Submission
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Environmental Protection Act 1986 (WA) Amendments

Discussion Paper & Exposure Draft Bill – October 2019

Submission to Department of Water and Environmental Regulation

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About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia. CME is funded by member companies responsible for more than 90 per cent of the State's mineral and energy production and workforce employment.

In 2018-19, the Western Australia's mineral and petroleum industry reported a record value of $145 billion.[1] Iron ore is currently the State's most valuable commodity at $78 billion. Petroleum products (including crude oil, condensate, liquefied natural gas, liquefied petroleum gas and natural gas) followed at $38 billion, with gold third at $12 billion.

The value of royalties received from the sector totalled $6.8 billion in 2018-19, accounting for 21 per cent of general government revenue.[2] [3] [4] In addition to contributing 40 per cent of the State's total industry Gross Value Added,[5] the sector is a significant contributor to growth of the local, State and Australian economies.

Summary of recommendations

Recommendations addressing key concerns

CME highlights it has been difficult to fully assess the implications of proposed amendments to the *Environmental Protection Act 1986* (EP Act) without a thorough understanding of consequential amendments to the *Environmental Protection Regulations 1987* (EP Regulations). Much of the detail and hence the practical effect of proposed amendments cannot be adequately considered in the absence of required regulations. Noting this, CME looks forward to further engagement with the Department of Water and Environmental Regulation (DWER) on the proposed amendments to the EP Regulations and any new regulations required to support proposed amendments.

Additionally, to provide sufficient clarity and confidence in the 'whole of government' approach to environmental protection, the interplay between the EP Act and other relevant legislation requires further consideration (including consequential amendments) by DWER and associated agencies. This approach would be consistent with the government's commitment to *Streamline WA*.

In order to progress development of the Exposure Draft Bill (Draft Bill), CME recommends DWER prioritise the recommendations below which address the key issues of concern to the resources sector.

General

- Assess the interactions between the EP Act and other Acts and Regulations, and where applicable, the incorporation of necessary amendments in the EP Act to ensure compatibility and eliminate duplication.
- Increase use of statutory timeframes for amendments and secondary approvals.
- Add express powers to supersede, combine and/or split Ministerial Statements, applicable also to proposals that have more than one Ministerial Statement as a result of s46 changes, derived proposals, and the combination of derived proposals with existing approved proposals.

Part I – Preliminary

- Review and simplify definitions of decision-making authorities (DMAs) to support the consistent identification of appropriate and accountable DMAs as required for proposals and significant amendments.
- Explicitly exclude heritage aspects from the definition of social surroundings to remove duplication between the EP Act and the *Aboriginal Heritage Act 1972* (AH Act).

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[1] Government of Western Australia, *Latest statistics release: Mineral sector highlights*, Department of Mines, Industry Regulation and Safety, September 2019: http://dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx

[2] References hereafter to government refer to the Government of Western Australia, unless otherwise indicated.

[3] Government of Western Australia, *Annual report 2018-19*, Department of Mines, Industry Regulation and Safety, November 2019, p. 77.

[4] Government of Western Australia, *2018-19 Annual report on State finances*, Department of Treasury, September 2019, p. 8.

[5] Duncan, A. and Kiely, D., *BCEC Briefing note: WA Economic update*, Bankwest Curtin Economics Centre, November 2019, p. 4.

Part IV – Environmental Impact Assessment

- Substantially re-write Part IV to reduce drafting complexity and more clearly and simply articulate fundamental principles and processes.
- Add a specific trigger (sub-clause) for referral of an 'amendment' under s38.
- Add an express power for the Environmental Protection Authority (EPA) to determine a third-party referral as invalid and therefore not accept it.
- Add express powers to clarify how s41, 45C, and 46 to 46C relate to referrals and decisions in relation to strategic assessments and derived proposals.
- Add a clause under s39B providing a statutory timeframe for the EPA to declare whether a referred proposal is a derived proposal.
- Add express powers allowing for strategic assessments and conditions to be updated if significant new information becomes available (without retrospective impact on previously derived proposals that are already approved).
- In circumstances where the criteria in s39B(4) are met, allow assessment to the relevant new issues, information or change thereby permitting new issues to be assessed whilst ensuring issues already addressed in the strategic assessment avoid re-assessment.
- Specify that any cost recovery model / framework must demonstrate improved efficiency, productivity and responsiveness of government activities and accountability for those services.
- Implement and publish metrics for whole of government performance to ensure accountability and transparency in respect of cost recovery and service deliverables.
- Remove the term “implementation” under proposed s48AA(1) to clarify that Part IV cost recovery only applies to referral services and environmental impact assessment services.

Part V – Environmental Regulation

- Recommend detailed analysis of the interacting issues with the *Biodiversity Conservation Act 2016* (the BC Act) and the EP Act, and the implementation of the BC Act more broadly, and where possible, remedy issues through this amendment opportunity.
- Include a mechanism to allow applicants to bypass the clearing permit referral process and move straight into the clearing permit application process.
- Redraft s51DA to clarify the statutory timeframe for DWER’s response to clearing permit referrals, and the process by which clearing permit referrals become clearing permit applications.
- Add an ability to appeal a referral decision that a clearing permit is required.
- Remove the phrase ”accompanied by” throughout the EP Act, in consideration of the *Forrest & Forrest Pty Ltd v Wilson & Ors* (2017) 262 CLR 510 (Forrest & Forrest) High Court Case.
- Clearly specify in DWER’s supporting administrative procedures and guidance the intent that construction, commissioning and operation will be permitted to be captured under a single licence application.
- Further consult and more clearly draft Division 3 regarding the interaction of prescribed activities, offences and potential defences, including emissions that occur outside prescribed areas surrounding authorised activities.
- Provide further information on the application and use of voluntary licences.
- Amend Division 3 to specify that the process for applying for voluntary licences can only be initiated by the licence holder.
- Amend Division 3 to explicitly state that clearing permits provide authorisation for both the activity and the clearing.
- Ensure the second reading speech for the Bill provides clarification and confirms DWER’s intent of applying a risk-based approach for defences offered by licences.
- Modify or remove s74A(2) to ensure consistency with a risk-based approach.

Part VI – Enforcement

- Fully assess the interactions of powers for inspectors to use reasonable force under the EP Act and duties under *Mines Safety and Inspection Act* 1994 (MSIA) and other relevant safety Acts and Regulations.
- Ensure adequate protections are afforded to those potentially liable under these other legislative instruments due to actions taken by inspectors under the EP Act.

Part VII – Appeals

- Initiate a wider review of appeals as a priority and, in the interim, introduce an express power for the Appeals Convenor to compel public authorities, or other DMAs, to respond to appeals within a specified timeframe, or as otherwise agreed in writing, as an initial step to improve timeliness of the current process.

Part IXA – Bilateral agreements with the Commonwealth

- Ensure any introduction of fees associated with bilateral agreements do not result in duplication of assessment or administrative effect, or fees between State and Federal process or other Acts.

Schedule 2 – Matters in respect of which regulations may be made

- Conduct cost benefit analysis of alternative responses to application quality issues to find the most appropriate, reasonable and effective response.
- Remove the head power for accreditation of environmental practitioners.

Context

CME welcomes the opportunity to provide a submission on the proposed amendments to the EP Act detailed within the Discussion Paper and Exposure Draft Bill released by the DWER in October 2019.

The Discussion Paper details proposed amendments to the EP Act, outlines new areas of environmental reform, and presents additional stakeholder proposals and issues for consideration in the review of the EP Act.

Responses to the Discussion Paper

CME has consulted extensively with its members to inform its submission in response to the Discussion Paper and Exposure Draft Bill.

CME supports DWER's stated objectives to modernise and streamline processes to improve regulatory effectiveness. Crucially, streamlining initiatives must be implemented in a manner that maintains the State's high standards of environmental protection whilst delivering an accountable, transparent and legally robust framework. CME welcome the current *Streamline WA* initiative and suggest that separate to the current proposed amendments to the EP Act addressed below there should be an opportunity for a more comprehensive review and reform of the EP Act and related regulation in Western Australia (WA).

In making this submission, CME has had regard to the Council of Australian Governments' (COAG) Principles of Best Practice Regulation.[6]

This submission firstly provides high-level comments on key issues followed by specific, detailed responses on each proposal in Appendix I, and responses to specific amendments within the Exposure Draft Bill in Appendix II.

CME have reviewed the Exposure Draft Bill under the reasonable assumption that all proposed amendments have been indicated in tracked changes within the released consultation document, and as such, have focussed our review on said tracked changes. It should be noted that at least two amendments within the Exposure Draft Bill were not marked in tracked changes raising the possibility that other amendments were similarly (presumably inadvertently) not tracked. CME notes that the Discussion Paper was high-level and did not address all tracked changes within the Exposure Draft Bill further complicating the task of identifying and evaluating all the potential proposed changes.

