a permit.

No issues arising under the FLPs

8.15 Clauses 9(1) and (2) of the Bill do not raise any issues under the fundamental legislative scrutiny principles.

Finding 47: The Committee finds that clauses 9(1) and (2) of the Bill do not raise any issues under the fundamental legislative scrutiny principles.

598 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p18.

599 Section 101A(7) of the *Environmental Protection Act 1986.*

600 Section 101A(6) of the *Environmental Protection Act 1986.*

CLAUSES 9(3) AND 10

Purpose of the amendments

8.16 In respect of the proposed deletion of the third party rights of appeal against decisions made under Part V of the EP Act, Hon Donna Faragher MLC, Minister for Environment said in the Second Reading Speech:

> *Finally, various appeal provisions apply to third parties in respect of refusals, suspension or revocations that are not used by third parties, as they affect the rights of the applicant or approval holder only, and are, therefore unnecessary.*[601]

CNV review findings and recommendations

8.17 The CNV Report said:

> *The Committee supports the retention of existing appeal provisions associated with applications to clear native vegetation and notes the opportunity for appeals to be dismissed quickly if considered groundless or vexatious.*[602]

Evidence of DEC

8.18 DEC response to the CNV Report's support for retention of existing clearing permit appeal provisions was:

> *The committee's finding is that existing appeal rights under part 5, division 2, should not be reduced. The amendments proposed in the bill do not materially affect any rights that are currently exercised by applicants, approval holders or third parties. … There is no significant effect on approval rights as a result of the proposal to remove third party appeals on refusals, revocations or suspensions. These appeal rights have never been exercised. This is because these decisions affect the applicant or approval holder only.* [603]

8.19 The Committee notes that the context for the CNV Report's recommendation was discussion of a submission that the clearing permit appeals were a 'duplication' of the appeal against the EPA's decision not to assess a proposal. The CNV Report did not

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601 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p9407.

602 Expert Committee, *Regulation Review: Clearing of Native Vegetation*, April 2009, p23.

603 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence,* 8 February 2010, pp4-5.

confine its recommendation to particular appeal provisions, when it had an opportunity to identify unnecessary appeals.

Appeal rights not utilised

8.20 DEC also said in respect of deletion of these appeals generally:

> ***Hon HELEN BULLOCK****: Has the third party appeal been used a lot in the past?*
>
> ***Mr McNamara****: It is used frequently when we propose to grant a permit in respect of both the granting and the conditions, but it has never been exercised when we have refused a permit, except by the applicant. It has never been exercised by a third party.*
>
> ***Ms McEvoy****: That is correct. The same experience is the case for works approvals and licences going back to 1987, when the act commenced. The reason it would be the same as for clearing permits is that only the applicant is materially affected by that refusal, rather than a third party. That does not prevent a third party assisting the applicant in preparing an appeal; legal advice is frequently sought by applicants.*[604]

8.21 As observed in Chapter 3, there does not appear to be any prescribed process by which third parties are notified of the CEO's decisions to revoke or suspend works approvals or licences. Decisions to refuse appear to be published in *The West Australian* as matter of administrative practice.[605]

Submissions and evidence of CCWA

8.22 None of the submissions directly addressed the amendments proposed by clauses 9(3) and 10 of the Bill.

8.23 Peel Preservation Group Inc noted that it is the local people who are most likely to understand the environmental impacts of a proposal concerning the clearing of good quality vegetation and effects on fauna.[606]

8.24 The Western Australian Farmers Federation made a global statement that none of the amendments proposed by the Bill appeared to benefit its members.[607] CME and DMP made general statements supporting the intent to streamline the approval process.

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604 Mr Keiran McNamara, Director General, and Ms Sarah McEvoy, Principal Policy Officer, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p6.

605 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p7.

606 Submission No 23 from Peel Preservation Group Inc, 11 January 2010, p11.

8.25 The CCWA evidence supported the advice from DEC that the relevant appeals are not seen as necessary to protect third party interests. CCWA advised that it was unlikely to utilise the particular appeal provisions as:

> *Essentially, we would be appealing on behalf of a proponent, if we were to do that, which is relatively unlikely.*[608]

Practical effect

8.26 The evidence is that these third party appeal rights are not used and no submission has been made that they serve any particular purpose.

8.27 A decision made in respect of the refusal of a permit or revocation or suspension of a clearing permit has effect notwithstanding the lodging of a third party appeal.[609]

8.28 A decision made in respect of the refusal of a works approvals and licences or revocation or suspension of a works approvals and licences also continues to have effect notwithstanding the lodging of an appeal.[610]

8.29 Although removal of these rights of appeal would appear to have little impact on delay, there may be some benefit in certainty to the decision-makers.

No issues arising under the FLPs

8.30 Applicants' and holders of permits, works approvals and licences retain the right to appeal the various decisions affecting their interests.

8.31 The evidence is that third party review of the relevant decisions is not utilised.

8.32 There has been no submission or evidence suggesting that deletion of the third party appeal rights renders the remaining review of the relevant decisions inappropriate.

8.33 Clauses 9(3) and 10 raise no issues under the FLPs.

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607 Submission No 2 from The Western Australian Farmers Federation, 7 January 2010, p2.

608 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence,* 15 February 2010, p18.

609 Section 101A(6) of the *Environmental Protection Act 1986*.

Finding 48: The Committee finds that clauses 9(3) and 10 of the Bill raise no issues under the fundamental legislative scrutiny principles.

610 Section 102(4) of the *Environmental Protection Act 1986*

CHAPTER 9

CLAUSES 13 TO 16 - MINOR OR PRELIMINARY WORK

INTRODUCTION

9.1 Clause 13 of the Bill proposes a new subsection, 41(4), which will provide that sections 41(2) and (3) (prohibiting a decision-making authority from making a decision that will have the effect of implementing a proposal pending the determination of the environmental impact assessment process) do not apply:

> *if the effect of the decision would be to cause or allow the doing of minor or preliminary work to which the Authority has consented under section 41A(3).*

9.2 Clauses 14, 15 and 16 propose equivalent amendments to sections 51F, 54 and 57 (respectively: providing that the CEO is not to perform any duty in respect of applications for a clearing permit, works approval or licence that is "*related to a proposal*" while any decision-making authority is precluded by section 41 from making a decision), each providing that:

> *Subsection … does not apply if the application is for a clearing permit/works approval/licence for the purpose of doing minor or preliminary work to which the Authority has consented under section 41A(3).*

9.3 Section 41A(1) restricts a person from implementing a proposal prior to publication of the Section 45(5) Statement. Section 41A(3) provides:

> *Subsection (1) does not apply to minor or preliminary work done with the Authority's consent.*

Purpose of the amendments

9.4 In the Second Reading Speech to the Bill, Hon Donna Faragher MLC, Minister for Environment said, referring to section 41A of the EP Act:

> *It is an offence for a person to do anything to implement a proposal if the Environmental Protection Authority has set out in the public record its decision that the proposal is to be assessed before a statement allowing its implementation is published. If the EPA consents to minor or preliminary work, this offence does not apply. However, the authority's consent currently does not affect the constraints on decision makers under section 41 of the EP act. … It*

> *is recognised that some decisions are incidental or of minor significance to the Minister for Environment's decision after consultation, and that decision-making authorities should not be constrained from making a decision that could have the effect of causing or allowing these minor and preliminary works to be implemented subject to the authority's consent.*[611]

9.5 In introducing section 41A through the *Environmental Protection Amendment Bill 2003*, Hon Kim Chance, then Leader of the House, said in the Second Reading Speech:

> *The first is proposed section 41A, under which it would be an offence to implement a proposal subject to assessment before the assessment is completed. At present the Act relies upon the fact that a proposal is likely to require approval under other legislation. Experience has shown that this is not always the case. When other approvals are required, they are not necessarily related to protecting the environment; therefore, the penalties and powers may be completely inadequate to provide a disincentive to protect the environment.*
>
> *Under the present legislation there have been instances where proponents have apparently gone ahead with implementing proposals before the EPA's assessment of the proposal was completed, leaving the Department of Environmental Protection powerless to take action. … There is provision for a small exception in proposed section 41A(4) when the EPA may consent to some minor or preliminary work. Examples might be the erection of fencing and signage, which may be part of the proposal and may also help to protect the environment while the assessment proceeds.*[612]

9.6 Section 41A was, therefore, introduced to the EP Act as a restrictive, not an enabling, provision to address the situation where approval of a proposal under other legislation did not provide the necessary protections for the environment.

Submissions

9.7 The only submission to address these clauses of the Bill was that of CME. CME is of the view that section 41 of the EP Act should be deleted.[613] In the event it is not, it

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611 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, pp9407-08.

612 Hon Kim Chance MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 November 2009, p2638.

613 Submission No 11 from The Chamber of Minerals and Energy Western Australia, 11 January 2010, p2.

supports what it describes as "*the clarification*" proposed in relation to minor or preliminary works.

