ENVIRONMENTAL PROTECTIONAMENDMENT BILL 2002
EXPLANATORY MEMORANDUM

This Bill amends the *Environmental Protection Act 1986*. Minor, mostly consequential, amendments are made to other Acts.

In these notes, clause numbers in the Bill are printed in bold type face, thus – **c.97**, while references to sections of the Act being amended are in normal typeface, thus – s45.

Part 1 - Preliminary

c.1. A formal clause titling the Bill.

c.2. Specifies when the Act is to come into operation. Different parts of the Bill can come into operation on different dates if necessary (e.g. if regulations are required).

c.3. Specifies that the amendments refer to the *Environmental Protection Act 1986* unless otherwise specified.

Part 2 - Assessment and implementation of proposals.

The amendments in this Part relate to the provisions in Part IV of the Act under which the Environmental Protection Authority (the EPA) conducts environmental impact assessment of proposals.

c.4 (1)(a) Three new definitions are inserted in the Act.

"implementation agreement or decision" is a more compact way of referring to the position agreed under section 45 by the Minister and other decision-making authorities on whether or not a proposal assessed by the EPA should proceed, and if so under what conditions.

The reference to s45 "as applied by s46(8)" relates to where conditions may be changed following a review under s46.

"implementation conditions" means the conditions agreed to by the Minister and other decision-makers as mentioned above.

"person" this is to clarify that a reference to a person in the Act includes a reference to a public authority.

(b) This change ensures that the person responsible for a proposal is the **"proponent"**, whether or not formal notification has taken place.

c.4 (2) The new section 3(2b) clarifies the significance of nominating a proponent.

(3) Clarifies the scope of 'changing' implementation conditions.

c.5 A new section 37B is inserted at the start of Part IV, Division 1 to define two new terms used in relation to strategic assessment in that Division.

"significant proposal" is a more compact expression for the phrase "a proposal that appears likely, if implemented, to have a significant effect on the environment" which the Act currently uses.

A proposal is a **"strategic proposal"** if it identifies one or more future proposals likely, if implemented, to have a significant impact on the environment. The future proposals may be significant individually or in combination, enabling class assessment of smaller proposals and the assessment of policies. A strategic proposal may only be referred by the proponent.

Strategic assessment

The Bill introduces the concept of strategic assessment, where a proponent can refer, and the EPA can assess, a **strategic proposal** that may not, of itself, have a significant effect on the environment. For example a plan outlining possible future oil exploration wells.

The plan has no impact, it is not until the individual wells are drilled that impacts arise. But assessment of the plan enables a review of the strategic issues applying to all the wells, saving time and money later as the wells come forward for approval.

Using strategic assessment it is intended that the EPA can assess the **strategic proposal** and recommend the conditions that should be applied to the future proposals that it identifies (e.g. the future exploration wells). When a future **significant proposal** is brought forward, the EPA can decide it is a **derived proposal** (derived from the assessed **strategic proposal**). The **derived proposal** is not assessed, but the Minister applies the conditions recommended by the EPA when it assessed the **strategic proposal**. If the significant proposal is different from what was anticipated in the strategic assessment, or raises new issues not assessed in the strategic assessment, the EPA can assess the new or different matters but need not re-assess those matters adequately considered in the strategic assessment.

c.6(1) This clause rewords and makes some important changes to the effect of section 38.

s38(1) With some exceptions, anyone may refer a significant proposal to the EPA.

(2) Where a town planning scheme or amendment has been assessed by the EPA, only the proponent may refer to the EPA under (1) an application for the approval of development or subdivision which is a

significant proposal. This is an existing provision and is not being changed.

(3) A strategic proposal may only be referred by the proponent and not by third parties. This specific reference to strategic proposals is intended to remove the implication in the present wording that only significant proposals may be referred.

Strategic assessment only takes its effect when a future significant proposal, identified in the strategic proposal, is referred and the EPA decides not to assess it. If there has been no strategic assessment, third parties can refer under (1), and the EPA is unconstrained in deciding to assess the significant proposal.

(4) The Minister's powers to refer to the EPA any proposal about the environmental effect of which there is public concern is unchanged.

(5) No change to the present requirement on decision-making authorities to refer significant proposals. However the wording is changed to clarify that the decision-making authority must determine whether the likely environmental impact of a proposal is sufficient to warrant referral to the EPA.

s5(5a) Clarifies that if the proposal has already been referred there is no need for the decision-making authority to refer it.

(5b) Present effect unchanged.

(5c) Present powers unchanged. The EPA is not empowered to "call-in" a strategic proposal, but may "call-in" any significant proposals, including those identified in a strategic proposal which the proponent declines to refer.

(5d) Clarifies the form of the requirement to refer.

(5e) Retains the present constraint on the EPA's "call-in" of proposals under assessed schemes.

(5f) This clarified the relationship between the EPA's "call-in" power and the decision of a responsible authority under s48I(2) that a proposal need not be referred.

s5(5g), (5h) & (5i)Clarification.

(5j) Re-worded to allow for terminated assessments (see page 14).

c.6(2) New provision s38(6a) to ensure that EPA is notified of any change in proponent.

c.6(3), (4) The deleted words, the intent of which was not clear, have been replaced by the new subsection (7a) which clarifies that the proponent's responsibility continues beyond assessment, but not if the assessment has been terminated.

c.6(5) The EPA is required to notify the proponent that it is going to assess a proposal. The new subsection (9) avoids the need for a separate letter formally nominating that person as proponent.

c.7 Inserts a new section 38A enabling the EPA to refuse to accept a referral. At present when the EPA receives a communication which it believes should not be regarded as a referral it treats it as correspondence. If the correspondent had intended it as a referral, there is no redress or accountability. This new section gives the EPA the power to refuse to accept a referral because it is not authorised or required (38A(1)), or for some other good reason (2). The EPA must notify the correspondent (3) within 14 days of referral (4) and that person has an appeal right against the EPA's decision (new 100(1) on page 32). Subsections (5) and (6) clarify the effect of the EPA's decision.

A new section 38B is inserted. The EPA often receives a referral that contains insufficient information to decide whether or not the proposal should be assessed. The Act requires the EPA to decide within 28 days, but it may take longer than that to seek the extra information. The new section provides for the EPA to seek extra information if necessary and ensures that the 28-day clock does not start until the EPA has the information it needs to make the decision.

c.8 A new section 39A is inserted which clarifies a number of procedural matters. Notably, the new 39A(4) and (5) enable the EPA to notify additional decision-making authorities during the assessment if any have been omitted, or if the proposal changes in a way which introduces new decision-making authorities. The provisions are a rewording of the existing s40(1), which is repealed under clause 9. The new s39A(6) preserves the EPA's existing power to provide informal advice on a proposal it decides to not assess.

The new s39B provides the second element of strategic assessment. When a proposal is referred to the EPA, the proponent can ask the EPA to declare it a **derived proposal** (derived from a strategic proposal that the EPA has previously assessed).

The new subsection (4) explains the grounds on which the EPA might decide not to declare the proposal a derived proposal. If the proposal is declared a derived proposal, it is not assessed (though the EPA can review the conditions recommended in its strategic assessment). The proponent can appeal against the EPA's decision (new 100(2b), page 32).

c.9 This clause makes changes of wording to clarify the intent of the existing provisions.

c.10 Section 40A is inserted to provide for the suspension or termination of an assessment. At present these actions have to be taken administratively without the appropriate head powers.