Additionally, several drafting issues were identified in the Exposure Draft Bill, with incorrect cross-referencing and inconsistent numbering of sections and Parts further hindering evaluation of proposed amendments within the tight timeframes permitted.

In this context, CME urges DWER to undertake necessary steps to ensure all inputs into the EP Act Amendment review process are duly considered and adequately summarised, in turn, fed back to participating stakeholders to ensure clarity and confidence in the outcomes.

General

1.1. Interactions with other Acts and Regulations

The overall success of the wider reform package will depend on consideration of how the EP Act interacts with other Acts and Regulations (including the AH Act, BC Act, *Contaminated Sites Act 2003*, and *Environmental Protection (Unauthorised Discharges) Regulations 2004*). Consistent with the aspirations of *Streamline WA's* 'whole of government approach' to make it easier to do business in WA, every opportunity ought to be taken to ensure associated regulatory practices are efficient and free from duplication. CME strongly recommend an assessment of the interactions between the EP Act and other Acts and Regulations, and where applicable, the incorporation of necessary amendments in the EP Act to ensure compatibility and eliminate duplication.

[6] Council of Australian Governments, *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, p. 4.

1.2. Statutory timeframes

Statutory timeframes provide certainty for business planning with clear expectations for government and proponents regarding assessment and approval timelines. Internal government key performance indicators, whether externally publicised or internally monitored, do not provide proponents a reasonable level of clarity or certainty for amendments or secondary approvals. CME recommend increased use of statutory timeframes including for amendments, appeals and secondary approvals.

1.3. Supersede, combine and/or split Ministerial Statements

The current lack of flexibility in the administration of Ministerial Statements, specifically in relation to the ability to supersede, combine and/or split, is placing an unnecessary regulatory burden on proponents and government. In the absence of powers to supersede Ministerial Statements, proponents are required to continue to monitor, assess and / or report against compliance requirements for projects which have not proceeded to commence (and have since been shelved), or have been completed and are no longer operational. The absence of powers to combine and / or split Ministerial Statements unnecessarily complicates the process of asset divestment and mergers, requiring proponents to duplicate approvals for divested assets, and managed duplicate approvals for merged assets. Although some attempts to improve this situation have been adopted in the proposed amendments, including introducing the ability to formally terminate Ministerial Statements, in CME's view, the proposed amendments are not sufficient. CME strongly recommend inclusion of express powers to supersede, combine and/or split Ministerial Statements, applicable also to proposals that have more than one Ministerial Statement as a result of s46 changes, derived proposals, and the combination of derived proposals with existing approved proposals.

Part I – Preliminary

2.1. Definition of decision-making authority (section 3(1) and consequential amendments in numerous other sections)

Although CME supports the intent of refining the DMA process to link more directly to DMAs of relevance, CME does not support the introduction of two tiers of DMAs as currently drafted. The drafted proposal is overly complex, inconsistently drafted and at times unclear.

The proposal to define key and non-key DMAs with the introduction of key DMAs (under s45) does not achieve the objective of improving the accuracy of determining relevant DMAs for proposals, or significant amendments to approved proposals, but rather adds another layer of complexity to the determination of a DMA which amendments to s45 do not clearly or fully articulate. Amendments are recommended which either:

(i) Simplify the two tiers of DMAs (key and non-key DMAs) into a single, updated definition of a DMA (under s3); narrowing a DMA to only be those with a major role in making decisions (so as to make the key DMA concept be the DMAs only). All other relevant public authorities and Ministers can still be stakeholders that are consulted, informed or similar through administrative or other processes. Consequential amendments will be required throughout the EP Act; or

(ii) Redraft s45 to clarify how the two tiers of DMAs (key and non-key) must function when deciding if a proposal may be implemented.

CME recommend the review and simplification of definitions of DMAs to support the identification of appropriate and accountable DMAs as required for proposals and significant amendments.

By extension, CME supports the proposal to narrow DMAs for amendments to be only those DMAs of specific relevance or responsibility to that amendment rather than the proposal in its entirety.

2.2. Definition of social surroundings (section 3(2))

The protection of heritage aspects of Aboriginal heritage sites is best regulated under the AH Act and its proposed replacement legislation currently being drafted, whilst the environmental aspects of significant sites (e.g. emissions impact) are to be regulated under the EP Act. Removal of duplication across Acts is a key priority of the Government's *Streamline WA* initiative and opportunities to remove obvious duplication must be seized as these opportunities arise. Current drafting of s3(2) does not reflect this.

CME recommend explicit exclusion of heritage aspects from the definition of social surroundings.

Part IV – Environmental Impact Assessment

Part IV has now been amended multiple times without an associated 'clean up' of the drafting. The current proposed amendments add to the complexity of the drafting and there are now numerous and frequent cross-references to different sections and poorly structured / grouped sections. The complicated drafting and cross-references increase the likelihood of errors and omissions in drafting of the Bill as well as the risk of legal challenge. Overall, the drafting of Part IV appears to be unnecessarily complex and unwieldy making it difficult to understand and implement.

CME recommend a substantial re-write of Part IV to reduce drafting complexity and more clearly and simply articulate fundamental principles and processes.

3.1. Referral of proposals to Authority (section 38)

CME support flexibility for proponents to amend or withdraw a proposal prior to a decision on assessment without impacting the right to refer the proposal in the future.

CME also supports the intent of the reform to clarify treatment of amendments to proposals, however the current drafting of Part IV does not achieve this objective as it remains unclear and ambiguous in several areas. CME recommend a specific trigger (sub-clause) be added for referral of an 'amendment' under s38. This will greatly simplify the overall drafting of Part IV and improve readability, clarity and implementation (for example, the prohibition on other DMAs granting other approvals).

Under s38AB, if a third party referred a proposal, and in the view of the proponent the proposal referred was inaccurate, incomplete, premature (etc.), the proponent may seek to have the specific proposal withdrawn so as to enable the proponent to refer the proposal once appropriately scoped. This proposal would then be open again to third party referral prematurely and/or inaccurately (potentially multiple times) frustrating the process and consuming the EPA's resources. CME recommend adding a power for the EPA to determine a third-party referral as invalid and therefore not accept it. Allowing the EPA to deem a referral as invalid or not accepted may also assist with third-party referrals where that proposal has appropriately been addressed through Part V (and is not significant) or pre-dates Part IV. CME remains concerned there is a risk of third-party referrals for pre-existing proposals that pre-date Part IV.

3.2. Strategic assessments and derived proposals (section 39B)

The application of s41, 45C, and 46 to 46C remains unclear with regard to referrals and decisions relating to strategic assessments and derived proposals. In particular, those provisions should apply to the notice issued under s45A(2) in respect of a derived proposal as well as to the implementation agreement or decision in respect of the strategic proposal under s45. CME recommend that express powers be added to clarify how s41, 45C, and 46 to 46C relate to referrals and decisions in relation to strategic assessments and derived proposals.

To increase potential uptake and usability of strategic assessments as a viable option, CME also recommends:

- A clause be added under s39B providing a statutory timeframe for the EPA to declare whether a referred proposal is a derived proposal;
- Powers be added such that there is provision for strategic assessments and conditions to be updated if significant new information becomes available (without any retrospective impact on previously derived proposals that are already approved). This would facilitate keeping the strategic assessment contemporary and usable, rather than risk eliminating all future derived proposals being unsuccessful due to the emergence of new environmental factors or contemporary condition requirements; and
- In circumstances where the criteria in s39B(4) are met, allow assessment to the relevant new issues, information or change thereby permitting new issues to be assessed whilst ensuring issues already addressed in the strategic assessment avoid re-assessment.

3.3. Fees and charges relating to referral and assessment of proposals (section 48AA)

Although CME understands the potential drivers for the Government to establish cost recovery of Part IV referral and assessment services, further information is required regarding the proposed cost recovery framework, modelling and, importantly, how it will improve service efficiencies and timely delivery. The WA Government has implemented multiple cost recovery frameworks previously which cumulatively impact on the cost of doing business in WA of mandated government services, which leads to issues relating to cross-subsidisation, inequitable application, and a lack of performance reporting, transparent accounting reporting or hypothecation of the funds recovered.

The development of cost recovery provisions must be conducted in consultation with industry and based on a robust business case, ensuring the resultant framework is underpinned by the key principles of:

- Efficiency and effectiveness;
- Transparency and accountability; and
- Stakeholder engagement.

A framework based on the above principles should promote a cost recovery framework that is successful from the viewpoint of both regulator and business, facilitating a culture of efficient, best-practice regulation. To reinforce this behaviour however, any efficiency gains achieved will need to be retained and 'ring fenced' by the agency, rather than returned to the Consolidated Account.