PROCESS FOR EPA CONSENT TO MINOR OR PRELIMINARY WORK

What constitutes "*minor or preliminary work*"

9.8 The term "*minor or preliminary work*" is not defined in the EP Act. In that circumstance, the EPA uses the ordinary meaning.[614]

9.9 The New Shorter Oxford Dictionary relevantly defines:

- "*minor*" as:

  comparatively unimportant or insignificant; (of an operation) relatively simple or small scale …;[615]

- "*preliminary*" as:

  An action … that precedes another to which it is introductory or preparatory;[616] and

- "*work*" as:

  A thing, structure, or result produced by the operation, action, or labour of or of a person …an engineering structure … An excavated space or structure ….[617]

9.10 The OEPA explained the way the term was applied as follows:

> *The type of thing that is in mind is where there is a requirement to undertake some fairly routine but non-significant ground disturbing activity related to geophysical testing, sampling or something like that, which is not about implementing the project; it is simply about acquiring information that would better inform the assessment by the EPA.*[618]

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614 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p27.

615 *New Shorter Oxford Dictionary*, (4th Ed), Oxford University Press, Oxford, 1993, p1783.

616 Ibid, p2333.

617 Ibid, p3717.

618 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p27.

9.11 The Committee inquired whether there were guidelines as to characterising works that were minor or preliminary. The OEPA advised:

> ***Mr Murray**: It is assessed on a case-by-case basis because it is difficult to actually know what might be there but we are giving thoughts to better defining what "minor" and "preliminary" would be from an EPA perspective.*[619]

Process for EPA consent

Process not in legislation

9.12 The EP Act does not provide a process for the EPA to give consent to performance of minor or preliminary works. The Committee did not identify any relevant regulations.

9.13 Nor were any regulations identified by the OEPA:

> ***The CHAIRMAN**: Okay. What provisions of the EP act or regulations made pursuant to it set out the process for the EPA to consent to minor or preliminary works?*
>
> ***Mr Murray**: Section 41A(3) of the Environmental Protection Act has the provision for minor and preliminary works.*[620]

9.14 As noted above, section 41A(3) provides:

> *Subsection (1) does not apply to minor or preliminary work done with the Authority's consent.*

Application and consideration

9.15 The OEPA described the process of applying for, and granting of, EPA consent:

> ***Mr Murray**: A person applies to the Environmental Protection Authority seeking approval under the provision of the act and it is then considered and they would receive a written letter from the chairman of the EPA authorising or not.*
>
> ***The CHAIRMAN**: What is the EPA investigation process for consenting to minor or preliminary works? What opportunity is there for public scrutiny of the process for granting consent to a minor or preliminary work?*

619 Ibid.

620 Ibid.

> ***Mr Murray**: The requirement would be for the applicant to specify what it is that they intend to do, why they need to do it, what the context is of the assessment and to give an outline of what they believe to be the impacts resulting from that because, as I say, the whole idea is that there would be minimal impact resulting from this. We would normally go to some of the key decision-making authorities who have knowledge about it, particularly if it is related to a mining project we would go to the Department of Mines and Petroleum, to get advice about their understanding of both the need for it and also the significance of it. Quite clearly, if the application relates to a proposal that may have a significant effect on the environment, then in fact it should be coming in through section 38 and not as minor or preliminary works.*[621]

9.16 In the event of EPA and a decision-making authority disagreement as to whether works constitute minor or preliminary works: "*It is the EPA's call*".[622]

Notification of EPA decision

9.17 The process by which decision-making authorities will be advised of an EPA decision to consent to minor or preliminary works also appears to be informal.

9.18 The DEC and OEPA advised that decision-making authorities, including the CEO of DEC, are advised of the EPA decision in writing.[623]

No appeal

9.19 There is no right of appeal by any person in respect of the EPA decision on whether or not to consent to minor or preliminary works.

Lack of alignment between sections 41 and 41A

9.20 Sections 41 and 41A of the EP Act do not exactly align. Section 41 restricts a decision-making authority from making a decision that would result in implementation of a proposal from the time of referral of a proposal, whereas section 41A restricts a proponent from the later time that the EPA's decision to assess is recorded.

621 Ibid.

622 Ibid, p28.

623 Mr Colin Murray, Director, Assessment and Compliance Services, Office of the Environmental Protection Authority, *Transcript of Evidence*, 8 February 2010, p28.

9.21 However, this lack of alignment gives rise to no conflict in referring to section 41A(3) for the purposes of making a decision of the kind referred to in sections 41, 51F, 54 and 57 of the EP Act.

PRACTICAL EFFECT

9.22 It appears to the Committee that the proposed amendments result in a more consistent scheme. If a proposal can be implemented by a proponent in respect of minor and preliminary works, it appears inconsistent to restrain the decision-maker.

9.23 The CCWA's evidence was that the amendments merely reflect what is occurring in any event. When asked for its comment on clauses 13 to 16 of the Bill, CCWAsaid:

> ***Dr Dunlop****: It does not make much material difference as far as we are concerned. Minor works seem to occur anyway.*[624]
>
> …
>
> ***Mr Verstegen****: Our advice from the EPA is that those changes simply formalise an existing process; in which case, there may be no material difference.*[625]

9.24 The Committee notes that the OEPA advice as to the nature of works that the EPA considers falls into this category is consistent with the intent of the Second Reading Speech in respect of the amendment Act inserting section 41A into the EP Act.

Whether procedure for application for EPA consent and what constitutes "*minor or preliminary work*" should be regulated by subsidiary legislation

9.25 The Committee has some concerns as to the informal nature of the application for EPA consent and absence of prescription as to what constitutes "*minor or preliminary work*".

Increased importance of EPA decision

9.26 Clauses 13 to 16 of the Bill expand the situations in which a proponent may seek consent from the EPA for the performance of "*minor or preliminary work*".

9.27 In this circumstance, it appears to the Committee that the determination of what constitutes "*minor or preliminary work*" is likely to become increasingly contested and that the process for application, information required for consideration and

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624 Dr J Nicholas Dunlop, Environmental Science and Policy Coordinator, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p19.

625 Mr Piers Verstegen, Director, Conservation Council of Western Australia Inc, *Transcript of Evidence*, 15 February 2010, p20.

decision itself is likely to be of increased importance. In this circumstance, it may be appropriate for these processes to be prescribed by way of regulation, rather than governed by administrative procedures.

9.28 The Committee notes that section 122?? of the EP Act provides power for regulations to be made in respect of the EPA's decision as to whether minor or preliminary works should be permitted.

Recommendation 20: The Committee recommends that the Minister for Environment advise the Legislative Council whether it is proposed that the process for applying for EPA consent to minor or preliminary works under section 41A(3) of the *Environmental Protection Act 1986* will remain a purely administrative process.

Some ambiguity as to purpose of the amendments

9.29 In the Second Reading Speech to the Bill the Minister for Environment spoke of the purpose of the amendments as being to allow decisions that were:

> *incidental or of minor significance to the Minister for Environment's decision after consultation*[626]

9.30 While the Minister for Environment continued to speak of decisions allowing minor or preliminary works to occur, it seems to the Committee that there is potential for the amendments proposed by the Bill to shift the focus of the EPA's decision from the impact of the works themselves on the environment to consideration of whether the decision that will be enabled is "*incidental or of minor significance*" to the Minister for Environment's decision on the related proposal.

626 Hon Donna Faragher MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, pp9407.

Recommendation 21: The Committee recommends that the Minister for Environment confirm for the Legislative Council:

- **whether it is intended to extend the ambit of "*minor or preliminary work*" used in section 41A(3) of the EP Act to include work that would permit decisions "*incidental or of minor significance to the Minister for Environment's decision after consultation*"; and**
- **if so, the additional works encompassed by the extension.**

Applications in respect of which consent is required

9.31 CME raised an issue in respect of the practical effect of clauses 14 to 16 of the Bill.

9.32 CME is concerned that the requirement for the EPA to consent to minor or preliminary work in respect of applications for clearing permits, works approvals or licences applies only in respect of such work that would otherwise infringe the prohibition on implementing a proposal. This concern arises from section 51F, 54 and 57 of the EP Act applying to an application that is "*related*" to a proposal. In the CME's view, this may capture applications that fall outside that category. It is CME's belief that this is not intended.[627]

9.33 DEC confirmed that:

> *The CEO is currently more restricted in making decisions on clearing permits, works approvals and licence applications under sections 51F, 54 and 57 than other decision-making authorities. The CEO may not perform any duty imposed on him in respect of decisions on clearing permits, works approval and licence applications if the application is related to a proposal for which any decision-making authority is precluded by section 41 from making a decision that could have the effect of causing or allowing the proposal to be implemented. In other words, the CEO is constrained, not only in respect of the proposal itself, but for any related proposal.*[628]

9.34 The Committee notes that the matter raised by CME arises from the existing provisions of the EP Act, not from the Bill.

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627 Submission No 11 from The Chamber of Minerals and Energy Western Australia, 11 January 2010, p2.

628 Mr Keiran McNamara, Director General, Department of Environment and Conservation, *Transcript of Evidence*, 8 February 2010, p11.

9.35 The Committee is of the view that CME raises a policy issue, requiring the balancing competing interests. The Committee, therefore, simply reports the DEC's confirmation of the practical effect of clauses 13 to 16 of the Bill.