The term 'implementation' implies actually doing something in the environment. It is not directly applicable to a strategic proposal, where the action in the environment will come with the anticipated future derived proposals. Section 40B clarifies how those sections of this Division, which refer to implementation, are to be understood in reference to strategic proposals.

c.11 Subsection 41(1), which was redundant, is deleted, as is the reference to it in s41(2). Other minor consequent amendments are made to section 41.

c.12 A new section 41A is added, making it a Tier 2 offence for the proponent to proceed to implement a proposal while the EPA is assessing it. The Environmental Protection Act presently relies on the fact that other approvals may be required and that the penalties for proceeding without those approvals would be a sufficient deterrent. Experience has shown that other approvals are not always required and that where they are, the penalty for failing to gain those approvals is not related to protecting the environment and may not provide an adequate deterrent. (For example, $3,000 maximum penalty for clearing in contravention of a soil conservation notice under the Soil and Land Conservation Act 1945.) Subsections (2) and (3) clarify how this provision applies to suspended and terminated assessments and subsection (4) allows the EPA to approve minor or preliminary works which may assist in the assessment of the proposal (e.g. a monitoring bore) or the protection of the environment during the assessment (e.g. fencing).

c.13 Section 43 is amended to clarify that the Minister cannot direct further assessment under this section after the Minister has issued the statement or notification under section 45 which effectively completes the assessment process. In such circumstances the Minister's options would be to refer a new or changed proposal under section 38 or ask the EPA to review under section 46 the conditions set on the proposal.

When the Minister issues a direction under section 43 the reasons for giving the direction must be published.

c.14 The Act currently makes no allowance for the fact that the proposal may change during the assessment. In fact the assessment process seeks to persuade the proponent to make changes to the proposal which will be better in protecting the environment. The new section 43A allows the EPA to consent to changes to the proposal during the assessment, provided they do not significantly increase the impact of the proposal on the environment. (Such changes would require a new referral.)

c.15 Section 44 (1) and (2) are redrafted to remove unintended constraints on the content of the EPA's report and to clarify the wording.

c.15(2) Subclause (2) makes further clarifying changes.

c.16 Minor changes of wording to section 45 are made using the new terms "implementation agreement or decision" and "implementation conditions".

c.17 The new section 45A explains how the conditions agreed or decided following the assessment of a **strategic proposal** are applied by the Minister to a proposal that the EPA declares to be a **derived proposal**.

It is often the case that there are changes to a proposal after the assessment is completed. The Act provides for those changes that are of such significance as to justify further assessment. However, often changes can be minor, or environmentally beneficial. The new section 45B provides that the implementation conditions apply by default to any revised proposal. This means the conditions will apply to minor changes of proposal without the need for further assessment unless there are significant new issues to consider.

Section 45C allows the Minister to approve minor changes of proposal that do not lead to a significantly different detrimental environmental impact.

c.18 Section 46 is reworded to clarify its intent and to incorporate the new terminology. The effect is essentially unchanged.

Section 46 is reworded to clarify its intent and to incorporate the new terminology. The effect is essentially unchanged.

Section 46 enables the Minister to ask the EPA to assess whether the conditions set on a proposal should be changed. It is quite possible that this would be because the existing conditions have been found to be flawed or inadequate. They may, for example, be failing to protect the environment. It may be desirable, therefore, for these flawed conditions to be replaced while the EPA reviews the matter.

The new section 46A enables the Minister to set revised conditions to apply in the interim. The proponent's interests are protected because the proponent's consent to the interim conditions is required, and the environment is protected because the Minister is not permitted to issue interim conditions which provide a lesser level of environmental protection.

The new section 46B clarifies that the EPA can address the question of changes to conditions during an assessment of a revised proposal. This avoids the need for the EPA to do two assessments, one of the change of proposal and one of the change of conditions.

Section 46C enables the Minister to standardize wording or correct minor errors of drafting in conditions without needing to go through an assessment under section 46. The scope of these minor changes is severely constrained.

19 Section 47 is reworded to clarify its intent and to incorporate the new terminology.

Subsection (4) introduces a new offence for implementing a proposal when the Minister has issued a statement under s45(8) that it may not be implemented. The penalty is the same (Tier 1) as for a failure to comply under (3).

c.20(1) Section 48 relates to monitoring the implementation of proposals to ensure the conditions are complied with. Subsection (1) currently constrains the CEO to monitoring only those conditions that are not to the satisfaction of some other decision-making authority. The new wording removes this constraint so the CEO can more effectively co-ordinate the monitoring of all conditions to ensure compliance. Subsection (1) currently constrains the CEO to reporting to the Minister any non-compliance, while other decision-making authorities are allowed to use what powers they may have to rectify the situation. The new subsection (1a) removes this constraint on the CEO so he/she is clearly permitted to use his/her powers to take immediate action to protect the environment. Subsection (2) is reworded but the effect is unchanged.

c.20(2) & 21 Consequent amendments.

c.22 Simpler wording.

c.23 Changes to the appeal provisions consequent upon the foregoing changes and to clarify the intent of the section.

The new subsection 100(1) provides a new appeal against the EPA's decision not to accept a referral (the new s38A). To the existing appeal points in subsection (2)(a) to (e) is added (f), an appeal against the EPA's declaration that a proposal is a derived proposal.

Subsection (2b) adds an appeal for the proponent where the EPA decides the proposal is not a derived proposal.

Section 100(3) is replaced by a new (3) and (3a), and is reworded to clarify its intent and to introduce the new terminology. Currently in some instances the appeal period is to start from 'the latter or the last of the persons being notified'. It is not possible for the CEO to know when this occurs. Since, in the relevant cases, the matters the subject of appeal are required to be placed on the public record (under current practice they are also advertised in the newspaper), the appeal period is made to start from the placing of the matter on the public record.

Section 100(4)(a) currently provides an appeal right against the Minister's direction to take immediate action to rectify non-compliance with a condition under section 48(4)(a). Since the action must be taken within 24 hours, the appeal could be to no effect. It is therefore deleted.

c.24 Consequent and clarifying amendments are made to section 101.

Consequent and clarifying amendments are made to section 101.

Consequent and clarifying amendments are made to section 101.

c.25 Schedule 1 of the Act is amended by the insertion of a Tier 2 penalty for the offence of implementing a proposal while the assessment is in progress.

c.26 A head power is inserted to enable regulations to prescribe how information is to be provided (e.g. prescribing the form in which a referral is to be made).

Part 3 - Environmental Harm

Division 1 Amendments to the *Environmental Protection Act 1986*

This part of the Bill introduces the concept of **environmental harm**.

Environmental harm

The Act currently has a broad definition of **pollution** as "alteration of the environment to its detriment or degradation" but the Supreme Court has clarified that its interpretation must be narrowed. Malcolm CJ concluded that "detriment" and "degradation" must take their colour from the ordinary meaning of "pollution", which, according to the Shorter Oxford Dictionary means "to make physically impure, foul or filthy".[1] This leaves the Act powerless to deal with acts of unauthorised environmental vandalism caused by other actions. The proposed amendments seek to rectify this problem, restoring some of the breadth of application that the drafters of the 1986 Bill intended, and addressing the Supreme Court's concerns.

The approach taken in these amendments is to leave the existing, narrow offence of pollution and to add environmental harm. Environmental harm includes a broad element (c), which would be given precision through EPPs specifically defining environmental values. It also offers a level of general protection of the environment from harm which is not trivial or negligible. The definition includes specific elements relating to removal or destruction of native vegetation (a)(i) or habitat (ii) (which under certain circumstances could include clearing) and other prescribed alteration of the environment (d).