For some schemes that have transitioned to industry-funded cost recovery, CME members have not seen a corresponding increase in the quality or consistency of service delivery, and in some cases, a decline has been observed. As these various cost increases are in addition to existing taxes, royalties and fee payments made to all levels of government, this contributes to the negative perception of a "death by a thousand cuts" scenario whereby industry becomes less competitive and at the same time subsidises or masks inefficient government services. The development and implementation of a cost recovery model should be in accordance with the Australian Governments' Cost Recovery Guidelines (CRGs)[7]. CME recommends that any cost recovery model / framework must demonstrate improved efficiency, productivity and responsiveness of government activities and accountability for those services.

Furthermore, consistent with the CRGs, CME strongly recommends that implementation of the cost recovery model be supported by publication of metrics for whole of government performance to ensure accountability and transparency in respect of cost recovery and service deliverables.

In the development of a model for cost recovery for Part IV referral and assessment services, the following considerations are paramount:

- Clarification of what activities are captured under "administration of Part IV of the EP Act only" (as stated in the Discussion Paper).
- Part IV application fees should be appropriate in scale so as to not discourage referral or create additional barriers to entry.
- Fees should be standardised across the board and not scaled for individual industries.
- Fees and charges for bilateral approvals and bilateral assessments must prevent duplication of costs for government services imposed on proponents.
- The timing of application fees must be clarified.
- Disclosure of sums received and expenditure.

It is understood from review of the Discussion Paper that the detail of the cost recovery model is to be captured in supporting regulations, and that, as advised by DWER, members of Parliament are to be briefed about the intent and principle structure of cost recovery for Part IV services prior to debate on the Bill. Industry must be engaged as part of this process and CME looks forward to this consultation and further information prior to forming a final industry view on the proposal.

CME is of the understanding that the State is considering a fee structure associated with referral services and environmental impact assessment services only. For consistency with this intent, CME recommend removal of the term "implementation" under proposed s48AA(1).

Part V – Environmental Regulation

4.1. Referral of proposed clearing to CEO for decision on whether a clearing permit is needed (section 51DA)

CME is of the view that there are issues and inconsistencies between the clearing framework in the EP Act and the BC Act which have not been resolved in this Bill. In part, these issues may stem from the limited implementation of the BC Act to date and the teething issues, including lack of implementation guidance,

[7] Australian Government, *Australian Governments' Cost Recovery Guidelines (RMG 304)*, Department of Finance, January 2020: https://www.finance.gov.au/publications/resource-management-guides/australian-government-cost-recovery-guidelines-rmg-304

associated with a new Act. CME recommends detailed analysis of the interacting issues with the two Acts and the implementation of the BC Act more broadly and where possible, for issues to be remedied through this amendment opportunity. In some instances, the BC Act may more appropriately need to be amended.

Although CME supports the intent of introducing the proposed referral and decision process (to allow the CEO to decide that a clearing permit is not needed), the majority of clearing that is typically done by our members using a clearing permit will likely still require a clearing permit in the future. Therefore, introducing a mandatory referral, assessment and decision step in advance of that clearing permit assessment introduces an unnecessary step and additional delay. CME strongly recommend a mechanism be inserted into the EP Act to allow applicants to bypass the referral process and move straight in to the clearing permit process. The absence of this option introduces unnecessary 'red tape' and duplication, is a significant concern to CME.

Regarding s51DA(7)(b), this section appears to be an attempt at defining a statutory timeframe for the clearing referral process and a means to give a proponent a way to move forward if that timeframe has lapsed. This intent is supported, however as drafted, it does not appear to be practical or effective. After the 21 days, it is possible the proponent completes this request, but this request may not be accepted or acknowledged and so it remains unclear how the referral automatically becomes a clearing permit application. CME is concerned about potential delays and uncertainty of status from the process as currently drafted. CME recommend redrafting of s51DA to clarify (i) the statutory timeframe for DWER's response to clearing permit referrals; and (ii) the process by which clearing permit referrals become clearing permit applications.

As the referral process (and associated decision) for clearing applications is a new process inserted into the EP Act, CME recommend adding an ability to appeal a referral decision (i.e. to dispute that a permit is required) as the pre-existing appeals processes have not contemplated this new process.

Regarding s51DA(8), current drafting may create a Forrest & Forrest-type issue, as it requires that if the form and fee are not all simultaneously received by DWER, the application must be declined by the CEO. CME strongly recommend removal of the phrase "accompanied by" throughout the EP Act.

To support implementation of the new referral process, departmental guidance needs to be developed to capture the following detail:

- Outline how the referral process for clearing permits will operate.
- Level of information required for the referral.
- Structure of the referral document.
- Timing of regulatory review of the referral.
- What other documents need to be compiled after the referral.
- The process as a flow diagram (similar to the Part IV diagram on the EPA website).
- Confirmation if the referrals will be published and publicly available similar to the Part IV Projects on the EPA website.
- How the referral process will work with clearing permits which are assessed by the Department of Mines, Industry Regulation and Safety (DMIRS).

CME supports the intent of the reform to provide greater legal certainty for clearing exemptions through prescribed enactments. As indicated by DWER as the intent, this prescription must ensure the existing exemptions understood to exist will be preserved and prescription will not be used as a means to narrow or withdraw existing exemptions.

4.2. Licences (Division 3)

CME supports, in principle, the move towards regulation of prescribed activities and the combination of works approvals and licences into a single instrument (licence). To ensure improvement in assessment and approvals efficiency, the intent that construction, commissioning, and operation will be permitted to be captured under a single licence application should be clearly specified in DWER's supporting administrative procedures and guidance. This will limit potential implementation creep over time and mitigate against the risk that the efficiency benefit from this option is administratively lost over time.

As Part V licences will still in part be tied to a location, it remains unclear how locations will interact with Part IV development envelopes and how a location will limit emissions. Further clarification on this and the impact on licence conditions is required. Further, current drafting does not clarify the offences and potential defences

for emissions which occur outside of licence boundary surrounding prescribed activities. CME strongly recommend further consultation and clearer drafting regarding the interaction of prescribed activities, offences and potential defences, including for emissions that occur or extend outside prescribed areas surrounding authorised activities.

As advised by DWER, the change from regulation of prescribed premises to activities is intended to address current issues associated with mobile plant licensing. Tying licences to activities rather than to premises introduces a practical flexibility which is expected to benefit operational management, regulatory efficiency and improve environmental management. However, as the Discussion Paper does not provide detail on the important consequent amendments to the EP Regulations, there remains uncertainty pending updates to Schedule 1 of the EP Regulations regarding definition of activities and related thresholds. Extensive industry consultation will be essential as part of updating the EP Regulations.

The proposed amendments allow licences to overlap, for example, one physical area may be shared by multiple operators carrying out activities with similar emissions and/or discharges. CME notes, this may cause compliance issues with emissions and discharges (e.g. leaks, spills) as it may prove difficult for DWER to determine who caused the pollution or release into the environment.

Although CME in principle supports the concept of voluntary licences, limited detail on application scope and explanation on regulation has been provided. CME is concerned that this voluntary process may become a mechanism for regulating all activities due to the risk of prosecution or result in a lowering of thresholds over time. CME recommend further information be provided on the application and use of voluntary licences. CME also recommend amendment to Division 3 to specify that the process of applying for voluntary licences can only be initiated by the licence holder.

4.3. Defences (Division 5)

CME supports the application of DWER's source-pathway-receptor approach, however, s74A(2) too narrowly defines the scope of the defence offered by a licence, consequently creating multiple unreasonable consequences for licence holders. This amendment will likely require proponents to comprehensively list every minor, low-risk emission to ensure a defence for emissions incidental to approved controlled works and prescribed activities undertaken. For example, reverse osmosis plants, wastewater treatment plants and oily water separators will likely not be required to be licensed as their emissions, being of low volume, will likely not exceed the threshold for emissions requiring licensing. However, due to the low threshold amount ($20,000) for material and/or serious environmental harm, these low-risk emissions will likely exceed the threshold amount and thereby be considered environmental harm without actual environmental harm having had occurred. This is unreasonable and inconsistent with a risk-based approach.

Additionally, in many instances, surrogates are appropriately monitored and limited (controlled) for emissions, rather than all emissions. These surrogates cannot protect a licensee from the other emissions to which the surrogate relates, so therefore all the other possible emissions will necessarily need to be listed and necessarily need to be monitored, potentially greatly increasing compliance costs and generating unnecessary work in order to avoid an offence (again, that is absent of causing environmental harm). The interaction of licensing with the defences and offences including impacts on use of surrogates needs to be reconsidered.

Under s74A(1)(ba)(i), a clearing permit must also provide a defence for necessarily associated matters directly stemming from the clearing. Clearing permits, therefore, must authorise the activity and the clearing. CME recommend amendments to explicitly state that clearing permits provide authorisation for both the activity and the clearing.