Hon Adele Farina MLC
Chairman

Date: 28 April 2010

APPENDIX 1

LIST OF STAKEHOLDERS

APPENDIX 1

LIST OF STAKEHOLDERS

Mr Gordon Graham, Acting Director, The Conservation Commission of Western Australia

Mr Piers Verstegan, Director, Conservation Council of Western Australia

Ms Josie Walker, Principal Solicitor, Environmental Defenders Office

Mr Peter Robertson, Manager, The Wilderness Society of Western Australia

Mr Tony Evans, Secretary, Western Australian Planning Commission

Mr David Price, Executive Director, The Law Society of Western Australia

Ms Robyn Glindemann, President, National Environmental Law Association

Ms Ricky Burges, President, Western Australian Local Government Association

Dr Paul Vogel, Chairman, Environmental Protection Authority

Ms Regina Flugge, Executive Officer, Environment and Land Access

Mr Richard Sellers, Director General, Department of Mines and Petroleum

Mr Mike Norton, President, Western Australian Farmers Federation

Ms Jenni Stawell, Director, Pastoralists and Graziers Association of Western Australia

Ms Jo Harrison-Ward, Chief Executive Officer, Fire and Emergency Services Authority of Western Australia

Mr Eric Lumsden, Director General, Department of Planning

Mr Paul Rosair, Director General, Department of Planning

Ms Debra Goostrey, Chief Executive Officer, Urban Development Institute of Australia

APPENDIX 2

INTERGOVERNMENTAL AGREEMENT

APPENDIX 2

INTERGOVERNMENTAL AGREEMENT

Intergovernmental Agreement on the Environment

AN AGREEMENT made the 1st day of May one thousand nine hundred and ninety two

BETWEEN

THE COMMONWEALTH OF AUSTRALIA of the first part,
THE STATE OF NEW SOUTH WALES of the second part,
THE STATE OF VICTORIA of the third part,
THE STATE OF QUEENSLAND of the fourth part,
THE STATE OF WESTERN AUSTRALIA of the fifth part,
THE STATE OF SOUTH AUSTRALIA of the sixth part,
THE STATE OF TASMANIA of the seventh part,
THE AUSTRALIAN CAPITAL TERRITORY of the eighth part,
THE NORTHERN TERRITORY OF AUSTRALIA of the ninth part,
THE AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION of the tenth part.

WHEREAS

On 31 October 1990, Heads of Government of the Commonwealth, States and Territories of Australia, and representatives of Local Government in Australia, meeting at a Special Premiers' Conference held in Brisbane, agreed to develop and conclude an Intergovernmental Agreement on the Environment to provide a mechanism by which to facilitate:

- a cooperative national approach to the environment;
- a better definition of the roles of the respective governments;
- a reduction in the number of disputes between the Commonwealth and the States and Territories on environment issues;
- greater certainty of Government and business decision making; and
- better environment protection;

AND WHEREAS the Parties to this Agreement

ACKNOWLEDGE the important role of the Commonwealth and the States in relation to the environment and the contribution the States can make in the development of national and international policies for which the Commonwealth has responsibilities;

RECOGNISE that environmental concerns and impacts respect neither physical nor political boundaries and are increasingly taking on interjurisdictional, international and global significance in a way that was not contemplated by those who framed the Australian Constitution;

RECOGNISE that the concept of ecologically sustainable development including proper resource accounting provides potential for the integration of environmental and economic considerations in decision making and for balancing the interests of current and future generations;

RECOGNISE that it is vital to develop and continue land use programs and co-operative arrangements to achieve sustainable land use and to conserve and improve Australia's biota, and soil and water resources which are basic to the maintenance of essential ecological processes and the production of food, fibre and shelter;

ACKNOWLEDGE that the efficiency and effectiveness of administrative and political processes and systems for the development and implementation of environmental policy in a Federal system will be a direct function of:-

i. the extent to which roles and responsibilities of the different levels of Government can be clearly and unambiguously defined;

ii. the extent to which duplication of functions between different levels of Government can be avoided;

iii. the extent to which the total benefits and costs of decisions to the community are explicit and transparent;

iv. the extent to which effective processes are established for co-operation between governments on environmental issues; and

v. the extent to which responsible Governments are clearly accountable to the electorate for the development and implementation of policy; and

ACKNOWLEDGE that in the development and implementation of environmental policy it is necessary to accommodate the regional environmental differences which occur within Australia;

THE PARTIES AGREE AS FOLLOWS:

SECTION 1 - APPLICATION AND INTERPRETATION

1.1 "Commonwealth" means the Commonwealth of Australia.

1.2 "States" means a State or Territory named as a party to this Agreement.

1.3 "Local Government" means a Local Government body established by or under a law of a State other than a body the sole or principal function of which is to provide a particular service (such as the supply of electricity or water).

1.4 "Australian Local Government Association" means the Federation of State-wide Local Government Associations of the States, constituted by Local Government bodies.

1.5 A reference in this Agreement to the words "give full faith and credit" to the results of mutually approved or accredited systems, practices, procedures or processes, means that the Commonwealth and the States acting in accordance with the laws in force in their jurisdictions, will accept and rely on the outcomes of that system or the practices, procedures or processes, as the case may be, as a basis for their decision making. In making the decision to accredit a system or practices, procedures or processes, the Commonwealth or the States may make provision for how unforeseeable circumstances or flawed execution may be taken into account. A decision to accept and rely on the outcome does not preclude the Commonwealth or the States taking factors into account in their decision making, other than those dealt with in that system or those practices, procedures or processes.

1.6 A reference to a Ministerial Council in this Agreement is a reference not to the Ministerial Council as such but to the Australian members of that Council acting separately from that Council pursuant to this Agreement.

1.7 Commonwealth responsibilities under this Agreement include ensuring adherence as far as practicable within the External Territories and the Jervis Bay Territory.

1.8 Any matters under this Agreement which are the responsibility of the Norfolk Island Assembly under the Norfolk Island Act 1979 will be referred by the Commonwealth to the Norfolk Island Government for its consideration.

1.9 In relation to each of its external Territories and the Territory of Jervis Bay, the Commonwealth has, subject to paragraphs 1.7 and 1.8 the same responsibilities and interests as each State has in relation to that State under paragraph 2.3.

1.10 Section 2.2.3 of this Agreement should be read subject to the Australian Capital Territory (Planning and Land Management) Act 1988.

1.11 The Commonwealth, the States and the Australian Local Government Association acknowledge that while the Association is a party to this Agreement, it cannot bind local government bodies to observe the terms of this Agreement. However in view of the responsibilities and interests of local government in environmental matters and in recognition of the partnership established between the three levels of government by the Special Premiers Conference process, the Commonwealth and the States have included the Australian Local Government Association as a party to this Agreement and included references in the Agreement to local government and all levels of government.

1.12 The States will consult with and involve Local Government in the application of the principles and the discharge of responsibilities contained in this Agreement to the

extent that State statutes and administrative arrangements authorise or delegate responsibilities to Local Government, and in a manner which reflects the concept of partnership between the Commonwealth, State and Local Governments.

1.13 Questions of interpretation of this Agreement are to be raised in the first instance in the appropriate Ministerial Council(s) after consultation by the Chair of the Ministerial Council with the President of the Australian Local Government Association where appropriate. Where these mechanisms do not resolve the interpretation, the matter will be dealt with by reference from the Ministerial Council(s) to First Ministers.

SECTION 2 - ROLES OF THE PARTIES - RESPONSIBILITIES AND INTERESTS

2.1 RESPONSIBILITIES AND INTERESTS OF ALL PARTIES

2.1.1 The following will guide the parties in defining the roles, responsibilities and interests of all levels of Government in relation to the environment and in particular in determining the content of Schedules to this Agreement.

2.2 RESPONSIBILITIES AND INTERESTS OF THE COMMONWEALTH

2.2.1 The responsibilities and interests of the Commonwealth in safeguarding and accommodating national environmental matters include:

i. matters of foreign policy relating to the environment and, in particular, negotiating and entering into international agreements relating to the environment and ensuring that international obligations relating to the environment are met by Australia;

ii. ensuring that the policies or practices of a State do not result in significant adverse external effects in relation to the environment of another State or the lands or territories of the Commonwealth or maritime areas within Australia's jurisdiction (subject to any existing Commonwealth legislative arrangements in relation to maritime areas).

iii. facilitating the co-operative development of national environmental standards and guidelines as agreed in Schedules to this Agreement.

2.2.2 When considering its responsibilities and interests under paragraph 2.2.1(ii), the Commonwealth will have regard to the role of the States in dealing with significant adverse external effects as determined in 2.5.5 of this Agreement, and any action taken pursuant to 2.5.5.

2.2.3 The Commonwealth has responsibility for the management (including operational policy) of living and non-living resources on land which the Commonwealth owns or which it occupies for its own use.

2.3 RESPONSIBILITIES AND INTERESTS OF THE STATES

2.3.1 Each State will continue to have responsibility for the development and implementation of policy in relation to environmental matters which have no

significant effects on matters which are the responsibility of the Commonwealth or any other State.