For harm to the environment to be an offence it must be "not trivial or negligible". This ensures that acts such as pruning the roses and exhaling, referred to by the Supreme Court, are not an offence. A defence applies if the defendant can show that the harm was authorised.

The provision therefore supports the existing approval processes, because where someone has the appropriate approvals to alter the environment it cannot be an offence.[2] The provision is aimed, rather, at those who damage the environment with no thought to the approval processes the Parliament has put in place.

c.27 The long title of the Act is amended to reflect the incorporation of environmental harm.

c.28(1) The definition of pollution is deleted; and a new definition is provided in **c.29** below.

(2) Several new definitions and terms are inserted. The significance of the term **ecosystem health condition** is explained below.

[1] *Palos Verdes Estates Pty Ltd v. Carbon*[(1991)6WAR] AT 239
[2] This answers the concern expressed by Rowland J in *Palos Verdes Estates P/L v. Carbon* [(1991)6WAR] at 251.

"emission"

The Act currently frequently uses phrases such as " the discharge of waste or the emission of noise, odour or electromagnetic radiation". The Bill introduces the term **emission** to include emissions of waste, noise, odour and electromagnetic radiation. It also seeks to cover situations where a pollutant such as electromagnetic radiation (light) may be transmitted (reflected) rather than emitted. As a consequence of introducing this new term, the wording of the Act is greatly simplified.

"environmental value"

The Act currently assumes that environmental protection policies will be framed in terms of the protection of a **beneficial use** of the environment. Modern practice is to refer to the protection of an **environmental value**, a broader concept that includes protecting the environment for its own sake by protecting a specified **ecosystem health condition**. Both beneficial use and ecosystem health condition are defined in two ways. The first way relates to their need for protection from discharges and emissions (the definition of beneficial use already has this). With the introduction of environmental harm, this has been extended to include the need for protection from the removal or destruction of, or damage to native vegetation or habitat. The second way they may be defined is in an environmental protection policy approved under Part III of the Act.

(2) (cont'd) Several new definitions and terms are inserted. In some instances cross-references to definitions elsewhere in the Act are provided.

(3) The term **pollution abatement notice** is replaced by **environmental protection notice**. Provisions covering how these notices are issued (s65) have also been amended (see **clause 45**).

c.28(4) Words are added to the definition of beneficial use to provide for protection from the key elements of environmental harm.

(5),(6) Consequential amendments.

c.29 A new section 3A is inserted, providing several new definitions.

"pollution" – the previous definition is retained, but the words are added "that involves an emission", consistent with the Supreme Court's decision in the Palo Verdes case.

"environmental harm" includes the general concept "alteration of the environment to its detriment or degradation" (b) or to the detriment of any environmental value (c) and specific provisions for the destruction of, or damage to native vegetation (a)(i) or habitat (ii). It allows for specific forms of environmental harm to be prescribed.

Environmental harm is **not,** of itself, an offence.

"material environmental harm" is the lower level environmental harm offence. To be an offence, the harm must be "not trivial or negligible" (the environmental harm threshold test) or result in loss, damage or costs (of prevention or making good) of more than $20,000 (the **threshold amount)**.

"serious environmental harm" is the higher level offence. It involves harm that is irreversible, of a high impact or on a wide scale, harm that is significant, harm to an area of high conservation value or special significance, or harm that results in loss, damage or costs of more than $100,000.

"damage costs" includes the cost of actions taken in respect of the act, to prevent, control or abate the harm or to make good the damage. They are limited to "reasonable costs".

"threshold amount" is set at $20,000, but may be revised by regulation to keep the amount up to date.

c.30, 31 Consequential amendments.

c.32, 33, 34 Consequential amendments.

c.35 The heading to Part V of the Act is changed from "Control of pollution" to "Environmental regulation" in recognition of the introduction of environmental harm. The Part is divided into four divisions consistent with the existing structure plus a new Division 2 dealing with clearing permits. Division 1 is headed "Pollution and environmental harm offences".

c.36 Consequential amendment.

c.37 Offences are introduced in s50A for serious environmental harm. Causing or allowing serious environmental harm intentionally or with criminal negligence (s50A(1)) is the most serious offence and attracts a penalty of up to $500,000 and 5 years' jail for an individual or up to $1,000,000 for a body corporate. Without culpability (s50A(2)) the penalty is halved. These penalties are the same as those for pollution. The various defences against the offence are in s74, 74A and 74B (see below), and include provision for a defence if the harm was authorized.

Under s50A(3) a prosecution for intentional or criminally negligent serious environmental harm which proves the serious environmental harm but not the culpability can lead to a conviction for the lesser offence.

s50B has an identical structure to s50A, but for the lesser offence of material environmental harm.

s50C provides that a prosecution for serious environmental harm which successfully establishes material environmental harm (but not

serious environmental harm) can lead to a conviction for the lesser offence.

S50D introduces a head power under which regulations can create Tier 2 offences for "conduct affecting the environment" (with a maximum penalty of $50,000 for an individual and $100, 000 for a body corporate). Without this provision offences under regulations would attract a maximum penalty of $5,000.

c.38 Consequential amendments

c.39 A new heading of Division 3 is inserted "Prescribed premises, works approvals and licences".

c.40 Consequential amendments.

c.41 Consequential amendments.

c.42 Consequential amendments.

c.43 Provisions of s70(1)(a) which dealt with keeping records of works approvals and licences are updated and moved to a new s63A within this new Division.

c.44 A new heading is added for Division 4 "Notices, orders and directions", and a new s64A, containing those provisions of s70(1)(b) which dealt with keeping records of pollution abatement notices, but updated to refer to the new name, "environmental protection notice".

c.45 Section 65 of the Act presently contains the provisions for pollution abatement notices (commonly known as PANs). Experience in court has shown the instrument to be too prescriptive and inflexible. The amendments replace the PAN with an environmental protection notice (EPN). Like a PAN, the EPN can be issued in the event of pollution or likely pollution (1)(a) and non-compliance with a standard prescribed by regulation (1)(c). It can also be issued in relation to actual or likely environmental harm (1)(b).

(Note that changes under **clause 69** allow the notice to address circumstances where the emission is <u>onto</u> the licensed premises themselves (as well as emissions <u>from</u> the premises) to enable action to stop the creation of future contaminated sites or contaminated groundwater plumes.)

Under the new ss(1a) in addition to specifying the measures to be taken ((c)), the CEO can require the person responsible to investigate the extent and nature of the problem ((a)) and prepare and implement a plan to rectify the situation. This enables the CEO to specify the environmental objectives and lets the person take responsibility for the problem and its rectification and design a

solution that fits the person's circumstances while meeting the environmental objectives specified by the CEO.

The EPN can require the recipient to monitor the effectiveness of the actions taken and report to the CEO. Subsections (1b) and (2) provide more detail of the form of the notice.

c.45(2) & (3) Consequential amendments.

c.46(2) Consequential amendments.

c.47 Consequential amendments.

c.48 Consequential amendment.

c.49 Consequential amendment.

c.50(a) Consequential amendments.

c.50(b) Section 72 relates to notifying the CEO of exceptional discharges of waste. In such circumstance time is often of the essence. The Act currently requires written notification. This amendment enables a verbal or electronic report, followed by the written report, to facilitate prompt reporting, and prompt action.

c.51 Section 73 provides powers to take prompt action where waste is being discharged without approval or pollution has occurred or is likely to occur. The provision is currently confusing. It provides powers for the CEO, or an inspector, with the CEO's approval, to take action to rectify the situation, or to issue a notice to someone else, requiring them to do so. There are also provisions for cost recovery.