To assist with addressing CME's concerns above about regulatory intent and construction of the amendments, CME strongly recommend the second reading speech for the Bill provides clarification of the regulatory intent of applying a risk-based approach for licences.

Additionally, CME strongly recommend the modification or removal of s74A(2) and further requests a detailed discussion with DWER on how this section should alternatively function.

Part VI – Enforcement

5.1. Use of assistance and force (section 89A)

CME supports, in principle, the power for inspectors to use reasonable force, however, it is not sufficiently clear how these powers interact with requirements and duties under the MSIA (or other safety related

legislation). Under the MSIA, Registered Managers are responsible for ensuring the safety of all personnel on a mine site (refer s33 of the MSIA), and as such the EP Act should not in any way circumvent notifying the Registered Manager, or other responsible person at the mine site, of their presence. Note, Mine Safety Inspectors are required to provide notice of intention to inspect a site, refer s21(4) of the MSIA:

> *"21(4) Where a district inspector or special inspector intends to inspect and examine a mine under the powers conferred by this section, the inspector must, where practicable on entering the mine, give notice of his or her intention to do so, either to the principal employer or to the manager, or in their absence to another responsible person."*

Notification prior to entry allows at least the mine operator to ensure the inspector is overseen, and account for the inspector in the case of emergency. It is expected that the powers of inspectors under the EP Act would be similar to powers provided to inspectors under s21 of the MSIA:

> *"21(1) A district inspector or special inspector may, for the purposes of this Act —*
>
> *(a) at all times of the day or night, enter, inspect, and examine any mine and examine any plant, substance, or other thing whatsoever at the mine (but must do so in such a manner as not unnecessarily to impede or obstruct the working of the mine); […]*
>
> *(c) conduct such examination and inquiry as the inspector considers necessary to ascertain whether the provisions of this Act have been and are being complied with in respect of a mine or a mining operation."*

DMIRS inspectors undergo substantial training and are intimately familiar with the hazards that occur in mining yet do not use reasonable force and will take reasonable measures to notify (etc.). It is questionable how DWER inspectors with potentially limited or no specialised knowledge of operational hazards would be safe to do otherwise. Further, it is unclear how an offence under the MSIA that stems as a direct result of actions taken by a DWER inspector using reasonable force (with no notification or potential knowledge of specialised operational factors) will be treated and how that will affect liabilities and penalties for the mining operator.

CME recommend the full assessment of the interactions of powers for inspectors to use reasonable force under the EP Act and duties under the MSIA and other relevant safety Acts and Regulations. Furthermore, CME recommends that adequate protections are afforded to those potentially liable under these and other legislative instruments due to actions taken by inspectors under the EP Act. This assessment must explicitly consider specialised hazards (e.g. blast zones, high walls, subsidence zones, confined spaces, high voltage facilities, underground operations) that frequently occur at mining operations, oil and gas facilities and other heavy industry sites.

Part VII – Appeals

The proposed reform is limited in terms of appeals. CME understands a wholesale reform of the appeals process is unlikely to be achievable in the short timeframe available, however legitimate concerns remain regarding the transparency, procedural fairness and timeliness of the appeals process as currently implemented. CME request a wider review of appeals be initiated as a priority and, in the interim, recommend the introduction of an express power for the Appeals Convenor to compel public authorities, or other DMAs, to respond to appeals within a specified timeframe, or as otherwise agreed in writing, as an initial step to improve timeliness of the current process.

Further, the full effect of wider EP Act amendments and application of appeals must be considered in the final drafting.

Part IXA – Bilateral agreements with the Commonwealth

CME supports the proposed amendments which ensure the State Government is able to fully implement bilateral agreements, thereby removing duplication between State and Federal assessment and approval processes and improving timeframes.

Any introduction of fees associated with bilateral agreements must ensure there is no duplication of assessment or administrative effort, or fees between State and Federal process or other Acts.

Schedule 2 – Matters in respect of which regulations may be made

8.1. Provide a head power for certified environmental practitioners

In discussions with DWER, CME understand that improved quality of applications and subsequently reduced assessment timeframes within DWER are the key objectives of this proposed amendment. However, the introduction of a head power for the accreditation of environmental practitioners is a disproportionate policy response to what is understood to be a small proportion of poor-quality applications received by DWER. A direct feedback mechanism to this issue already exists with longer assessment timeframes experienced by these applicants and potential risk of application rejection. Similar accreditation / certification schemes employed in other departments / jurisdictions (including DMIRS) have not resulted in improved quality or reduced assessment timeframes and in some recent examples have been abandoned as it became evident that the policy response did not achieve the desired objective.

CME strongly support the implementation of the COAG Principles of Best Practice Regulation[8] and believe a range of alternative responses, including improved guidance, better templates, online application and assessment (automation with appropriate validations), and training, must be considered and their benefits and costs assessed to find the most appropriate, reasonable and effective response to this decidedly non-systemic issue. No analysis has been provided as to why this specific policy response has been provided for, nor has transparency been offered around other policy options considered (and presumably discounted).

The imposition of a requirement for the certification of application documentation will add another unnecessary layer of bureaucracy and is expected to result in substantially increased costs to the proponent (through either increased consultancy costs or through increased in-house costs where in-house training must then be provided (potentially 'doubling up' the burden in addition to increased consultancy costs) and extended assessment timeframes to account for additional red tape in application preparation and certification, while providing no tangible additional environmental benefit.

Introducing an arbitrary new certification process would also appear inconsistent with the Government's stated objectives of reducing red tape, unnecessary business and professional licensing requirements and broader *Streamline WA* initiatives to make it easier to do business in Western Australia.

Consultation with industry on this aspect and its value proposition for all proponents has been wholly inadequate. CME does not support introduction of the head power for accreditation of environmental practitioners.

Conclusion

CME thanks DWER for the opportunity to comment on these draft documents and looks forward to continuing to work with DWER through this Act review process and on the important supporting accompanying components contained in the regulations, associated guidance and explanatory materials. CME urges the government to invest adequate time and resources to provide this clarity and confidence in the end-to-end implications of the proposed Act amendments.

If you have any further queries regarding the above matters, please contact Kira Sorensen, Senior Policy Adviser – Environment.

Authorised by	Position	Date	Signed
Paul Everingham	Chief Executive Officer	28/01/2020	
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[8] Council of Australian Governments, *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, p. 4.

Appendices

Appendix I: Detailed responses to proposed amendments

Table 1: Responses to proposed amendments.

Part	Section	Description of proposed amendment/s	Position	Response
Part I – Preliminary	s3	Amendments to definitions that are a consequence of amendments to other Parts of the EP Act.	Do not support as currently drafted	**“Decision-making authority” and “key decision-making authority”, s3(1)** Refer to section 2.1 above. **"Waste", s3(1)** As previously raised with DWER, this definition of 'waste' is problematic. Although a wholesale revision of the waste legislative regime is not appropriate at this time, minor improvements should be possible as part of this reform. For example, DWER has released guidance around 'what is waste' – the core aspects of this should be incorporated so as to give that guidance some standing (guidance currently cannot overrule / out rank the definition here in the EP Act). **Social surroundings, s3(2)** Refer to section 2.22 above.
	s3A	No proposed amendments.	Do not support	**"Threshold amount", s3A(3)** CME notes that combined with the definition of "material environmental harm" and "serious environmental harm" this is a very low threshold for material or serious harm. This has implications in subsequent sections. This definition uses the monetary amount to indicate the environmental outcome. This is inappropriate and will rarely be a strong correlation particularly once remote locations and logistical costs are considered. For example, a minor hydrocarbon spill (e.g. less than 20L) in to a leach drain that runs below the surface of slab would technically require excavation and removal of a slab (costing well more than $20,000) if natural attenuation were not permitted. Similarly, a minor effluent spill in to an earthen sump in a remote mine site (e.g. less than 100L) may require mobilisation of a sucker truck from the nearest town which may be several hundred kilometres away also costing well more than $20,000. Price does not equal environmental outcome and therefore, particularly in remote locations, this is an incredibly low threshold.
Part II – Environmental Protection Agency	s7	EPA Chairman to be either full-time or part-time.	Conditionally support	**s7(3)** Recommend change "daily newspaper" to "prescribed manner" to contemporise the publication and notification aspects of the Act. **s7(4b)** The deletion of s7(4b) is supported with the consideration that, in affording this flexibility, the level of service and availability of the EPA should not be limited by the appointment of a part-time Chairperson, as can currently be experienced by CME members engaging with the part-time Deputy Chairperson (as either Acting Chairperson or as nominated delegate due to conflict of interest).
	s11	Meetings of Authority.	Conditionally support	The addition of s11(2A) and 11(4) are supported, however EPA operational procedures must be updated to ensure any decision-making functions conducted remotely or out of session are documented clearly and are valid to avoid legal challenge. **s11(2)(a)** Recommend confirm definition of "not present" will still hold if meetings are to be done virtually using, for example, teleconference, Skype (etc.) **s11(2A) & 11(4)** Recommend an alternative term be used instead of "instantaneous". Taking a strict compliance view following the Forrest & Forrest High Court Case, methods like teleconference, Skype, Webex, Teams (etc.) are not technically "instantaneous" and this may result in a legal challenge. CME support the intent of allowing increased flexibility about meeting and reducing travel time, but the definition must be robust and defensible against legal challenge. **s11(4)** It is unclear why "Authority member" is included in this section when Authority member is covered by 11(2A), and 11(3) refers to persons other than the Authority members. CME recommend a review of this drafting.