2.3.2 Each State has responsibility for the policy, legislative and administrative framework within which living and non living resources are managed within the State.

2.3.3 The States have an interest in the development of Australia's position in relation to any proposed international agreements (either bilateral or multilateral) of environmental significance which may impact on the discharge of their responsibilities.

2.3.4 The States have an interest and responsibility to participate in the development of national environmental policies and standards.

2.4 RESPONSIBILITIES AND INTERESTS OF LOCAL GOVERNMENT

2.4.1 Local Government has a responsibility for the development and implementation of locally relevant and applicable environmental policies within its jurisdiction in co-operation with other levels of Government and the local community.

2.4.2 Local Government units have an interest in the environment of their localities and in the environments to which they are linked.

2.4.3 Local Government also has an interest in the development and implementation of regional, Statewide and national policies, programs and mechanisms which affect more than one Local Government unit.

2.5 ACCOMMODATION OF INTERESTS

2.5.1 Between the States and the Commonwealth

2.5.1.1 Where there is a Commonwealth interest in an environmental matter which involves one or more States, that interest will be accommodated as follows:

i. the Commonwealth and the affected States will cooperatively set outcomes or standards and periodically review progress in meeting those standards or achieving those outcomes; or

ii. where outcomes or standards are impractical or inappropriate, the Commonwealth may approve or accredit a State's practices, procedures, and processes; or

iii. where the Commonwealth does not agree that State practices, procedures or processes are appropriate, the Commonwealth and the States concerned will endeavour to agree to modification of those practices, procedures and processes to meet the needs of both the Commonwealth and the States concerned;

iv. where agreement is reached between the Commonwealth and a State under (iii) the Commonwealth will approve or accredit that State practice, procedure or process.

2.5.1.2 Where it has approved or accredited practices, procedures or processes under 2.5.1.1 the Commonwealth will give full faith and credit to the results of such practices, procedures or processes when exercising Commonwealth responsibilities.

2.5.1.3. Where a State considers that its interests can be accommodated by approving or accrediting Commonwealth practices, procedures or processes, or an agreed modified form of those practices, procedures or processes, a State may enter into arrangements with the Commonwealth for that purpose.

2.5.1.4 Where a State has approved or accredited practices, procedures or processes under 2.5.1.3 that State will give full faith and credit to the results of such practices, procedures or processes when exercising State responsibilities.

2.5.1.5 The Commonwealth and the States note that decisions on major environmental issues taken at one level of government may have significant financial implications for other levels of government and agree that consideration will be given to these implications where they are major or outside the normal discharge of legislative or administrative responsibilities of the level of government concerned.

2.5.1.6 Clause 2.5.1.5 applies to each of the Schedules to this Agreement.

2.5.2 International Agreements

2.5.2.1 The parties recognise that the Commonwealth has responsibility for negotiating and entering into international agreements concerning the environment. The Commonwealth agrees to exercise that responsibility having regard to this Agreement and the Principles and Procedures for the Commonwealth-State Consultation on Treaties as agreed from time to time. In particular, the Commonwealth will consult with the States in accordance with the Principles and Procedures, prior to entering into any such international agreements.

2.5.2.2 The Commonwealth will, where a State interest has become apparent pursuant to the Principles and Procedures and subject to the following provisions not being allowed to result in unreasonable delays in the negotiation, joining or implementation of international agreements:

i. notify and consult with the States at the earliest opportunity on any proposals for the development or revision of international agreements which are relevant to Australia and which relate to the environment and will take into account the views of the States in formulating Australian policy, including consultation on issues relating to roles, responsibilities and costs;

ii. when requested, include in appropriate cases, a representative or representatives of the States on Australian delegations negotiating international agreements related to the environment. Any such representation will be subject to the approval of the Minister for Foreign Affairs and Trade, and will, unless otherwise agreed, be at the expense of the States;

iii. prior to ratifying or acceding to, approving or accepting any international agreement with environmental significance, consult the States in an effort to

secure agreement on the manner in which the obligations incurred should be implemented in Australia, consistent with the roles and responsibilities established pursuant to this Agreement.

2.5.2.3 The States will establish and advise the Commonwealth on the appropriate channels of communication, and persons responsible for consultation, to ensure that the Commonwealth can discharge its international responsibilities in a timely manner.

2.5.2.4 When ratifying, or acceding to, approving or accepting any international agreement with environmental significance, the Commonwealth will consider, on a case by case basis, making the standard Federal Statement on ratification, accession, approval or acceptance.

2.5.3 Mechanisms for Determining Commonwealth Interests

2.5.3.1 Where a State wishes to determine whether or not an environmental matter in that State will involve the interests of the Commonwealth and is not covered by any established processes, that State may request the Commonwealth to indicate whether that matter is a matter of Commonwealth interest.

2.5.3.2 On receipt of a request from a State, the Commonwealth will consult with that State. If the Commonwealth requires further information it will seek such information within six weeks. The Commonwealth will, as soon as possible, or in any event within eight weeks after the receipt of the original request, or six weeks after the provision of the further information, as the case may be, notify the State whether or not it considers that the matter does involve Commonwealth interests. If it does involve Commonwealth interests, the Commonwealth will notify all other States of the basis and scope of its interest.

2.5.3.3 Where the Commonwealth wishes to determine whether or not a State agrees that an environmental matter in that State involves the interests of the Commonwealth, it may seek advice from the State concerned and the State and the Commonwealth will, if necessary, enter into discussions on the matter within four weeks after the State receives the request for advice.

2.5.3.4 The Commonwealth and the States recognise the importance of responding to requests made under

2.5.3.1 and 2.5.3.3 in the shortest possible time.

2.5.3.5 Where there is disagreement as to whether or not there is a Commonwealth interest in an environmental matter, the Commonwealth and the States concerned will use their best endeavours to resolve the disagreement at First Minister level.

2.5.4 Duplication of Interests

2.5.4.1 With a view to eliminating functional duplication, wherever the interests of a level of Government have been accommodated, the relevant levels of Government will review the need and justification for retaining any comparable processes or institutions.

2.5.4.2 Where some duplication or overlap of interests between levels of government is unavoidable, the relevant levels of Government will seek clear and distinct liaison and consultative procedures, under mechanisms to be agreed at First Minister level, such as Ministerial Councils, to coordinate and harmonise actions and to avoid disputes.

2.5.4.3 Any review under clause 2.5.4.1 or liaison and consultation procedures under 2.5.4.2 will be guided by the need to work towards simplicity, certainty and transparency in the mechanisms relevant to the development and implementation of environmental policy, consistent with the maintenance of proper environmental protection.

2.5.5 Between the States

2.5.5.1 Where the policies, programs, projects, legislation or regulations of a State may affect the environment of another State or States, the States undertake to provide timely notification to any affected State, and appropriate consultation in relation to those policies, programs, projects, legislation or regulations.

2.5.5.2 Wherever significant adverse external effects on another State are expected or identified, the relevant States will use their best endeavours to establish appropriate mechanisms for ensuring cooperative management.

2.5.5.3 Where the States are directly and cooperatively involved with the management of significant adverse external effects and one or more of the States considers that one or more of the other States are not adequately discharging their management responsibilities, the State or States concerned will endeavour to resolve expeditiously any issue of disagreement or concern.

2.5.5.4 The States will if necessary determine what mechanism or process should be employed to resolve any disagreement or matter of concern, which mechanism or process may include inviting the Commonwealth to assist in the resolution of the matter.

2.5.6 National Interest

Notwithstanding the particular responsibilities of the Commonwealth in safeguarding and accommodating national environmental matters, the parties agree that all levels of Government have a responsibility to ensure that matters of national interest are properly taken into account in their activities.

SECTION 3 - PRINCIPLES OF ENVIRONMENTAL POLICY

3.1 The parties agree that the development and implementation of environmental policy and programs by all levels of Government should be guided by the following considerations and principles.

3.2 The parties consider that the adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and

environment. This requires the effective integration of economic and environmental considerations in decision-making processes, in order to improve community well-being and to benefit future generations.

3.3 The parties consider that strong, growing and diversified economies (committed to the principles of ecologically sustainable development) can enhance the capacity for environmental protection. In order to achieve sustainable economic development, there is a need for a country's international competitiveness to be maintained and enhanced in an environmentally sound manner.

3.4 Accordingly, the parties agree that environmental considerations will be integrated into Government decision-making processes at all levels by, among other things:

i. ensuring that environmental issues associated with a proposed project, program or policy will be taken into consideration in the decision making process;

ii. ensuring that there is a proper examination of matters which significantly affect the environment; and

iii. ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed.

3.5 The parties further agree that, in order to promote the above approach, the principles set out below should inform policy making and program implementation.

3.5.1 precautionary principle -

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

i. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

ii. an assessment of the risk-weighted consequences of various options.

3.5.2 intergenerational equity -

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3.5.3 conservation of biological diversity and ecological integrity -

conservation of biological diversity and ecological integrity should be a fundamental consideration.