The section has been redrafted into two sections (73 and 73A). The new section 73 relates to the inspector's and CEO's powers to take action to rectify the situation and recover costs. The provisions are essentially unchanged apart from the consequential amendments relating to environmental harm. The power to issue notices is shifted to a new section 73A.

c.52 The new section 73A is a redrafting of the CEO's powers (under the old s73) for issuing notices. In the past, these notices have been commonly known as "cleanup notices", however, in view of the focus on the notices being used to prevent pollution or environmental harm, in the new provision they are called **"prevention notices"**. Again, the powers are essentially unchanged in the redrafted provision.

The new section 73B inserts a provision, based on section 35(6) of the Soil and Land Conservation Act 1945, providing a clear right of action for damage caused as a result of a failure to comply with a notice.

c.53 New heading for Part V Division 5 – Miscellaneous inserted.

c.54 Consequential amendments and the repeal of section 74(3) which is replaced in the next clause by a new section 74A.

c.55 The new section 74A replaces the old 74(3), expanding it and making it clearer. The provision relates to those approvals, authorisations and the like under the Act that may constitute a defence to proceedings for pollution or environmental harm.

The new section 74B provides the additional defences for an offence of material or serious environmental harm. There is a defence under these provisions if the harm occurred –

(a) in accordance with an authority, approval, requirement or exemption under another written law (this is intended to include, for example, planning and mining approvals and fisheries licences);

(b) by a public authority exercising its functions under another written law;

(In both these cases provisions are already in place for proposals with a significant impact on the environment to be referred to the EPA for possible assessment, and this provision doesn't change those arrangements.)

(c), (d) and (e) relate to processes under the *Agricultural Practices (Disputes) Act 1995* and the *Soil and Land Conservation Act 1945* which do not fit the definition of an authority or approval but which, nevertheless, provide a defence.

(d) refers to codes of practice which may identify a "normal farming practice" under the *Agricultural Practices (Disputes) Act 1995*. **Clause 65** introduces a new section 112A under which the CEO can make codes of practice to which this defence will apply. (d)(ii) provides harvest security for plantations managed and harvested in accordance with an approved code of practice.

(e) only applies in transition in respect of Regulation 4 of the Soil and Land Conservation Regulations as that Regulation is being deleted under the clearing permit provisions.

(f) and (g) ensure that activities exempted from the requirement for a clearing permit are not able to be considered as environmental harm.

The wording of this section is intended to ensure the defence only applies if <u>all</u> necessary approvals have been obtained.

c.56 Consequential amendment.

c.57 Previous amendments to section 89(1) have made it unnecessarily complicated. The proposed redrafting of s89(1)(b) and (c) rectifies this. The amendment to s89(1)(f)(ii) is consequential.

The amendment to 89(2) makes the provision clearer and adds that an inspector may enter a private dwelling house if the inspector reasonably believes that the house or land has been adversely affected by an emission.

c.58, 59 Consequential amendments.

c.60, 61, 62, 63 Consequential amendments.

c.64 Consequential amendments.

c.65 Under a new section 122A the CEO may develop, with appropriate consultation, and issue, codes of practice for activities that involve emissions or environmental harm. These codes of practice are voluntary and not binding, but may provide a defence under section 74B for farming practices covered by the code of practice.

c.66 Schedule 1 is amended to insert penalties for environmental harm, equivalent to those currently applying to pollution.

c.67 Consequential amendments to Schedule 2

Division 2 - Consequential Amendments to other Acts.

c.68 These amendments to other Acts are consequential on the introduction of the offence of environmental harm.

Part 4 - Licensing and works approvals

This part includes amendments to improve the efficiency and flexibility of works approvals and licences and to introduce "closure notices" to manage the decommissioning of licensed premises.

c.69(1) Identifies where "closure notice" is defined and makes a minor consequential amendment to definitions.

(2) Ensures that any reference to a discharge emission or transmission covers all such emissions, including emissions that may not extend beyond the premises. This enables action to be taken to stop on-site discharges that may lead to future contamination or off-site effects.

c.70 The purpose of a works approval is to ensure that premises, plant and equipment which is to be involved in an activity which has the potential to cause pollution is constructed so that the potential for pollution can be properly controlled.

Section 52 currently requires a works approval for works which cause premises to "become" prescribed premises. However, premises only become "prescribed" once they commence operation. Most people constructing premises which will become prescribed premises apply for a works approval, but in two recent cases construction has proceeded without a works approval and the environment has not been adequately protected.

This small change ensures that a works approval can be required to build premises which are intended for an activity which will require a licence.

c.71 Consequential amendment.

c.72(1) Enables greater flexibility. Regulations can specify how fees are to be calculated as well as specifying the absolute amount. This enables pro-rata fees for licences for more or less than one year.

(2) Consequential amendments.

(3),(4) There has been uncertainty over the current effect of s54(4)(b) and the reason behind the words. (similar words appear at s57(4)(b) and s59(4)(b)). The amendment in **clause 72(3)** read with the new subsection (5) ensures that –

- if a decision-making authority makes a decision that prevents the proposal proceeding, the CEO need not issue a works approval while that decision prevents the proposal from proceeding.

c.73 Consequential amendment.

c.74 The present wording of s56 fails to account for emissions under a works approval, making it difficult to manage commissioning of parts of a plant while other parts are still under construction. This change adds the required flexibility.

c.75(1) This clause makes amendments to the provisions for licences equivalent to those made to works approvals above.

(2) The effect of s57(2)(a)(ii)(A) is presently too constraining. It prevents the CEO from licensing a part of the premises until all the conditions of the works approvals relating to all parts of the premises are completed. The proposed change enables a smoother transition from control by works approval to licence during commissioning.

(3),(4) Consequential amendments.

c.76 Minor, gender-neutral rewording.

c.77 At present s59 of the Act provides for the amendment, revocation or suspension of a licence but makes no provision for amending (or revoking or suspending) a works approval. Since s3(2) makes reference to amending a works approval, it appears that the failure to provide the mechanism for amending works approvals was a drafting error. This clause introduces more complete and up to date provisions for amendment, revocation and suspension, and applies them to both licences and works approvals.

c.78 Section 60(3) is replaced with words to more clearly establish the relationship between a requirement in a works approval or licence and standards required under an approved environmental protection policy (Part III of the Act) or prescribed under regulations.

c.79 Section 61 is reworded to clarify, but not change, it effect.

In the present Act, section 62 seeks to list all the sorts of conditions which might be applied to a licence. Not surprisingly, experience has shown the list to be incomplete. There are matters about which conditions are needed, for the purposes of the Act, which are not listed. These matters can be controlled through conditions set under Part IV following environmental impact assessment, however, this is sometimes cumbersome and inappropriate. In other jurisdictions it is common to provide that the licence may be subject to such conditions as are "necessary or convenient for the purposes of the Act." The amended s62 follows this approach. Though the scope of the conditions is further constrained by the words "relating to the prevention, control, abatement or mitigation of pollution or environmental harm". This would, likely, not empower the CEO to set conditions requiring enhancement of the environment. The list, with some additions, is retained in s62A for guidance, but not to constrain.

Section 62A lists some kinds of conditions that may be attached to a works approval or licence:

(a) a new general provision covering many of the conditions set on works approvals and licences;

(b) the present (a) and (b) reworded. Several of the items in the current list include references to "within such period, if any, as is specified". The new (s) replaces these words.