Part	Section	Description of proposed amendment/s	Position	Response
	s14A	Decision without meeting.	Conditionally support	The addition of s14A is supported, however EPA operational procedures must be updated to ensure any decision-making functions conducted remotely or out of session are documented clearly and are valid to avoid legal challenge. **s14A** Recommend this section also makes reference to the Deputy Chairperson in those instances where the Chairperson is absent and hence the Deputy Chairperson is acting as the Chairperson.
Part III – Environmental Protection Policies	s26	No proposed amendments.	Conditionally support	**s26(1)(d)** Recommend change "daily newspaper" to "prescribed manner" to contemporise the publication and notification aspects of the Act.
	s36	No proposed amendments.	Conditionally support	**s36(1)(b)** Although there are not many environmental protection policies (EPPs) existing in Western Australia, adherence to the seven-year review appears poor. For example, the *Environmental Protection (Kwinana) (Atmospheric Wastes) Policy 1999* is well beyond its seven-year review. The Minister did a gazette notice to not review "at this time": http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/Gazette%20Notice%20214%2016%20November%202010.pdf The notice however states that "the Minister may direct the EPA to undertake a review within a period of seven years from the date on which this notice is published". That seven-year period has now lapsed yet there is no further notice not to review nor indication of how a review is then to be initiated. Subsequent reviews / reform of the EP Act should consider how EPPs are used and how they are maintained.
Part IV – Environmental Impact Assessment	s38	Allow a proposal to be referred more than once where the referral of the proposal has been withdrawn (under s38AB or 38A(3)), terminated (under s40A), or revoked (under s47A).	Conditionally support	Refer to section 3.1 above. **s38(5j)** Reference to s45C(3) requires update as s45C(3) does not exist. Note, it is difficult to assess the potential effect of proposed drafting where sections are incorrectly cross-referenced, and it cannot be deduced what section was intended to be referred to and hence what this clause was to be subjected to. **s38(6)** (deleted) CME notes the intent of this clause has been largely retained but moved to s39AA. The role of the Minister in s39AA has been changed to the role of the EPA. CME supports this change in role as appropriate.
	s38AA	Allow a referred proposal to be amended by the proponent, at the EPA's discretion, prior to an assessment decision being made.	Conditionally support	As this provision applies prior to a decision by the EPA regarding the level of assessment, the proponent's right to amend a proposal prior to any decision-making should not be limited.
	s38AB	Allow proponent to withdraw a referred proposal prior to an assessment decision being made.	Support	Support the ability for referred proposals to be withdrawn where a proponent does not wish to proceed.

Part	Section	Description of proposed amendment/s	Position	Response
	s38A	Require additional information about a proposal to be provided within a specified time frame. Allow a referred proposal to be withdrawn: a) if no response is received within the specified period from the proponent; b) with agreement of the proponent, for a proposal referred by a person other than the proponent.	Do not support as currently drafted	Support the high-level intent of the reform but not as currently drafted. **s38A(1)** Recommend inclusion of a provision whereby referrals are not invalidated if the requested information is unable to be provided within the specified timeframe. In some instances, given the nature of the requested information, it is not possible or practicable for proponents to provide the information within the specified timeframe. This will particularly be the case if the referral was premature due it being a third-party referral. Also recommend adding "or as otherwise agreed in writing" or similar phrase to allow for circumstances where additional information may take longer to obtain. As an example, it is not uncommon in northern WA to need to re-schedule planned field trips due to cyclonic or other weather events. It is unreasonable for a referred project to be automatically withdrawn or potentially invalidated following legal challenge due to a reasonable delay outside the proponent's control. Where this is the case, referrals should not be invalidated. The wording in s38A(3) is particularly forceful under such circumstances. Recommend rewording or clarifying s38A(3) and well as modifying s38A(1). **s38A(2)** Non-compliance with the timeframe should not invalidate the referral or the subsequent assessment (where applicable). The request for information timeframe should be set up as a 'stop the clock' mechanism for transparency of process. As currently written, none of the days of the 28 days prior to final receipt 'count'. Consequently, the EPA may spend (for example) 27 days assessing the referral (which is substantial and largely complete) and then on day 28 request a minor additional piece of information thereby fully re-setting and entirely clearing the preceding 27 days spent assessing the substance of the referral. This 'reset' approach is inconsistent with other assessment processes and use of 'stop the clock'. Additionally, in CME's experience, the 28 days is rarely met and there are no consequences for failure to achieve this statutory timeframe. Regarding reference to s39A(3), this reference is incorrect as the section has moved and must be changed to s39A(1). **s38A(4)** What happens if the proponent does not provide consent? Is the subsequent pathway sufficiently clear in the drafting?
	s39A	EPA has discretion to determine which decision-making authorities it will notify of its decision to assess a proposal, allowing the EPA to identify only major decision-makers in relation to an approval. Clarifies that decision to assess (and 28-day statutory timeframe for making a decision on referred proposal) does not apply to Derived Proposals. EPA to take into consideration other statutory decision-making processes.	Conditionally support	CME support the reduction of regulatory duplication afforded by the ability for the EPA to consider the role of other statutory decision-making authorities to regulate the environmental impacts of that proposal. This amendment is particularly relevant to the overlap between the AH Act and the EP Act. Support the EPA to utilise discretion to identify and notify only relevant decision-making authorities (and therefore constraining them from making subsequent decisions). The EPA's operational procedures need to be updated to define how a decision-making authority is determined to be 'relevant' to a referred proposal under s39A(1)(c).
	s39AB	The Minister may transfer responsibility for a proposal after a statement that records the implementation agreement or decision has been published.	Conditionally support	**s39AB(2)(b)** This section appears to provide for the EPA to nominate a responsible person regardless of the nomination from the proponent. Is this the intent and what if the proponent disagrees with the EPA? **s39AB(6)** This section is circular once you follow through with the Terms defined and other section references. Redrafting is recommended to facilitate understanding and clarity. Regarding reference to s39A(3)(a), this reference is incorrect and must be changed to s39A(1)(a).
	s39B	Allow for assessment of strategic proposals, enabling consideration of cumulative environmental impacts on a sub-regional and regional basis.	Conditionally support	Refer to section 3.2 above.

Part	Section	Description of proposed amendment/s	Position	Response
	s40	Clarifies process for referral and assessment of a significant amendment and that the proposed changes are to be assessed in the context of the entire project.	Do not support as currently drafted	**s40(1A)** CME is concerned with the specific wording of this clause and potential for unintended and unreasonable consequences and subsequent legal challenge / invalidity. This provision is inflexible and does not have regard to the fact that limited environmental data may be available for historically approved projects as information requests for impact assessment always change over time. A recent example where approval for a revised proposal was sought included consideration of subterranean fauna. However, subterranean fauna was not a factor when the original project was approved and there is not data available on the historical subterranean fauna status associated with the original proposal. The proposed amendment opens up an avenue for legal challenge of assessments where consideration of historical impacts is unreasonably difficult or not possible. Importantly, note that previous proposal may pre-date Part IV and pre-date the discovery of certain species and hence knowledge of these is unreasonable (impossible). Further, historical impacts are already taken into account in an impact assessment whereby the environmental baseline describes the current state of the environment and the conservation significance of species and ecological communities. Inclusion of historical impacts in a cumulative impact assessment presents the risk of double-counting these impacts. Recommend change 'must' to 'may' to enable the reasonable application of this provision where it is practicable, significant and of environmental benefit.
	s40A	Proponents are able to terminate the assessment of a proposal by written notice.	Support	
	s40A(1)	No proposed amendments	Conditionally support	**s40A(1)(c)** Is it clear that this only holds where the DMA actually has the authority to 'refuse' (versus 'approve') a proposal in a substantive way? It is possible to be a DMA without the DMA having the ability to approve / refuse a proposal (or potentially just a part of a proposal). It may also be possible to amend a proposal to remove a DMA (entirely).
	s41	Where decision-making authorities are constrained from making a decision that allows the proposal to be implemented, this does not apply to an approved proposal if it is an assessment of a 'significant amendment' to an approved proposal.	Conditionally support	**s41(3)** The incorrect reference to s39A(3)(c) requires update to s39(1)(c). **s41(5)** The definition in s3(1) for significant amendment is: "significant amendment of an approved proposal means a significant proposal, as defined in s37B, that is or includes the amendment of an "approved proposal". Given that this definition in s3(1) links back to the approved proposal and then includes the amendment, does the drafting of this clause still work (how does it clearly exclude the approved proposal?). Suggest that this is amended to clarify that subsections (2) and (3) only apply to a decision in relation to the significant amendment to the approved proposal.
	s41A	A proponent is not constrained from implementing the approved proposal if there is, or will be, an assessment of a 'significant amendment' to the approved proposal, i.e. a Revised Proposal	Conditionally support	**s41A(2)** This amendment does not make sense as s40A(1)(aa) refers only to the termination of a proposal at the request of the proponent and does not refer to a new proposal referred under s38. Recommend change to "[...] any new proposal referred to the EPA under s8 in place of a proposal terminated under s40(A)(1)(aa)." **s41A(4)** See comments under s45(5) regarding definition for significant amendment. Suggest that this is amended to clarify that subsections (1) only applies to a decision in relation to the significant amendment to the approved proposal.
	s43	Minister can direct the EPA to assess a project or re-assess a proposal more fully/publicly even if the Minister has dismissed an appeal against a decision not to assess.	Do not support	**s43(3A)** This amendment appears to leave a trailing risk for not-assessed projects, that can no longer be closed out by Ministerial determination of an appeal. Recommend this amendment be redrafted so that the Ministerial power to direct the EPA to re-assess a proposal is closed out following determination of an appeal against a not-assessed decision. **s43(4)(b)** Recommend change to "published in a prescribed manner as soon as practicable after the direction is given."