3.5.4 improved valuation, pricing and incentive mechanisms -

- environmental factors should be included in the valuation of assets and services.

- polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement

- the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes

- environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

SECTION 4 - IMPLEMENTATION AND APPLICATION OF PRINCIPLES

4.1 The Schedules to this Agreement deal with specific areas of environmental policy and management and form part of this Agreement. The schedules have been prepared and are to be interpreted in accordance with Sections 1, 2 and 3 of this Agreement.

4.2 Nothing in this Agreement will affect any existing intergovernmental agreement between the Commonwealth and a State or States, or between the States, unless alterations or amendments to those agreements are proposed in accordance with any existing review process and/or any review process arising as a result of this Agreement.

4.3 For each particular Schedule included in this Agreement, the Commonwealth and the States undertake to nominate an agency or Ministry to assume primary responsibility within its jurisdiction for the issues covered in the Schedule and to inform the other parties accordingly.

4.4 Where not otherwise provided in the Schedules, existing intergovernmental arrangements will be the primary mechanisms for the cooperative application of the provisions of this Agreement.

SECTION 5 - REVIEW

5.1 The operation of this Agreement will be reviewed every three years by the presentation of a report from the relevant Ministerial Councils to the First Ministers following consultation by the Chair of the Ministerial Council with the President of the Australian Local Government Association.

5.2 The Agreement may be amended and schedules added by agreement of all First Ministers. Prior to making amendments in relation to matters specified in this Agreement, or developing any draft schedules, that involve local government, First Ministers will consult and seek the agreement of the President of the Australian Local Government Association.

IN WITNESS WHEREOF this Agreement has been respectively signed for and on behalf of the parties as at the day and year first above written.

SIGNED by the Honourable PAUL JOHN KEATING, Prime Minister of the Commonwealth of Australia

SIGNED by the Honourable NICHOLAS FRANK GREINER, Premier of the State of New South Wales

SIGNED by the Honourable JOAN ELIZABETH KIRNER, Premier of the State of Victoria

SIGNED by the Honourable WAYNE KEITH GOSS, Premier of the State of Queensland

SIGNED by the Honourable CARMEN MARY LAWRENCE, Premier of the State of Western Australia

SIGNED by the Honourable JOHN CHARLES BANNON, Premier of the State of South Australia

SIGNED by the Honourable RAYMOND JOHN GROOM, Premier of the State of Tasmania

SIGNED by ROSEMARY FOLLETT Chief Minister of the Australian Capital Territory

SIGNED by the Honourable MARSHALL BRUCE PERRON, Chief Minister of the Northern Territory

SIGNED by Councillor GRAEME BLATCHFORD FRECKER, President of the AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

SCHEDULE 1

DATA COLLECTION AND HANDLING

1. The parties agree that the collection, maintenance and integration of environmental data will assist in efficient and effective environmental management and monitoring.

2. The development of consistent standards for the description and exchange of all land-related information will be coordinated and fostered by the Australian Land Information Council in conjunction with Standards Australia and specialist groups where needed.

3. In order to avoid overlap and duplication in the collection and maintenance of all land-related data, the Australian Land Information Council will facilitate the coordination of intergovernmental arrangements (including appropriate financial arrangements) and provide mechanisms to make the data more accessible across all levels of government and the private sector. Any arrangements entered into will detail the circumstances in which the exchange and ongoing sharing of data is appropriate. The intergovernmental arrangements will be submitted to First Ministers for their approval no later than twelve months after the execution of this Agreement.

4. The collection of data on natural resources should, where possible, be integrated from the outset, in order to avoid the difficulties inherent in collating data collected with different methodologies and in different conditions.

5. The Australian Land Information Council, (through the National Resources Information Centre and the Environmental Resources Information Network where appropriate) will consult with the relevant national co-ordination bodies and, through its members, with Commonwealth and State jurisdictions, to ensure the development and maintenance of comprehensive directories of natural resource and environmental spatial datasets and to develop and maintain national natural resource data standards.

SCHEDULE 2

RESOURCE ASSESSMENT, LAND USE DECISIONS AND APPROVAL PROCESSES

1. The parties agree that the concept of ecologically sustainable development should be used by all levels of Government in the assessment of natural resources, land use decisions and approval processes.

2. The parties agree that it is the role of government to establish the policy, legislative and administrative framework to determine the permissibility of any land use, resource use or development proposal having regard to the appropriate, efficient and ecologically sustainable use of natural resources (including land, coastal and marine resources).

3. The parties agree that policy, legislative and administrative frameworks to determine the permissibility of land use, resource use or development proposals should provide for -

i. the application and evaluation of comparable, high quality data which are available to all participants in the process;

ii. the assessment of the regional cumulative impacts of a series of developments and not simply the consideration of individual development proposals in isolation;

iii. consideration of the regional implications, where proposals for the use of a resource affect several jurisdictions;

iv. consultation with affected individuals, groups and organisations;

v. consideration of all significant impacts;

vi. mechanisms to resolve conflict and disputes over issues which arise during the process;

vii. consideration of any international or national implications.

4. The development and administration of the policy and legislative framework will remain the responsibility of the States and Local Government. The Commonwealth

has an interest in ensuring that these frameworks meet its responsibilities and interests as set out in this Agreement. The Commonwealth will continue to co-operate with the States in agreed programs.

5. Within the policy, legislative and administrative framework applying in each State, the use of natural resources and land, remain a matter for the owners of the land or resources, whether they are Government bodies or private persons.

6. To ensure that State land and resource use planning processes properly address matters of Commonwealth interest, a State may refer its land and resource use planning system and its development approval process to the Commonwealth for a preliminary view, as to whether its system or process can be accredited as accommodating Commonwealth interests. In the event that the Commonwealth is of the view that the processes are inadequate to accommodate the Commonwealth interest, then the State will consider whether it wishes to review and modify the systems and processes and will consult with the Commonwealth on terms of reference for such a review.

7. A State will consult Local Government where appropriate, when undertaking any review of its land and resource use planning systems and/or development approval processes pursuant to this Agreement.

8. Where the Commonwealth has accredited a system or process within a State, the Commonwealth will give full faith and credit to the results of that system or process when exercising Commonwealth responsibilities.

9. Within twelve months of the execution of this Agreement, the parties agree to reconsider the matters contained in this Schedule with a view to incorporating any relevant findings of the ecologically sustainable development process.

SCHEDULE 3

ENVIRONMENTAL IMPACT ASSESSMENT

1. The parties agree that it is desirable to establish certainty about the application, procedures and function of the environmental impact assessment process, to improve the consistency of the approach applied by all levels of Government, to avoid duplication of process where more than one Government or level of Government is involved and interested in the subject matter of an assessment and to avoid delays in the process.

2. The parties agree that impact assessment in relation to a project, program or policy should include, where appropriate, assessment of environmental, cultural, economic, social and health factors.

3. The parties agree that all levels of Government will ensure that their environmental impact assessment processes are based on the following:

i. the environmental impact assessment process will be applied to proposals from both the public and private sectors;

ii. assessing authorities will provide information to give clear guidance on the types of proposals likely to attract environmental impact assessment and on the level of assessment required;

iii. assessing authorities will provide all participants in the process with guidance on the criteria for environmental acceptability of potential impacts including the concept of ecologically sustainable development, maintenance of human health, relevant local and national standards and guidelines, protocols, codes of practice and regulations;

iv. assessing authorities will provide proposal specific guidelines or a procedure for their generation focussed on key issues and incorporating public concern together with a clear outline of the process;

v. following the establishment of specific assessment guidelines, any amendments to those guidelines will be based only on significant issues that have arisen following the adoption of those guidelines;

vi. time schedules for all stages of the assessment process will be set early on a proposal specific basis, in consultations between the assessing authorities and the proponent;

vii. levels of assessment will be appropriate to the degree of environmental significance and potential public interest;

viii. proponents will take responsibility for preparing the case required for assessment of a proposal and for elaborating environmental issues which must be taken into account in decisions, and for protection of the environment;

ix. there will be full public disclosure of all information related to a proposal and its environmental impacts, except where there are legitimate reasons for confidentiality including national security interests;

x. opportunities will be provided for appropriate and adequate public consultation on environmental aspects of proposals before the assessment process is complete;

xi. mechanisms will be developed to seek to resolve conflicts and disputes over issues which arise for consideration during the course of the assessment process;

xii. the environmental impact assessment process will provide a basis for setting environmental conditions, and establishing environmental monitoring and management programs (including arrangements for review) and developing industry guidelines for application in specific cases.

4. A general framework agreement between the Commonwealth and the States on the administration of the environmental impact assessment process will be negotiated to avoid duplication and to ensure that proposals affecting more than one of them are assessed in accordance with agreed arrangements.

5. The Commonwealth and the States may approve or accredit their respective environmental impact assessment processes either generally or for specific purposes. Where such approval or accreditation has been given, the Commonwealth and the States agree that they will give full faith and credit to the results of such processes when exercising their responsibilities.