(c) The present (c) is reworded.

(d) New.

(e) New.

(f) New. This promotes the ability for the proponent to develop a management plan to suit the particular situation and for the licence to endorse and adopt the plan.

(g), (h), (i) A rewording of the present (e)

(j) New.

(k) The present (f) unchanged.

(l), (m) These sorts of investigations may well be required before a licence is issued. As situations change, they may also be required during the ongoing operation of the plant. An ability to set conditions requiring the studies ensures

operations are not interrupted while the studies are undertaken.

(n) The requiring of these reports is implied in the present (e).

(o), (p) The ability to require audit reports is essential for the implementation of self-monitoring. Note that this relates to reports of audits required under the licence, not to voluntary audits the licencee may have undertaken.

(q) The ability to require the adoption of some form of management system or management plan is an essential element of the "best practice" licence.

It is not intended to use this sort of condition to require the adoption of specific accredited management systems such as ISO 14001. Such systems have not been developed for the purposes of environmental regulation and may be inappropriate.

(r) A new provision needed for self-monitoring and "best practice" licensing

(s) A general provision to replace wording in several of the existing sorts of conditions

(2) Minor rewording of the existing s62(2).

c.80 Consequential amendments.

c.81 At present, the Act and regulations require that while premises are being used for a purpose which leads to them being prescribed premises, the premises must be licenced, but once the activity ceases a licence is no longer required. This means that the licence cannot be used to control the de-commissioning of those premises, to ensure the closure does not leave an accumulation of problem wastes or a contaminated site. Similar problems apply to other forms of authorization.

This clause introduces a new section 68A which provides for the CEO to issue a **closure notice** to investigate, plan and/or undertake the proper de-commissioning of the premises. Subsection (2) indicates the grounds for issuing a closure notice. Subsections (3), (4), (5) and (6) specify people to whom it may be issued and others who must receive a copy.

Subsection (7) lists the things a closure notice may require and (8) lists the things it must contain.

A closure notice is to be treated like an environmental protection notice in a number of respects.

c.82-84 Consequential amendment of appeal provisions

c.85 Consequential amendment of the schedule of penalties.

c.86(1) These changes to Schedule 2 of the Act enable greater flexibility in the specification and calculation of fees.

(2) Consequential amendment.

c.87 - Part 5 – Financial assurances

This part introduces new provisions enabling the Minister (under Part IV) or the CEO, with the Minister's approval, to require that a person provides a financial assurance.

s86A A financial assurance can be required as a condition of a general exemption (s6), a clearing permit (new Division 2 of Part V), a works approval or licence, a special emergency exemption (s75), a licence or permit under the regulations, a statement issued by the Minister (s45), a closure notice (new s68A), an environmental protection notice (amended s65), a vegetation conservation notice (amended s70) or a prevention notice (new s73A).

The **responsible person** is the person required to provide the financial assurance. In general it is the person who holds the approval etc.

s86B This section provides the power for financial assurances to be required, makes non-compliance a Tier 2 offence and specifies the forms in which the financial assurance may be required to be provided.

s86C The CEO, in seeking the Minister's approval for requiring the financial assurance, and the Minister in giving that approval, or imposing a requirement under implementation conditions, must consider,

- the risk of pollution or environmental harm from implementing the proposal or authorisation;
- the likelihood that special action will have to be taken to prevent, control or abate pollution or environmental harm from implementing the proposal or authorization;
- the environmental record of the responsible person; and
- other financial assurances required under other laws (eg the *Mining Act 1978*).

as well as any other matters prescribed by regulation.

s86C The provisions in (2) are repeated separately in (3) for notices because the scope in this case is set by the actions required under the notice, rather than the actions involved in implementing the proposal.

s86D The amount of the financial assurance must be specified in the requirement, and must not exceed the reasonable costs incurred in taking the action which could be required to be taken (as anticipated in s86C). (The requirement can also specify the form in which the assurance is to be provided (s86B(4)); when it is to be provided

(s86B(5)), and how the moneys are to be called on or used (s86B(6)).

s86E This section spells out how claims on a financial assurance are to be made.

Firstly the Minister or CEO issues a written notice to the responsible person (the person who has provided the financial assurance) about the proposed claim.

s86E The notice lists the action that has been taken and the amount to be claimed, and invites the person to make representations if the person considers the amount proposed should not be claimed.

The notice must also specify a period of a least 30 days from the giving of the notice, in which representations may be made.

The representations must be considered and then a notice issued, advising of the decision on the proposed claim.

s86F When the CEO is satisfied the reason for the financial assurance no longer exists, the requirement for the financial assurance lapses, and the CEO advises the responsible person.

s86G (1) The fact that the financial assurance may be called upon and used doesn't affect the responsible person's liability for a penalty, or other action that may be taken, even though it may relate to the same circumstances.

(2) If the amount of the financial assurance is insufficient, other provisions in the Act for claiming moneys owing may be called on for the remainder

(3),(4) However, those other provisions cannot be used to recover costs which have already been recovered through the financial assurance. There is to be no "double dipping".

c.88 This clause inserts Tier 2 penalties into Schedule 1 for failure to comply with a requirement to provide financial assurance.

c.89 This clause adds an item to Schedule 2 to allow for regulations to spell out the contents of a financial assurance requirement.

c.90 - Part 6 – Environmental Protection Policies

Section 5 is amended to clarify that the primacy of the EP Act extends to environmental protection policies (EPPs) made under the Act. Legal advice was that this was the likely interpretation of the current wording but that some clarification would be helpful.

c.91 This amendment of Section 26 and some subsequent amendments enable the making of State-wide EPPs which set the broad principles and standards which are to apply. Subordinate measures can then specify the areas of the State to which those standards are to apply. An example would be groundwater protection, where the EPP would set the State-wide standards, and they would be applied to specific groundwater resources by listing them in a schedule, which could be amended by regulation. To do this at present would require a separate EPP for each groundwater area.

c.92 The insertion of s28(2) clarifies what the EPA's report on the draft policy is to cover.

c.93 Section 30 is amended to provide the Minister with some flexibility. Normally, the Minister will carry out a second consultation with all the affected people. However, under this provision, where the Minister considers the EPA has already consulted all the affected people on the draft policy and there has been no significant change to the policy since that consultation, the Minister may decide that further consultation is not required.

c.94 Further changes to facilitate the making of State-wide EPPs whose area of application can be amended by regulations.

c.95, 96 Further changes to facilitate the making of State-wide EPPs whose area of application can be amended by regulation.

c.97 This clause amends the penalties applying to offences under three existing EPPs. The EPPs are the Swan Coastal Plain Lakes EPP, the Gnangara Mound EPP and the South West Agricultural Zone Wetlands EPP, and in each case the maximum penalty is increased from $5,000 (Tier 3) to $62,500 (Tier 2) for an individual and twice that for a company.