Part	Section	Description of proposed amendment/s	Position	Response
	s43A	Minister may direct EPA to assess or further assess a proposal after the EPA has decided not to assess, and the Minister has upheld the EPA decision following appeal. Streamline the process for amending a proposal during assessment - rather than requiring referral of a new 'revised' proposal in some cases, all changes shall be made under section 43A. If the EPA agrees to a proposed amendment, the EPA shall determine whether it justifies setting a different level of assessment, require further information from the proponent, or further public review.	Conditionally support	Support that the ability for a proponent to request to amend a proposal during assessment is no longer linked to the significance of the amendment. This will reduce regulatory burden and does not increase risk to the environment as the EPA has full flexibility to reject the change, increase the level of assessment, or change the scoping document. The EPA's discretion and powers to give or refuse to give approval for amendments to the proposal during assessment should be proportionate to the proposed amendment. This increased discretion presents a risk that inconsistency could arise in EPA decisions. A right of appeal against the EPA's decision is recommended.
	s44	EPA may take into consideration other statutory decision-making processes.	Support	Strongly support the EPA's consideration of other statutory decision-making processes in their assessment to avoid duplication of regulation in Ministerial Statements and other regulatory instruments. **s44(2b)** This is the first use of the term "reassessment" (assumed to be referring to if the Minister remits an assessment back to the EPA following an appeal for 'reassessment'). Does 'reassessment' need to be defined or specified? Which of the other sections relates / is relevant to reassessment? If redrafting of Part IV is pursued, perhaps there is a clean / clear way to define or refer to reassessment and make clear which parts of Part IV do and do not apply to a reassessment. **s44(3)(b)(ii)** Incorrect reference to s39A(3)(c) requires update to s39A(1)(c).

	s45	Requires the Minister and other decision-making authorities to have regard to the outcome of an appeal in making an agreement under s45. The Minister is only required to consult and attempt to reach agreement with those decision-makers relevant to the proposal and its environmental impacts. Specifies the types of implementation conditions that may be imposed, the list is not exhaustive and does not limit the types of conditions imposed. Power to enter into covenants and impose offsets, including monetary contributions to a fund. New requirements covering enforceability of management plans under implementation conditions.	Conditionally support	Support, in principle, the amendments to s45 to allow key DMAs relevant to the proposal and its environmental impacts to be identified and to limit statutory consultation requirements to those key DMAs identified by the Minister. However, previous comments must be considered (see section 2) regarding the definition of DMAs and the introduction of two tiers of DMAs, and either (i) simplification of the definition of a DMA, or (ii) redrafting of s45 be implemented. Current drafting of s45 does not clearly articulate how the two tiers of DMAs (key and non-key) must function when deciding if a proposal may be implemented (see further comments in Appendix II). The intent of streamlining regulatory processes is strongly supported, however it is noted that this provision presents the risk that some DMAs (which may be considered relevant to the proposal) may be actively excluded. **s45(1)** The term 'assessed proposal' is used in other sections beyond s45. Should be defined as a term used in s3 or else in s37B at the start of Part IV given wider use beyond s45. Support amendments to allow the Minister's appeal decision to not constrain the outcome of the decision-making process. **s45(1B)** Refer to section 22.1 above. **s45(5)(a)(ii)** Needs to be updated to specify which subsection of s39A is relevant. Recommend change reference to s39A to s39A(1) and 39A(4). **s45(5AA)** Support this amendment as it makes it explicit that a Ministerial Statement for a revised proposal can be an amalgamation of previous statements. **s45(5A)** Requires update to reference to s45AA, s45AA does not exist. **s45(5B)** Recommend this section is updated to a standalone section as it does not need to sit under s45C. Further, the current wording of s45(5B) implies that the list of implementation conditions is an exclusive list. Recommend reword to "The following list includes things the proponent of the assessed proposal [...]". The presence / absence of a management 'system' is process-focussed not environmental outcome-focussed. It can also be difficult to audit. The focus of conditions should be environmental outcomes. Recommend remove 'environmental management systems'. **s45(5B)(a)** Do not support including a power to require proponents to 'substantially commence' a proposal within a specified period as it is not reasonable and not necessary for the protection of the environment. Proponents must continue to have flexibility as to whether and when they commence an approved proposal. Such a condition would risk a proponent being in breach of a condition which is an offence under the s47 of the EP Act where it fails to 'substantially commence' a proposal by a date determined by the Minister. There are instances where a proponent may need to delay the commencement of a proposal (including waiting for other regulatory processes). If this proposed amendment is to clarify power to impose a time limit on commencement of an approved proposal as is the current practice, CME recommended the text be reworded and included elsewhere in s47. **s45(5B)(c)** What happens if the proponent does not have access / authority to the land? Conditions imposed must not be impossible. **s45(6)** It is CME's understanding that this section has been redrafted as a response to the Yeelirrie court case (WASC34) (see page 13 of the Discussion Paper). Given the court case decision confirmed what was the Minister's decision on the appeal and that the appeal decision does not constrain the outcome of the decision-making process (i.e. the court decision confirmed the State's interpretation and application of the Act was legally robust) it is unclear why this must be re-worded / re-written as it has now been tested and confirmed by the WASC. Redrafting changes the wording and hence means new wording will not have been through the WA Supreme Court so may be challenged afresh.

Part	Section	Description of proposed amendment/s	Position	Response
				s45(7) Recommend change 'may' to 'must'. This is required to make sure decision-making authorities can progress and make required decisions following notification from the EPA that they are no longer constrained by s41. This provision should be able to be delegated by the Minister to ensure no delays to implementation owing to issues with the Minister's availability. **s45(9)** Support the unimpeded implementation of an approved proposal where it is decided that a significant amendment to the approved proposal may not be implemented.
	s45A	No proposed amendments.	Amendment recommended	Recommend the addition of express powers that s45C and s46 to s46C apply to the notice issued under s45A(2), not just the strategic proposal ministerial statement issued under s45 (i.e. s45C to apply to changes to the description of the derived proposal and s46 to s46C to apply to implementation conditions referred to in the s45A(2) notice).
	s45B	If a significant amendment of an approved proposal is referred, implementation conditions relating to the approved proposal continue to apply.	Support	
	s45C	Allow Minister to approve minor amendments to proposals. Amendments enable the Minister to require information when a proponent makes a request to change the proposal.	Conditionally support	How provisions under s45C apply to strategic proposals and derived proposals needs to be expressly stated. It is unclear whether this section applies to significant amendments. If so, this needs to be expressly stated. In general, the (assumed) intent of the proposed amendments as described through the Discussion Paper is supported but the drafting in this section is not clear and hence it is unclear if the drafting achieves the aim. Recommend an express power added that allows for the merger / combining of proposals (to result in a single authorisation), a splitting of proposals (to result in two or more authorisations, potentially with different proponents) and a superseding / replacement of proposals (that definitively terminates the previous authorisation). This should extend to enabling these actions in respect of derived proposals, including combining a stand-alone approved proposal with a related derived proposal (for example, for expansion of the project the subject of the stand-alone approval). **s45C(1A)** This approach needs statutory timeframes and procedures as s45C applications are taking increasingly longer to be assessed. For example, a timeframe for the EPA to decide whether to consider an application under s45C, and timeframes for requests for additional information. How does this section relate (or not) to an amendment that is not significant? Or if an amendment is determined not to be significant (and therefore does not need approval under s45C)? **s45C(2)** Support the alignment of the test for amendment of conditions with the test currently used in section 45C. Where a proposal has been subject to multiple s45C amendments and/or previously has been the subject of a significant amendment referred under s38, and is consequently substantially different from the original proposal, future amendments which might have a significant detrimental effect on the environment should be reviewed against the last approved revised proposal, not the original proposal. It is therefore recommended that this section be updated to require the review of s45C applications against the Ministerial Statement, rather than the 'proposal as originally approved'.
	s46	Removal of some decision-making authorities from the process of deciding on changes to conditions where those conditions are not relevant to that DMA.	Support	