SCHEDULE 4

NATIONAL ENVIRONMENT PROTECTION MEASURES

General Purpose

1. The Commonwealth and the States acknowledge that there is benefit to the people of Australia in establishing national environment protection standards, guidelines, goals and associated protocols (hereinafter referred to as 'measures') with the objectives of ensuring:

i. that people enjoy the benefit of equivalent protection from air, water and soil pollution and from noise, wherever they live;

ii. that decisions by business are not distorted and markets are not fragmented by variations between jurisdictions in relation to the adoption or implementation of major environment protection measures.

Any proposed measures must be examined to identify economic and social impacts and to ensure simplicity, efficiency and effectiveness in administration.

National Environment Protection Authority

2. The Commonwealth and the States agree to set up a Ministerial Council to be called the National Environment Protection Authority. Each State and the Commonwealth will nominate a Minister to be a member of the Ministerial Council, with the Commonwealth Minister to chair the Council and decisions to be made by a two thirds majority of the members of the Ministerial Council.

3. The Authority is to be assisted and supported by:

i. a standing committee of officials, with one representative being nominated to the committee by each member of the Authority and an observer nominated by the President of the Australian Local Government Association who will seek and present the views of the Association. Each member is entitled to be accompanied by other persons who may be able to assist with the deliberations of the committee. Members of the committee will ensure that the Authority has access to appropriate scientific and technical advice on environmental matters and on the economic and social impacts of the matters considered by the Authority;

ii. a permanent Executive Officer appointed to a statutory office under the legislation establishing the Authority;

iii. appropriate personnel seconded or otherwise provided by the parties to conduct continuing or specialist ad hoc tasks, as required by the Authority.

4. The Authority and the statutory office of Executive Officer is to be established by agreed Commonwealth legislation and recognised by agreed complementary State legislation.

National Environment Protection Authority's Powers and Process

5. The Authority may establish measures for the protection of the environment for the benefit of the people of Australia, for:

i. ambient air quality;

ii. ambient marine, estuarine, and freshwater quality;

iii. noise related to protecting amenity where variations in measures would have an adverse effect on national markets for goods and services;

iv. general guidelines for the assessment of site contamination;

v. the environmental impacts associated with hazardous wastes;

vi. motor vehicle emissions;

vii. the reuse and recycling of used materials;

and shall monitor and report on their implementation and effectiveness.

6. In determining whether to adopt standards, guidelines or goals, the Authority will consider which is the most effective means to achieve the required national environmental outcomes. The Authority will also take into account existing intergovernmental mechanisms in relation to such measures.

7. The Authority will develop national motor vehicle emission and noise standards in conjunction with the National Road Transport Commission. **

8. The standards, guidelines or goals will be interpreted and applied in accordance with agreed protocols on such matters as requirements for monitoring and auditing.

9. To facilitate effective and timely public consultation, draft measures, including timetables for implementation where relevant, will be published by the Authority.

10. Publication of such drafts will be accompanied by an impact statement which includes -

i. the environmental objectives and reasons for the measures and the environmental impact of not adopting those measures;

ii. alternatives considered to achieve the desired environmental objectives and the reasons for their non-adoption;

iii. an assessment of the economic and social impact on the community and industry as a result of establishing the measures;

iv. the manner in which any regional environmental differences in Australia have been addressed in the development of the measures.

11. The Authority will notify the public of the availability of the draft measures and the associated impact statement and invite comment thereon within a specified time.

12. When finalising any measures, the Authority will give consideration to the impact statement and any comment received on the draft measures or the impact statement.

13. The Commonwealth undertakes to table in its Parliament (in accordance with the Commonwealth's existing practices in relation to delegated legislation) all measures established by the Authority, and to use its best endeavours to ensure their acceptance by the Commonwealth Parliament.

14. The tabling of any measures in the Commonwealth Parliament will be accompanied by an impact statement covering the matters referred to in clause 10 and a summary of public comment received and the response to those comments.

15. Either House of the Commonwealth Parliament can disallow any measure established by the Authority within a specified time.

16. The Commonwealth and the States agree to develop for consideration by First Ministers under clause 23, legislation which will enable the Commonwealth and State Parliaments to authorise the Authority to establish any measures. The legislation will also establish mechanisms for the application of measures in the States. The legislation will ensure that any measures established by the Authority -

a. will apply, as from the date of the commencement of the measure, throughout Australia, as a valid law of each jurisdiction; and

b. will, subject to clause 20, replace any existing measures dealing with the same matter.

Implementation, Enforcement, Impact and Reporting in Relation to National Measures

17. The Commonwealth and the States will be responsible for the attainment and maintenance of agreed national standards or goals and compliance with national guidelines within their respective jurisdictions through appropriate mechanisms such as Commonwealth and State environment protection bodies.

18. The Commonwealth and the States agree to establish a uniform hierarchy of offences and related penalty structures to apply to breaches of any requirements applied under any agreed law for the purposes of complying with the standards, guidelines or goals.

19. The measures established and adopted in accordance with the above procedure will not prevent the Commonwealth or a State from introducing more stringent measures to reflect specific circumstances or to protect special environments or environmental

values located within its jurisdiction provided there has been consultation with the Authority.

20. Nothing in this Agreement will prevent a State or the Commonwealth maintaining existing more stringent standards which are in effect at the date when the Authority comes into existence.

21. The Commonwealth and the States will prepare an annual report on the measures they adopt to attain and maintain the standards, guidelines, goals or protocols established pursuant to this Agreement and submit that report by 30 September each year to the Authority.

22. The Authority will prepare an annual report which includes the reports received from the Commonwealth and the States. The annual report will be tabled in all Parliaments, through the respective Ministers who are members of the Authority.

Action to Implement Agreements in the Schedule

23. Within twelve months of the execution of this Agreement the Working Group on Environmental Policy will, for the consideration of First Ministers:

i. prepare draft legislation to implement the agreements reached in this Schedule; and

ii. develop arrangements for consultation with relevant Commonwealth and State authorities, the Australian Local Government Association, and Ministerial Councils.

24. The Working Group on Environmental Policy will, when submitting the draft legislation to First Ministers, also submit a report on the financial arrangements necessary to give effect to the agreements set out in this Schedule.

25. Once the legislation referred to in clause 23 has been agreed to by First Ministers, the Commonwealth and the States will submit to their Parliaments, and take such steps as are appropriate to secure the passage of, the Bills containing this legislation.

Definitions

26. For the purposes of this Schedule:

i. a standard is a quantifiable characteristic of the environment against which environmental quality is assessed. Standards are mandatory.

ii. a goal is a desired environmental outcome adopted to guide the formulation of strategies for the management of human activities which may affect the environment;

iii. a guideline provides guidance on possible means of meeting desired environmental outcomes. Guidelines are not mandatory.

iv. a protocol is the description of a process to be followed in measuring environmental characteristics to determine whether a standard or goal is being

achieved or the extent of the differential between the measured characteristic and a standard or goal.

v. SCHEDULE 5

CLIMATE CHANGE

1. The parties acknowledge the potentially significant impact of greenhouse enhanced climate change on Australia's natural, social and working environment, as well as on the global community and global environments. The parties accept and support the need for Australia to participate in the development of an effective international response to meet the challenge of greenhouse enhanced climate change and note Australia's participation in the development of an international convention on climate change.

2. The parties note their endorsement of the decision to adopt an interim planning target to stabilise greenhouse gas emissions (not controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer) based on 1988 levels, by the year 2000 and reducing these emissions by 20% by the year 2005. The parties reiterate their support, as agreed in October 1990, for the interim planning target to form the basis of development of the National Greenhouse Response Strategy, subject to Australia not implementing response measures that would have net adverse economic impacts nationally or on Australia's trade competitiveness, in the absence of similar action by major greenhouse gas producing countries. The parties agree that assessment of the implementation of the National Greenhouse Response Strategy against this agreed objective will be reviewed at Special Premiers' Conferences.

3. The parties reiterate that a National Greenhouse Response Strategy based on the interim planning target must include positive measures for:

- limiting emissions of all greenhouse gases, not controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer;
- conducting further research;
- adapting to the impacts of climate change; and
- ensuring that the community understands the need for early action on measures to reduce greenhouse gas emissions.

The parties also agree that such a strategy should include measures for auditing and reporting on national greenhouse gas emissions.

4. Taking into account regional differences, the parties recognise that development and implementation of the National Greenhouse Response Strategy will require coordinated and effective action by all levels of government and the community to achieve equitable and ecologically sustainable solutions.

5. The parties agree that First Ministers have ultimate responsibility for intergovernmental considerations of and final decisions on the National Greenhouse Response Strategy.

6. To facilitate the preparation of the National Greenhouse Response Strategy, the parties agree to establish a National Greenhouse Steering Committee.

7. The National Greenhouse Steering Committee will have the following responsibilities:

v. to facilitate the development and co-ordination of an overall framework for the National Greenhouse Response Strategy;

vi. to consult with the Standing Committees of Ministerial Councils on elements for inclusion in the Strategy and activities of the Ministerial Councils and other specialised bodies such as the National Greenhouse Advisory Committee, and make recommendations to First Ministers on proposed courses of action;

vii. to encourage development of the strategy in areas where it is not being handled elsewhere;

viii. to present the Strategy to First Ministers for consideration/adoption;

ix. to recommend to First Ministers requirements for further development of the Strategy as implementation proceeds.