Part 7 - Appeals

c.98 In response to the recommendation of the 1992 Review of the Act for an "Appeals Commissioner, the office of the Appeals Convenor was established administratively. Under these amendments the office is established in the statute.

c.99 From the present wording of s102(1), (2) and (3) it is not clear just when the appeal period commences. These amendments clarify that the period commences when the notice is given. The provisions of s102(4) are reworded to clarify, but not change, their effect.

c.100 Currently s106 spells out the preliminary action to be taken by the Minister in respect of appeals. With the introduction of the office of the Appeals Convenor these tasks are given to that office. The wording of ss(1)(a) and (b) is changed to ensure a right of reply to the body whose action or decision is the subject of the appeal (the CEO or the EPA as the case may be). The new subsection (4) enables decision-making authorities (who will be consulted over conditions to be set under section 45) to make submissions related to matters under appeal without the need to formally lodge an appeal. (This is the current practice, informally).

c.101 Consequential amendment

c.102 New sections 107A to 107D are inserted to establish the office of the Appeals Convenor, define the functions of the office, and provide for the preparation and publication of administrative procedures for the way appeals are to be dealt with. It is proposed to use these provisions to develop procedures to address some perceived concerns about matters of natural justice. Much of the detail of the conditions of appointment of the Appeals Convenor is in a new Schedule 8 (see below).

Under section 107B the Appeals Convenor is to operate as an appeals committee and may advise the Minister generally on appeals under the Act.

The new section 107C enables the Appeals Convenor to convene an appeals panel to assist in the administration of appeals.

Section 107D provides for the presentation and publication of administration procedures.

c.103 Further amendments to ensure a "right of reply" for the appellant and the body whose decision has been appealed (CEO or Authority).

c.104 A new Schedule 7 is inserted to cover the administrative arrangements applying to the office of the Appeals Convenor.

Part 8 – Bilateral Agreements

Bilateral Agreements

Under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) there are provisions requiring new proposals for development to undergo environmental impact assessment, under certain circumstances. These are additional to the requirements under the Western Australian *Environmental Protection Act 1986* under which the EPA may decide to submit a proposal to environmental assessment. It is possible, therefore, for a proposal to be required to undergo two assessments. However, the EPBC Act provides for the Commonwealth to enter into bilateral agreements with a State under which the State's environmental impact assessment will meet the requirements of the EPBC Act, removing the need for a second assessment.

Negotiation of an agreement between the Commonwealth and the State of Western Australia is well advanced, and it is timely to make minor amendments to the EP Act to facilitate the implementation of the anticipated bilateral agreement.

c.105 A definition of **bilateral agreement** is inserted.

c.106 The EPA is given the additional function of facilitating the implementation of bilateral agreements.

c.107 The EPA is given the powers necessary to give effect to the requirements of the bilateral agreement.

c.108 Disclosure of information required under a bilateral agreement is not an offence under the secrecy provisions of the EP Act..

Part 9 – Clearing Permits

The Part inserts provisions for the protection of native vegetation and the control of clearing.

c.109(1) Three new definitions are inserted into section 3(1) of the EP Act. They take their meaning from other provisions which this Act inserts into the EP Act.

(2) Consequential amendment.

c.110 This clause inserts a new Division 2 into Part V of the EP Act. This new Division provides for the protection of native vegetation by making it an offence to clear native vegetation without a permit.

Comprehensive exemptions of the proposed regulations to cover day to day activities like cutting firewood and controlling regrowth.

The activities of Government agencies subject to statutory approval processes (like forest management plans) are exempt from the permit requirement, as are those who have an approval under the EP Act, the Wildlife Conservation Act or a subdivision approval under the Town Planning & Development Act. These exemptions are listed in a proposed new Schedule 6.

The exemptions proposed by regulation apply to clearing

1. reasonably required for the lawful construction of a building;
2. within 20m of a dwelling;
3. to remove risk of personal injury or damage to property;
4. in accordance with an approved Code of Practice;
5. as provided under a range of powers under the Bush Fires Act;
6. for domestic firewood use on the property;
7. for fenceposts for fence maintenance on the property;
8. to construct and maintain a fence;
9. to construct and maintain track for vehicles;
10. to construct and maintain a walking track
11. for a fire break of up to 5 metres;
12. to take specimens, cuttings for propogation or collect seeds;
13. to maintain regrowth;
14. for picking wildflowers on private land; and
15. to salvage plant material before clearing occurs.
16. in compliance with a local government notice under the *Bush Fires Act 1954*

s51A This new section introduces several new definitions.
'clearing' includes any substantial damage to vegetation, however caused. It includes activities like burning which can be beneficial or destructive to vegetation depending on how it is done, and grazing,

which can be managed sustainably or used to destroy vegetation. The definition is broad to capture all the ways in which people might seek to damage native vegetation without the proper approval.

'native vegetation' excludes plantations (unless the regulations prescribe otherwise). It also excludes native plants in gardens, but not vegetation required to be planted under statute.

The definitions of **'occupier**' and **'owner'** are intended to include all those people responsible for the management of native vegetation on land. A clearing permit (area permit)can be applied for by the owner, or someone else acting on the owner's behalf (51E(2)(a)). In the event of unlawful clearing, in the absence of evidence to the contrary, the occupier is deemed to have caused the clearing, and the owner to have allowed it (51R(3)).

s51B After consulting with everyone who has an interest in the matter, the Minister may declare an area of the State to be an environmentally sensitive area, in which the exemptions under the regulations do not apply. It may refer to a single geographically defined area and is also intended to include an ability to declare a class of areas where, for example, a sensitive species or plant community requires special protection.

s51C(1) It is an offence to clear native vegetation unless the clearing

(a) is in accordance with clearing permit;
(b) is covered by Schedule 6 (the exemptions for approvals under the EP Act, Wildlife Conservation Act, Sandalwood Act, forest management plans etc.); or
(c) is prescribed in the regulations.

(2) The exemptions in regulations only apply where the clearing is not in a declared environmentally sensitive area.

Under section 72 of the *Justices Act 1902* where someone seeks to rely on an exemption of this kind, the onus is on them to be able to prove that the exemption applies.

51D(1) Definitions.

(2) Under the Soil and Land Conservation Act (the SLC Act) a person may be required to enter into an agreement to reserve (limited term) or a conservation covenant (in perpetuity) under which vegetation on land is to be protected and managed.

A clearing permit can only be effectively issued in respect of land the subject of an agreement to reserve, with the written approval of the Commissioner for Soil and Land Conservation.

(3) A clearing permit cannot be issued for the clearing of land covered by a conservation covenant or for clearing in contravention of a soil conservation notice issued under Part V of the SLC Act.

51E(1) Clearing permits can be of two sorts. They may relate to the clearing of a specified area of land (an area permit) or they may relate to a program of clearing for a specified purpose (a purpose permit).

(2) An area permit can only be applied for by the owner of the land, or someone acting on the owner's behalf. A purpose permit can be applied for by a private individual or company if necessary, but is more likely to be appropriate for a public authority, such as Main Roads or a local government, for the management of the vegetation impacts of its road building and maintenance program.

(3), (4), (5) & (6) For simplicity, the processes for issuing a clearing permit closely follow those for issuing a works approval or licence.

(7), (8) An area permit must describe the boundaries of the area that may be cleared. A purpose permit must describe the purpose of the clearing, the principles and criteria to be applied and the strategies and procedures that are to be followed in undertaking the clearing. Both forms of permit can also be subject to conditions (see 51H).

51F Like other decision-making authorities, the CEO is constrained from approving a permit while the proposal to which it relates is being assessed by the EPA. Once the assessment is completed and a decision reached on the proposal, the CEO's decision on the clearing permit must be consistent with that decision.
If another decision-making authority makes a decision which prevents the proposal proceeding, the CEO need not complete the processing of the permit application.

51G An area permit is effective for 2 years and a purpose permit for 5 years, unless the permit specifies a different period.

51H The CEO can impose such conditions as the CEO considers necessary or convenient on a clearing permit to prevent, control, abate or mitigate environmental harm and offset the loss of vegetation. Section 51I lists some sorts of conditions, but the list is not exhaustive or limiting. Conditions must be consistent with any approved environmental protection policy and should not be seriously at variance with the clearing principles listed in Schedule 5.