Part	Section	Description of proposed amendment/s	Position	Response
	s46B		Conditionally support	**s46B(2)** Recommend change "[...] a proposed change [...]" to "[...] a proposed amendment [...]". Use of the term 'major change' in reference to amendments to implementation conditions is a relic from previous revisions of the EP Act where amendments were categorised as major or minor. Recommend remove the term 'major change' and update so that it is consistent with the test in s46A(3) and s46C(1A)(b).
	s46C	Expands the scope of the minor changes the Minister may make to conditions without EPA inquiry. Changes may be made by the Minister at the request of the proponent where implementation of the proposal under amended conditions will not have a significant detrimental effect on the environment in addition to, or different from, the effect of the proposal under existing conditions.	Support	This amendment removes a compulsory assessment process for a change to conditions irrespective of whether they have environmental implications. The inclusion of a similar test as for s45C regarding whether there are additional or different significant adverse environmental impacts is a practical and well understood test for changes to conditions.
	s47A	Allows an implementation agreement or decision to be revoked / expire: a) at the end of the grant period; b) where substantial commencement has not occurred prior to the lapse of a specified date as provided by condition; c) in agreement with the proponent.	Conditionally support	Support the general intent of this proposed amendment noting some queries / clarification required. The application to derived proposals needs to be clarified. Would this apply to derived proposals that have been issued a s45A notice (i.e. do the powers to revoke a Ministerial Statement apply to s45A notices)? Conditions of strategic proposal Ministerial Statements, for example, condition 3-1 of MS1105 imposes a time limit for substantial commencement of the derived proposal from issue of the s45A Notice. This does satisfy the test of being "condition mentioned in section 45(5B)(a)", so the revocation power is applicable. Section 47A(4) provides that the Minister may revoke "the implementation agreement or decision". It should be clarified that the revocation is limited to the derived proposal and does not extend to the entire strategic proposal approval. **s47A(1)** Clarification is required as to how this section does or does not relate / address existing proposals that have passed the period of their substantial commencement (but, for example, may have applied to have it amended / extended but have not yet received this confirmation). **s47A(2)** Recommend an additional clause to require the CEO to reach agreement with the proponent on the revocation of a Ministerial Statement. CME do not support the Minister's unilateral ability to terminate a Ministerial Statement without the proponent's consent (merely on the basis of the CEO determining that the commencement condition hasn't been met). This is illogical, and unreasonable, and is not consistent with the other termination provisions in the section. It is illogical as the project can't commence in any case until the Minister agrees to amend the Statement to allow for substantial commencement. It is unreasonable as it provides the proponent no say in whether it wishes to maintain the approval (unlike proposed s47A(3)). There are many foreseeable and reasonable factors that can lead to a delay in commencement of a major project (including delays in other statutory processes) and this should not result in unilateral termination of an approval without consent of the proponent. The current s47A proposal is not demonstrably representative of "good' regulatory process or governance in the absence of a strong environmental protection or public resourcing justification (i.e. balancing scare public resources), of which there appears to be none. **s47A(5)(a)** As 'to serve' requires receipt of the item it would not be possible to comply in circumstances where the proponent of the proposal or the person that referred the proposal is a natural person that is a deceased person or if a non-natural person, the entity non-longer exists. This would prevent Government from clearing out their historic backlog of unused and unusable proposals. Recommend reword "to be served on" to "to be served on, where reasonably practicable[...]".

Part	Section	Description of proposed amendment/s	Position	Response
	s48	Allows regulatory agencies, which are not necessarily decision-making authorities for a proposal but have regulatory expertise in a particular environmental matter, to monitor and enforce compliance with proposal implementation conditions. Minister to issue a notice requiring implementation of a proposal to cease for up to 28 days.	Do not support	**s48(2a)** The addition of regulatory agencies that are not decision-making authorities has the potential to create duplication and confusion for both proponents and within DWER and other regulatory agency. **s48(8)** Clarity required where notices under s48(4)(a), 48(4)(b), or 48(7) will be published in order to ensure transparency. It is unclear from drafting what is intended for transparency for these notices.
	s48AA	New head power to allow fees to be charged for Part IV environmental impact assessment to enable cost recovery. Regulations to be developed in consultation with stakeholders regarding cost modelling. Levy funds to be paid into special purpose account to be used for purposes of administration of Part IV only.	Conditionally support	Refer to section 3.3 above.
	s48A to s48J	Allows extension of assessment time where the EPA has sought additional information about a scheme to enable it to make a decision. Brings the assessment of planning schemes in line with those that already exist for assessment of proposals - EPA's assessment report in respect to a scheme must set out the EPA's recommendations as to whether or not it should be implemented, and if so, conditions for implementation. Minister for Environment and Minister for Planning can reach agreement that a scheme may not be implemented.	CME has not reviewed proposed amendments specific to schemes in detail as CME members tend to refer “proposals” not schemes.	
Part V – Environmental Regulation	s51B		Conditionally support	Support, in principle, the objective of ensuring environmentally sensitive areas remain current and relevant. The amendment should clarify that consultation should only be foregone when it has already occurred under another Act.
	s51DA		Conditionally support	Refer to section 4.1 above.
	s51E		Conditionally support	**s51E(1)** The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'. **s51E(3)** Recommend change 'must' to 'may' to prevent application knock backs / approval validity issues. See above.

Part	Section	Description of proposed amendment/s	Position	Response
	s51F	Clarify the CEO may not make a decision on a clearing permit application which have the effect of leading the proposal down the road of implementation in potential contradiction of EPA advise or Minister's decision.	Conditionally support	Do not object, in principle, to the ability for the Minister to not make a decision on clearing permits until broader implementation decisions have been made, however this may have unintended consequence for related but separate actions. For example, this could preclude a third-party, multi-user infrastructure provider from constructing or modifying an asset (eg: road, rail, port, pipeline) that may interconnect to a network and a different proponent even when the infrastructure asset may be a multi-user asset. **s51F(3) and 51F(4)** CME is concerned by the broad nature of "related". In a mining context, all infill, near field and brownfield explorations, for example, would be 'related' to assessed proposal(s) and hence so would their fly camps, hydrogeological investigations and potable water source investigations etc. Some of these early works and ancillary works will be able to be multi- or regional use activities which should be allowed to proceed as they are not material to the referred proposal or purely and only linked to the referred proposal but arguable are 'related' to the referred proposal (especially at risk if exploration is for replacement tonnes). The prohibition must be for works that are materially linked not 'related'.
	s51I		Support	Support deletion of the reference to the *Soil and Land Conservation Act 1945*, and inclusion of related placement provisions as practical changes.
	s51M		Conditionally support	**s51M(1)** The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'. **s51M(1B)** Recommend change 'must' to 'may'. **s51M(7A)** CME is concerned by the broad nature of "related". See comments for s51F above.
	s51NA		Conditionally support	A surrender should be specifically contemplated and/or allowed where the land use will be governed by an approval proposal under Part IV. This is to facilitate the reallocation of land clearing where proponents transition from exploration to operations and do not revegetate etc. **s51NA(1)** The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'.
	s51R	Use of remotely sensed images as *prima facie* evidence.	Support	

Part	Section	Description of proposed amendment/s	Position	Response
	s52		Conditionally support	Support in principle, however the assessment of the implications of this amendment is impossible without visibility over what is specified by the supporting regulations as being controlled work for the purposes of this definition. **“Controlled work”** S52(a), (b) and (c) should not all be 'and' statements. It should be one or more so may need to alter above to state “controlled work means one or more of [...]”, or change “and” to “and / or”. The probability that all these situations would arise simultaneously in order to fulfil and 'and' requirement are slim. **s52(a)** Current drafting is inconsistent with s53(1)(a) and 53(1)(b) which do not allow controlled work or a prescribed activity unless authorised by a licence. To clarify, recommend rewording to: "work at premises that is designed to enable a prescribed activity that is not already authorised by a licence to be carried out at the premises [...]". **s52(b)** A risk-based approach is needed with regards to what is captured under the definition of controlled works. Controlled works should include works which result in physical modifications to plant bringing about a material or significant increase of existing emissions, and new emissions only. Where ‘controlled work’ will result in a decrease in emissions or discharges then approval should not be required. It is recommended that "designed" be removed from the definition as this implies that design modifications are considered controlled work. Modification of plant design should not be considered controlled work as this can occur frequently with multiple iterations prior to implementation. The phrase 'change the way' is ambiguous and should be removed. The current definition would, for example, include changes designed to reduce or eliminate emissions or improve emissions management below existing licensed activity thresholds. **s52(c)** Inclusion of 'alteration' in this definition of work would be considered to include plant, equipment or building maintenance which is not reasonable. Strongly recommend rewording this definition to remove consideration of maintenance activities.