SCHEDULE 6

BIOLOGICAL DIVERSITY

1. The parties acknowledge that biological diversity is a major and valuable component of the environment and should be protected.

2. The parties note that the Commonwealth Government is currently preparing a draft national strategy for the conservation of biological diversity which is being pursued through the Biological Diversity Advisory Committee which has wide ranging representation, including the States.

3. The parties note that the Commonwealth is responsible for the negotiation, ratification and ensuring implementation of the proposed Biological Diversity Convention.

4. The parties note that the proposed Biological Diversity Convention, while having importance for nature conservation, is likely to have implications across a wide range of Commonwealth and State responsibilities and that the interests and responsibilities of the States and the Commonwealth which may be affected by the proposed Convention are not confined to any particular portfolios.

5. The Commonwealth will continue to provide the States with the opportunity to be represented on Australian delegations to meetings of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity. The Commonwealth and the States will continue their consultations in relation to formulating Australian policy regarding the Convention through the existing mechanisms involving the Department of Foreign Affairs and Trade and State agencies as nominated from time to time by their First Ministers.

6. Given the wide and significant implications of the proposed Convention, the Commonwealth and the States acknowledge that issues may arise which may cause a State to seek consultation in relation to the negotiations at First Minister level.

7. The Australian and New Zealand Environment and Conservation Council, in consultation with and, where appropriate, joint co-operation with, other Ministerial Councils, the agencies referred to in clause 5 and relevant organisations, will forward to First Ministers advice on:

x. the implications of implementing the proposed Convention; and

xi. the manner in which implementation of the proposed Convention may be undertaken.

8. For the purposes of clause 7, the other Ministerial Councils will include:

Australian Agricultural Council;
Australian Soil Conservation Council;
Australian Water Resources Council;
Australian Forestry Council;
Australian Fisheries Council;
Australian and New Zealand Mineral and Energy Council; and
Australian Industry and Technology Council.

SCHEDULE 7

NATIONAL ESTATE

1. The parties acknowledge that the primary role of the Australian Heritage Commission is to identify the National Estate and advise the Commonwealth on its conservation.

2. The parties further acknowledge that primary responsibility for land use and resource planning decisions rests with States.

3. The parties agree that the register of the National Estate is one of the factors that the States may consider when making land use and resource planning decisions and that Section 30 of the Australian Heritage Commission Act 1975 applies only to decisions of the Commonwealth Ministers, Departments and

Authorities. The parties recognise however that some applications of S.30 of the Act may have significant land and resource use planning implications.

4. The Commonwealth supports the current practice whereby the Australian Heritage Commission provides information on all places nominated to the Register of the National Estate or which are identified by studies, to the designated agencies in the relevant State. The Commonwealth agrees to support the current practice whereby the Commission seeks and considers the views of the relevant State on all nominated places before making a decision on interim listing.

5. Each State agrees to establish and advise the Australian Heritage Commission on appropriate channels of communication, the persons responsible for consultation and the persons responsible for coordination of responses to the Australian Heritage Commission on matters related to National Estate nominations and listings.

6. The Commonwealth supports the current practice whereby the Australian Heritage Commission provides information to the relevant local government body on places to be given interim listing status at least two months prior to any public notification of that interim listing.

7. The parties agree that systematic, thematic and/or regional assessment is the preferred basis on which to assess the national estate values of an area.

8. The Commonwealth and the States agree to facilitate joint assessment processes between the Australian Heritage Commission and the States where appropriate. In any event, existing data collections and assessment processes that conform to national estate assessment criteria which are set out in the Australian Heritage Commission Act 1975 can be accredited and relied upon by the Australian Heritage Commission as satisfying the requirements of the Commission.

9. The Commonwealth agrees that any State can negotiate with the Commission on improved forms of consultation concerning development of the Register of the National Estate generally.

10. The Commonwealth and the States agree that there will be consultation and agreement wherever possible on the timing of Australian Heritage Commission and State assessment processes.

11. Where there is an accredited or joint assessment of national estate values the Commonwealth and/or the States will give full faith and credit to the results of such assessment when exercising their responsibilities.

12. The Commonwealth and the States note that where there is an accredited or joint assessment of national estate values the Australian Heritage Commission will generally not, and in any event will not without consultation with the States, reconsider that assessment except where new and significant information is produced.

SCHEDULE 8

WORLD HERITAGE

1. The States recognise that the Commonwealth has an international obligation as a party to the World Heritage Convention to ensure the identification, protection, conservation, presentation and transmission to future generations of Australia's natural and cultural heritage of 'outstanding universal value'.

2. The Commonwealth will consult the States and use its best endeavours to obtain their agreement on the compilation of an indicative list of World Heritage properties. The States agree to consult the relevant local government bodies and interested groups (including conservation and industry groups) on properties for inclusion on the indicative list prior to submission to the Commonwealth. Should conservation or any other groups or individuals make suggestions on an indicative list direct to the Commonwealth these will be referred to the relevant State for comment.

3. The Commonwealth will consult with the relevant State or States, and use its best endeavours to obtain their agreement, on nominations to the World Heritage List.

4. Where the relevant State or States have agreed to a nomination, the preparation of that nomination for World Heritage listing will be the primary responsibility of the relevant State or States and will be undertaken in close consultation with the Commonwealth. In the case of properties that transcend State boundaries, the Commonwealth will coordinate preparation of the nomination. The Commonwealth is responsible for ensuring the nomination is in accordance with the World Heritage Convention and Guidelines and submitting the nomination to UNESCO.

5. Arrangements for the management of a property will be determined as far as practicable prior to the nomination. The management arrangements will take into consideration the continuation of the State's management responsibilities for the property while preserving the Commonwealth's responsibilities under the World Heritage Convention.

SCHEDULE 9

NATURE CONSERVATION

1. The parties agree that each level of Government has responsibilities for the protection of flora and fauna and should use their best endeavours to ensure the survival of species and ecological communities, both terrestrial and aquatic, that make up Australia's biota. The parties recognise that the protection and sound management of natural habitats is of fundamental importance to this aim and that all levels of Government should use their best endeavours to conserve areas critical to the protection of Australia's flora and fauna and the maintenance of ecological processes that ensure biological productivity and stability.

2. The parties recognise that the States have primary responsibility in the general area of nature conservation.

3. The parties recognise that the Commonwealth has a particular responsibility in the area of nature conservation in relation to:

- management of areas that lie within its own jurisdiction including the external territories and the Jervis Bay Territory, Commonwealth places and marine areas;
- Australia's obligations under international law including under treaties;
- exports, imports and quarantine.

The Commonwealth also has a particular interest in facilitating the effective and efficient co-ordination of nature conservation across all jurisdictions.

4. The parties agree that a national approach should be taken to rare, vulnerable and endangered species given that the distribution of these species and their habitats is not confined or determined by State or Commonwealth borders and that a national approach is desirable to avoid duplication of effort, to ensure appropriate outcomes and to maximise the effectiveness of available resources.

5. The parties agree that environmental management and resource use decisions taken by all levels of Government should have regard to the national distribution of species and other agreed national nature conservation considerations.

6. The Commonwealth and the States agree to cooperate in the conservation, protection and management of native species and habitats that occur in more than one jurisdiction. In addition to participating in such cooperative activities, the Commonwealth and the States may take whatever action they deem appropriate within their respective jurisdictions to protect any native species and habitats which they consider requires specific action.

7. Within one year of the execution of this Agreement, the Australian and New Zealand Environment and Conservation Council, in consultation with relevant Ministerial Councils, will develop and report to First Ministers on a strategy for a national approach to the protection of rare, vulnerable and endangered species. The Australian and New Zealand Environment and Conservation Council will provide a progress report to First Ministers within six months.

8. The report referred to in clause 7 will take into account the preparation of an 'Australian National Strategy for the Conservation of Species and Communities Threatened With Extinction' by the Endangered Species Advisory Committee which was established to advise the Commonwealth Minister of the Arts, Sport, the Environment, Tourism and the Territories and will include the following:

xv. the identification of Australia's rare, vulnerable and endangered species of flora and fauna;

xvi. the options for off reserve protection of species and habitats to complement the reserve system and the identification of ecologically significant remnant vegetation;

xvii. the manner in which all levels of Government might ensure that land or resource use decision making processes explicitly identify circumstances where there is an impact on identified rare, vulnerable and endangered species and assess the nature of this impact prior to taking a decision;

xviii. the development of mechanisms on a cooperative basis to address cross-jurisdictional problems;

xix. the setting of outcomes and goals and the allocation of tasks in relation to all States and the Commonwealth and monitoring and reporting on the achievement of those outcomes and goals;

xx. the co-ordination of any research initiatives;

xxi. the resource and financial implications and impacts of any national approach.