51I(1) Conditions can state what may be done or what may not be done.

(2) Lists the sorts of conditions which might be set. They include:

(a) taking measures to prevent control or abate environmental harm
(eg. Controlling run-off and soil loss from the cleared land);

(b) establishing new vegetation or conserving existing vegetation elsewhere and maintaining it or contributing to a fund for those purposes to offset
the loss of the cleared vegetation;
(c) giving a binding undertaking to establish and maintain vegetation;
(d) monitoring and reporting on the effects of the clearing.

(Note that "establish" is defined to include "conserve".)

51J If the holder of a permit contravenes a condition of the permit it is an offence. Only the holder of a permit can commit this offence. Other people, who do not hold the permit, are protected by the permit for actions they may take on the owner's behalf in accordance with the permit. For clearing beyond that covered by the permit, third parties may be guilty of the offence of clearing without a permit under 51C.

51K Provisions for amending a clearing permit with due notice, at the request of the holder or on the initiative of the CEO.

51L Under certain circumstances a clearing permit may be suspended (temporary) or revoked (permanent).

51M Describes the process for amending, revoking or suspending a clearing permit.

51N A clearing permit may be transferred.

51O Principles for the clearing of native vegetation are listed in Schedule 5. In dealing with clearing permits the CEO is to have regard to these principles and to make decisions consistent with them. Where the CEO makes a decision which the CEO believes to be significantly at variance from these principles, the reasons for the decision must be published along with the usual details of the decision. The CEO is also to have regard to relevant planning schemes, plans and policies. These decisions are open to appeal under the new 101A.

51P(1), (2) A clearing permit must be consistent with approved environmental protection policies,

(3)(a) except that the permit can impose a higher level of protection if the CEO is satisfied that environmental circumstances have changed so as to warrant that higher protection.

(b) The CEO can amend a condition of an existing permit to make it consistent with a new approved environmental protection policy.

51Q The CEO must keep records of applications and permits and make them public as required under the regulations. It is expected that the receipt of applications would be listed in the weekly advertisement in The West Australian each Monday.

51R(1), (2) An important tool for monitoring compliance and detecting and proving illegal clearing will be aerial photography. This provision deems a duly certified copy of an aerial photograph to be admissible as evidence. Subsection (2) requires that the CEO must have inspected the land to confirm the clearing.

(3), (4) In a prosecution for illegal clearing the occupier is deemed to have caused the clearing and the owner to have allowed it, in the absence of proof to the contrary.

(5) Once native vegetation has been removed and destroyed it may be difficult to prove that the vegetation removed was native vegetation. An offender, having destroyed the evidence could claim that the vegetation was in fact a crop. This provision does not prevent this but it does place the onus on the offender to prove that the vegetation was not native vegetation.

(6), (7) This provision prevents "buck-passing" between a company and its subsidiaries.

51S This provision gives a clear power for the CEO to seek, and the Supreme Court to grant, an injunction to stop someone clearing without a permit (51C) or breaching a permit condition (51J).

The power does not replace other powers the Supreme Court may have to grant injunctions (2) and it need not be proved that the person intends to do or has done the thing the injunction seeks to prevent (4). While the injunction is being considered an interim injunction can be granted (5) and in doing so the Supreme Court may not make a conditional ruling that the party seeking the injunction (the CEO in this case) is liable for costs or damages if the injunction is not granted (6). Actions of the CEO and the Supreme Court in respect of an injunction under this section do not affect any other proceedings under this Act.

51T This provision makes it clear that getting a clearing permit does not remove the requirement to get any other approval or permission required under other laws, and vice versa.

c.111 This clause replaces the existing section 70 with a new section under which a vegetation conservation notice may be issued.

70(1) Definitions.

(2) The CEO may cause a vegetation conservation notice to be given if unlawful clearing has occurred, is occurring, or is likely to occur. The notice requires the recipient to ensure no clearing, or no further clearing, takes place.

(3) A vegetation conservation notice can be given to the owner or occupier, or to someone else if the CEO thinks it practicable for that person to do what the notice requires.

(4) Where clearing has already taken place, the vegetation conservation notice can require the re-establishment of the vegetation, the prevention of erosion and other actions to repair the damage and prevent further damage.

(5), (6) A vegetation conservation notice to stop further clearing can be issued and take immediate effect, but a notice requiring the re-establishment of vegetation, and so on, under (4)(b) can't be issued until the person has had the opportunity to make a submission that he or she should not have to take the specified action. The CEO is required to consider any submissions made.

(7) A vegetation conservation notice is binding on the person to whom it is given and, if registered on the title, is binding on each new owner of the land.

(8), (9) A vegetation conservation notice is treated like an environmental protection notice under section 65.

(4) the notice can be revoked or amended;
(4a) culpable non-compliance is an offence (max $250,000);
(5) non-compliance is an offence (max $62,500)
(5a) a person charged under (4a) can be convicted under (5) if non-compliance is proved but culpability isn't.
(6),(7) before amending the notice the recipient must have a chance to say why it shouldn't be amended.

(10), (11) If a vegetation conservation notice is not complied with, the CEO can undertake the required action and recover the costs from the person bound by the notice. The recovered monies are paid into the Consolidated Fund.

c.111(2), (3), (4), (5) A transitional provision to discourage unlawful clearing while these provisions are being debated by the Parliament. From 26 June 2002, any "unlawful clearing" could lead to the CEO issuing a vegetation conservation notice, requiring re-establishment of the vegetation.

Unlawful clearing is defined as clearing in contravention of the Soil and Land Conservation Act, the Land Administration Act or the Country Areas Water Supply Act, clearing while a proposal is still being assessed by the EPA, and clearing when the assessment process has been completed and the decision is that the proposal may not be implemented.

Under this provision the person is not convicted of any offence, but the cost of re-establishing cleared vegetation can be quite substantial (up to $20,000 per hectare).

c.112 The new section 101A(1) provides the applicant for a clearing permit with avenues of appeal against a refusal to permit all or part of the clearing, a refusal to transfer a permit or a condition of a permit.

Under 101A(2) the holder can appeal against an amendment revocation or suspension unless (via the reference to s105) the action has been taken to give effect to the resolution of an appeal. This latter point makes sure that the resolution of the appeal is final and avoids an endless cycle of appeals.

Under (3) and (4) third parties have the right to appeal against these same matters.

While the appeal is being determined,

(5) a refusal, specification, revocation, or suspension continues to have effect;

(6), (7) an amendment continues to have effect if the appeal is from a third party but has no effect if the holder has appealed unless it is more restrictive on clearing, in which case it continues to have effect; and

(8) a granted permit is deemed not to have been granted.

c.113 This clause amends section 105 consequentially so that there is no appeal against the implementation of an appeal determination or against the minor changes or corrections of the permit allowed under section 51K(1)(e),(f),(g) and (h).

c.114 Consequential amendment.

c.115 Amendments to the Schedule of penalties.

Clearing without a permit is a mid-range Tier 1 offence, equivalent to intentional material environmental harm. The maximum penalty is $250,000 for an individual and twice that for a body corporate.

Breaching a clearing permit condition is a Tier 2 offence, equivalent to breaching a condition of a works approval or licence. The maximum penalty is $62,500 for an individual and twice that for a body corporate.

This does not mean that someone can take out a permit, ignore the conditions and be liable for a quarter of the penalty that would have applied for clearing without a permit. If the breach of conditions involved clearing which was not in accordance with the permit it would potentially be both clearing without a permit and material or serious environmental harm, which are all Tier 1 offences.

c.116 This clause lists in a new Schedule 5 of the Act principles for clearing native vegetation. Under section 51O the CEO is to have regard to these principles.

Schedule 6 is also inserted, which lists those forms of clearing which are approved or required under this or another law and for which a permit is not required. Other exemptions for minor clearing for day-to-day activities like cutting firewood or controlling regrowth are to be addressed in regulations.

Under Item 10 there is an exemption for clearing associated with a notice of intention under the SLC Regulations 1992. It applies to clearing undertaken from 90 days to 2 years after the giving of a notice of intention under the regulations, not referred to the Authority and not subject to a soil conservation notice.

It has transitional effect for notices of intention to clear under Regulation 4 given more than 90 days before the amendments come into effect and ongoing effect for notices of intention to drain under Regulation 5. Notices of intention to clear given less than 90 days are excluded from this exemption under subclause 11(3). Under subclause 14(2) they are regarded as applications for a clearing permit, subject to payment of the prescribed fee.

c.117, 118, 119 The Soil and Land Conservation Regulations 1991 are repealed. Regulation 4 of the Soil and Land Conservation Regulations 1992 under which a "notice of intention" to clear vegetation must be given is also repealed. Notices of intention which are in transition when these amendments come into effect are to be regarded as an application for a clearing permit, subject to the payment of the prescribed fee.

Note: There are no consequential amendments to the Land Administration Act, under which permits to clear are issued by the Pastoral Board or the Country Areas Water Supply Act, under which licences are issued for clearing in controlled catchments. The issuing of those permits and licences is already subject to the EP Act so the effect would be to require the applicant to seek an EP Act Clearing permit to ensure the wider protection of the environment and seek Pastoral Board approval or a CAWS Act licence (as the case requires) for the clearing according to the more specific criteria of these other Acts.

Part 10 - Miscellaneous

c.120 Minor stylistic drafting changes.

c.121 Introduces the object of the Act, which is to protect the environment of the State, having regard to give principles of environmental policy.

The first four principles come from the InterGovernmental Agreement on the Environment and appear in section 3 of Schedule 1 of the *National Environment Protection Council (Western Australia) Act 1966.*

Some stakeholders have questioned why the principles are not binding. They cannot be binding because they can be in conflict and a balance must be struck. For example, one way of minimizing the quantity of waste is to replace a copious but relatively inert waste stream with a smaller but more hazardous waste stream, meeting principle 5 but conflicting with principle 2 by leaving a problem for future generations.

Other stakeholders have questioned why these principles are to be included without those other principles about balancing environmental and economic considerations which provide the proper context for sustainable development. At present that balance is achieved outside the Act by the Minister and the Government. To change this arrangement would alter the nature of the Act and the EPA. It is a matter which can be addressed in the planned Review of the Act.

The fifth principle is a principle of waste minimization, not included in the IGAE list.

c.122 Section 123 of the Act presently requires that the EPA make recommendations to the Governor on the making of regulations. Regulations cannot be made without the EPA's involvement. It dates from a time when the EPA and the Department were the same and it now requires updating. For some regulations the EPA's advice is entirely appropriate, but some are administrative (for example the setting of licence fees) and there should be scope for the Minister to deal with these without reference to the EPA. This new subparagraph inserts a new function of the EPA into section 16 to advise the Minister on regulations relating to the Authority's functions. A subsequent clause amends s123.

c.123 The CEO already has general powers for the appointment of consultants. The provisions of section 23 are an unnecessary duplication. This clause repeals s23.

c.124 Section 81A is amended to provide that where it has been necessary to seize and store equipment used in emitting an unreasonable noise, the reasonable costs of seizure and storage can be reclaimed before the equipment is returned.

c.125 Under s99 police officers have the power to inactivate audible alarms. Because this provision specifically refers to "premises" it has not been clear that it empowers police officers to act in respect of vehicle alarms. The amendment rectifies this.

c.126 Consequential amendment.

c.127 Corrects a minor drafting error.

c.128 A new "whistle blower" protection provision is introduced. It is intended to protect from victimisation people who provide information which helps in enforcing the Act.

Victimisation of a person who has provided or may in the future provide information to help an investigation into a possible offence is a Tier 2 offence.

c.129 Section 114 deals with the initiation of proceedings for an offence under the Act. At present the Minister's consent is required to the initiation of proceedings for Tier 1 and Tier 2 offences. This could give the perception of political interference in the prosecution process. Under (1) it is deleted.

The other changes are consequential or to enable local governments that issue environmental protection notices (formerly called "pollution abatement notices") to institute proceedings, if necessary, to ensure compliance with those notices.

c.130 This provision changes the present arrangements for limiting how long after an offence a prosecution may be instituted. Under the present provisions it is possible for someone to conceal an offence for two years and so escape prosecution.

The new subsection 114A(1) provides that there is no time limit, after an offence occurs, beyond which prosecution for a Tier 1 offence cannot be instituted. Note that this change only applies to offences occurring after this Act comes into effect. It does not apply retrospectively to all previous offences.

For Tier 2 and 3 offences, ss(2) provides that prosecution must be instituted,

(a) within 2 years of the offence occurring, or

(b) within 2 years of the offence first coming to the attention of someone who could initiate a prosecution.

The Act presently lacks the second provision and so it is possible for someone to avoid prosecution by concealing an offence for two years.

c.131 This clause replaces the existing provisions relating to directors' liability with stronger clearer provisions consistent with modern practice. Specific reference is made to the concept of due diligence. Section 118 presently provides no defence for directors. The new provision introduces three threads of defence –

(a) no knowledge of the offence;

(b) no influence, or if able to influence used "all due diligence and reasonable precautions" to stop the offence; and

(c) some other defence under the Act was available to the body corporate.

This approach is similar to that in other States.

Directors' liability continued.

c.132 The present "General indemnity" provision in s121 is dated. This clause replaces it with improved, updated wording consistent with modern practice.

c.133 This change, linked to the change to the EPA's functions in **clause 122**, removes the requirement for the EPA to recommend **all** new and amended regulations.

c.134 Minor amendments to Schedule 2 of the Act to make specific reference to "analysis" and some other matters.

c.135 Schedule 3 is amended to enable the Minister to determine on a case-by-case basis whether a reference to the "Department of Conservation and Environment" (the predecessor to the Department of Environmental Protection) should be read as a reference to the Department through which this Act is administered.

c.136 References to "Chief Executive Officer" throughout the Act are amended to "CEO" being the chief executive officer of the department responsible for administering the Act, whatever the designation of that office. This retains "the Government's discretion and flexibility" (Machinery of Government Taskforce Report, p41).

A table of places in the Act where "Chief Executive Office" is to be changed to "CEO".

c.137 This definition of "licensed premises" is inserted into the *Environmental Protection (Landfill Levy) Act 1998* to apply to premises required to hold a licence whether or not a licence has been

issued. This ensures that a landfill operator cannot evade responsibility for the levy by failing to obtain the required licence.

c.138 The reference to the "Department of Conservation and Environment" in the *Control of Vehicle (Off-road Areas) Act 1978* is replaced by a reference to the CEO under this Act, consistent with the Machinery of Government recommendation.

Schedule 1

This Schedule of the Bill, via **clause 120(1)** makes minor stylistic and other amendments to the Act for consistency with modern drafting practice.