9. The parties recognise the threat posed to both the natural environment and agricultural and maricultural production by pest species of introduced plants and animals and acknowledge that a cooperative national approach to their control has the potential to produce savings from a reduction of duplication of existing effort. The parties agree that the Commonwealth's role should be one of facilitating co-ordinated State efforts within this national approach. Due to the nature of the threat, coordination of a national approach should be undertaken through the Australian and New Zealand Environment and Conservation Council, the Australian Agricultural Council and the Australian Fisheries Council.

10. The parties agree to co-operate in fulfilling Australia's commitments under international nature conservation treaties and recognise the Commonwealth's responsibilities in ensuring that those commitments are met.

11. The parties recognise the Commonwealth's responsibilities with regard to the implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the export of wildlife and wildlife products. The Commonwealth and the States agree to cooperate in the development of improved intergovernmental arrangements for regulating commercial use of native wildlife, including setting of nationally sustainable harvesting levels, establishment of national standards in marketing of wildlife products, and streamlining of permits and regulatory controls and enforcement.

12. The parties agree that the management of parks and protected areas is largely a function of the States. The Commonwealth has a responsibility for parks and protected areas on its own land and any parks or protected areas it establishes in Australia's maritime areas (subject to any existing Commonwealth legislative arrangements in relation to maritime areas), and to assist the States with common concerns which have been identified by the Commonwealth and the States to have national implications.

13. The parties agree that a representative system of protected areas encompassing terrestrial, freshwater, estuarine and marine environments is a significant component in maintaining ecological processes and systems. It also provides a valuable basis for environmental education and environmental monitoring. Such a system will be enhanced by the development and application where appropriate of nationally consistent principles for management of reserves.

14. The parties agree that the national approach to the conservation, protection and management of native species and habitats may include the addition of new areas to reserve systems and protected areas, some of which may be under multiple land use regimes, where such multiple land use does not adversely affect the prime nature conservation function of the reserve or protected area.

15. The parties further recognise that the establishment and management of a reserve system is not in itself sufficient to ensure the protection of Australia's flora and fauna. Off-reserve protection and management, particularly of remnant vegetation, are also required. The parties recognise the need for national co-operation to ensure that remnants that are ecologically significant on a national scale are identified; management and protection arrangements are consistent across borders; research initiatives are co-ordinated and not duplicated; and that off-reserve protection activities complement the reserve system.

16. The Commonwealth and the States agree to co-operate in the development of actions outlined in this schedule and that the Australian and New Zealand Environment and Conservation Council be the primary forum for all co-ordination of nationwide nature conservation functions.

RESERVATION BY THE NORTHERN TERRITORY

The Northern Territory in signing this Agreement notifies that it does not consider itself a party to the Intergovernmental Agreement on Road Transport entered into by the Commonwealth, States and the Australian Capital Territory, and accordingly is not bound by sub-clause 5(vi) and clause 7 of Schedule 4 to this Agreement.

The Northern Territory further notifies its intention to enter into discussions with the other parties with the objective of securing the direct participation of representatives of the Northern Territory Government concerned with transport administration in any joint or collaborative processes among the

Commonwealth, States and Territories for the establishment of measures for national motor vehicle emission and noise standards.

** See Northern Territory reservation at end of document.

Last updated: Tuesday, 10-Jul-2007 08:13:28 EST

APPENDIX 3

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 4

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

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Does the legislation have sufficient regard to the rights and liberties of individuals?

1. **Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?**
2. **Is the Bill consistent with principles of natural justice?**
3. **Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.**
4. **Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?**
5. **Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?**
6. **Does the Bill provide appropriate protection against self-incrimination?**
7. **Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?**
8. **Does the Bill confer immunity from proceeding or prosecution without adequate justification?**
9. **Does the Bill provide for the compulsory acquisition of property only with fair compensation?**
10. **Does the Bill have sufficient regard to Aboriginal tradition and Island custom?**
11. **Is the Bill unambiguous and drafted in a sufficiently clear and precise way?**

Does the Bill have sufficient regard to the institution of Parliament?

12. **Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?**
13. **Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?**
14. **Does the Bill allow or authorise the amendment of an Act only by another Act?**
15. **Does the Bill affect parliamentary privilege in any manner?**
16. **In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?**

APPENDIX 5

LETTER DATED 30 MARCH 2010 FROM OEPA

APPENDIX 5

LETTER DATED 30 MARCH 2010 FROM OEPA

GOVERNMENT OF WESTERN AUSTRALIA

Office of the Environmental Protection Authority

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Your Ref ENV
Our Ref
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Dear Ms O'Brien

Approvals and Related Reforms (No.1)(Environment) Bill 2009

I refer to your letter of 26 March 2010 following up on several matters raised during the hearing by the Standing Committee held on 8 February 2010.

The Environmental Protection Authority's (EPA) new administrative procedures for environmental impact assessment have yet to be gazetted, largely as a consequence of discussions with the Commonwealth in relation to the Bilateral Agreement. However, the draft administrative procedures were published by the EPA on 29 March 2010, (http://www.epa.wa.gov.au/docs/3151_DraftAdministrativeProcedures2010%20_2_.pdf) to give early notice on the new levels of assessment and other changes to the EIA process that the EPA intends to apply. The Procedures will only be implemented when they are published in the Government Gazette. The timing of this has yet to be determined.

As requested, please find attached a copy of the advice from the Commonwealth Department of Environment, Water, Heritage and the Arts (DEWHA) dated 18 December 2009 about their requirements for revision of the existing agreement between the Commonwealth of Australia and the State of Western Australia under Section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

The Office of the EPA and DEWHA are currently discussing and seeking advice on possible provisions to be included in the replacement bilateral agreement. As you will note from DEWHA's letter, it considers that the bilateral agreement will need to go through a public comment process before the agreement can be finalised and signed by the relevant ministers.

Yours sincerely

Michelle Andrews
A/General Manager

30 March 2010

Encl.

Australian Government

Department of the Environment, Water, Heritage and the Arts

C05/07319

Mr Colin Murray
Director, Environmental Impact Assessment Division
Environmental Protection Authority
Locked Bag 33, Cloisters Square
PERTH WA 6850

Dear Mr Murray

I refer to your letter of 9 September 2009 regarding the changes to environmental impact assessment processes in WA and seeking advice on the implications for the assessment bilateral agreement between the Commonwealth and Western Australia (WA) under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Thank you for providing a copy of the draft changes proposed to be made to the current WA Environmental Impact Assessment Administrative Procedures (the Administrative Procedures) which are provided for by the WA *Environmental Protection Act 1986* (EP Act). Staff within my branch have been discussing a more recent draft (version 4) of the Administrative Procedures with their counterparts in the Environmental Protection Authority Service Unit of the WA Department of Environment and Conservation (DEC) in order to continue to consider the possible implications for the bilateral agreement and the following advice is based on that version.

As you would be aware, the existing bilateral agreement currently accredits two WA assessment processes under the EP Act, namely assessment by way of Public Environmental Review and the Environmental Review and Management Programme. I understand that the changes currently being developed to the Administrative Procedures will provide for these and other WA processes to be replaced by two new processes, namely the Assessment on Proponent Information process (the API process) and the Public Environmental Review process (the new PER process). You have requested formal confirmation on whether these new processes can be accredited in the bilateral agreement once they take effect.

Requirements under the EPBC Act and EPBC Regulations

The EPBC Act and the *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations) currently set out a range of requirements that must be met in relation to an assessment process before it may be accredited in an assessment bilateral agreement. These requirements exist to ensure that each accredited process is transparent and provides sufficient information about the impacts of the actions they assess to enable the Commonwealth Minister to make an informed decision on whether to

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exchange of letters between Ministers with the replacement agreement taking effect on the date of signature by both parties.

Once a replacement bilateral agreement has been entered between the Commonwealth and a state or territory it is then necessary to develop joint administrative arrangements between the two appropriate agencies. Such arrangements are required to provide for a level of operational detail in relation to the day-to-day administration of the processes established in the bilateral agreement. I note that such arrangements are not currently in place under the existing bilateral agreement between the Commonwealth and WA however they are important in providing for cooperation at officer level and further aligning business practices with respect to any new agreement.

Transitional arrangements

As the process outlined above is not likely to commence until the draft Administrative Procedures have been finalised I note that there will be a period of time between when the new assessment processes have commenced effect and when they may be accredited upon signing of any replacement bilateral agreement.

The EPBC Act enables the Minister (or delegate) to accredit an assessment process on a case by case basis and this may be explored as a possible means of handling particular assessments under the new WA assessment processes during this interim period. If possible such one-off accreditation would ensure that the significant benefits in reducing the regulatory burden on stakeholders continues during this process. Until commencement of any replacement bilateral agreement, the existing bilateral agreement will continue to apply to actions that are assessed in the manner specified in Schedule 1 to this agreement (being the current WA assessment procedures).

Thank you again for your letter and I look forward to your advice once the draft Administrative Procedures have been finalised so that we may commence the process outlined above.

I understand our officers are in regular contact, however if you wish to speak to me directly regarding this matter I can be contacted by telephone on (02) 6274 1178.

Yours sincerely

Kathryn Collins

Dr Kathryn Collins
Assistant Secretary
Approvals and Wildlife Division
18 December 2009

3.