Part	Section	Description of proposed amendment/s	Position	Response
	s53 to s53B	Removal of Works Approvals as a separate instrument, combining with licences. Move to activity-based licensing for Part V rather than premises-based (including to better address mobile plant and equipment). Design and operation of a prescribed activity to be included on single licence. Ability to define a licence area will remain, with flexibility to determine the appropriate area over which a licence and its conditions may extend in each case. Licences allowed to overlap. Voluntary licences - creation of an opt-in system allows a person who carries out an activity that does not meet the threshold for a prescribed activity but wishes to hold a licence to avail themselves of the defences against offences of pollution, or serious or material environmental harm, to apply for and hold a licence. Licences can be granted to a person other than the occupier of the land; 'any person' carrying out a prescribed activity may apply for and hold a licence.	Conditionally support	Refer to section 4.2 above. **s53(1)(c)** Change 'deal' to 'authorise'. The licence must authorise the carrying out of an activity that would be a prescribed activity if it met the prescribed threshold for a category of activity, to 'deal' does not convey any authority. **s53(3)** The alternative scenario should also be possible (presumably) that a licence could authorise an activity to occur except in specific premises / areas. For example, a mobile concrete batching plant may be permitted anywhere in WA where it is not an environmentally sensitive area / the land holder has given written permission, and it is not within #m of a residential building etc. Does the drafting allow for this? **s53A & 53B** For concision, recommend collapse s53A and 53B into one. Controlled works are in relation to a prescribed activity and are anticipated to be regulated on the same licence through staging conditions (i.e. conditions for construction, installation, commissioning, operation and decommissioning). Consequently, a licence for controlled works will inevitably be a licence for prescribed activity (so combine s53A and 53B), and so s54(2)(c) is redundant.
	s53C		Conditionally support	Recommend inclusion of a provision to combine and split licences.
	s53D		Conditionally support	**s53D(1)** Current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'. Recommend including a provision to combine and split licences. This will then require consequential amendments to s55(3) as that is drafted as an exclusive list. **s53D(3)** Change "[...] the CEO must decline to deal with the application and advise the applicant accordingly" to "[...] the CEO may decline to deal with the application, and if the CEO does decline to deal with the application, the CEO must advise the applicant accordingly."
	s53E		Conditionally support	**s53E(2)** Recommend change 'must' to 'may'. **s53E(3)** Change 'must' to 'may' due to the link back to s53D(1)(b) and potential invalidity linked to "be accompanied by" and "any information required".

Part	Section	Description of proposed amendment/s	Position	Response
	s54	Sets out factors to which the CEO must have regard in determining whether to grant or refuse an application. CEO to have regard to planning instruments.	Conditionally support	**s54(2)(b)** Change 'must' to 'may'. The drafting of this leaves this section clearly open to legal challenge as has been the recent experience under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwth) (successfully challenged and invalidated). Strongly recommend re-wording. Furthermore, the section should be amended to clarify that it is any development approval or planning instrument to the extent applicable to land on which the controlled work or prescribed activity will be undertaken to which the CEO may have regard. This is consistent with the grounds for revocation or suspension of a licence under s56(2)(f). (This comment also applies in relation to s51O, s55(4)(b), and s60A). **s54(b)(ii)** Does this mean a Development Application would need to run in parallel to a Part V licence application or prior to? **s54(2)(c)** Remove as per above comment for s53A and 53B.
	s55		Conditionally support	**s55(3)** Recommend include provisions for the amendment of licences by: • “combining two or more separate licences” • “splitting a licence” • “adding or removing an additional licensee” Should also consider making this list an 'any one or more / any or all of the following' type of list. For several of the subsections, for example, 55(3)(e), (f) and (h), advertising should not be required. See comment in s56(6)(a) below. **s55(4)(b)** Recommend change 'must' to 'may'. **s55(6)(a)** Recommend minor amendments under s55(3)(e), 55(3)(f), and 55(3)(h) to be exempt from publication. Note, there would be nothing to prevent the CEO from publishing these should they so want but publication of these ones appears unnecessary to be a mandatory "must" requirement.
	s56	Allows suspension / revocation of a licence for non-payment of prescribed fees (instead of automatic termination).	Support	
	s59		Conditionally support	**s59(2)** Recommend remove as the key consideration should be capability of the transferee. These considerations appear irrelevant to the assessment of whether or not to transfer and definitely should not be a must requirement.
	s60		Conditionally support	**s60(2)** Recommend remove as the key consideration should be the fulfillment of compliance obligations. For example, are there any further or remaining necessary controls or remediation that needs to occur that should for example be put on to a closure notice at surrender?

Part	Section	Description of proposed amendment/s	Position	Response
	s60A		Conditionally support	CME supports, in principle, the intent of this proposed amendment but considers the drafting far too broad and hence impractical / unworkable. CME does not consider that this wording will work for strategic assessments and derived proposals, nor does it work for ancillary related activities such as those associated with exploration (for example, fly camps and their wastewater treatment plants), nor can it work for instances where there are related but separate (and rightly separately and independent) assets such as multi-user rail and port facilities and mine assets within the region. This drafting creates a significant legal challenge risk and must be remedied. Recommend changing this to a discretionary power that can be exercised, and explicitly confirm that this provision does not apply to decisions in respect of licences that are within the boundaries of a strategic proposal that is under assessment. Further clarity is required as to how this links in with strategic assessments given current EPA approach is based on a 'Development Envelope', such that where mobile plant (and a prescribed area around the plant) is regulated by a licence, can the mobile plant prescribed area move outside of the Part IV development envelope? Do no object in principle to the ability for the Minister to not make a decision on licences until broader implementation decisions have been made, however this may have unintended consequence for related, but separate actions. For example, this could preclude Australian Gas Infrastructure Group from constructing the interconnector between Pluto LNG and NWS Project until the NWS Project Extension implementation decision has been made. The current exclusion under s60A(5) applies to a s45C application only. It is recommended to extend these exclusions to s60A(3) and 60A(4) applications when the EPA has consented under s41(5). For example, if there is an existing proposal under s38 then it would still be appropriate to allow for a proponent to seek to amend licences. **s60A(2)** Question the need to include a transfer. For example, when asset sale occurs, it is necessary at a specific point in time to be able to simultaneously transfer a Part IV as well as a Part V. This prohibition is too broad to be workable in all scenarios.
	s60B		Conditionally support	Clarity required on what is “any approved policy” and whether this refers explicitly and only to EPPs. If not, this is quite broad and may create an issue where a licence is necessarily inconsistent, or a potential challenge opportunity is it is not demonstrated that all policies were considered.
	s61	Clarify the CEO may not make a decision on a licence application which have the effect of leading the proposal down the road of implementation in potential contradiction of EPA advise or Minister's decision.	Conditionally support	Support, in principle, the concept of proponent contributions to environmental monitoring programs as described under proposed Part VIIB, however the effectiveness of this provision will depend on the consequential arrangement. Therefore, consultation on the regulations and frameworks will be important. **s61(1)** Current legislation does not contemplate conditions on licence transfers. Recommend change 'transferred' to 'amended' for consistency with section 55(3). Otherwise this would create a new tier of licence being a conditionally transferred licence and the status during the process (or any other matter) is not contemplated in the Act. CME notes that there are broader powers to grant a licence than to amend a licence – is this intentional, and if yes, why? (see s55(3) vs 61(1)).
	s61A	Power to impose conditions allowing for staged implementation of a proposal.	Conditionally support	Clear time-based conditions with close-out criteria are needed. Proponent consultation on realistic timeframes for these are needed on a case-by-case basis. **s61A(2)(r)** The presence / absence of a management 'system' is process-focussed not environmental outcome-focussed. It can also be difficult to audit. The focus of conditions should be environmental outcomes. Recommend remove 'environmental management systems'. **s61A(3)** Recommend remove as this constitutes a breach of licence condition and is therefore captured under s62 so is unnecessary. It is also poor drafting practice to introduce an entirely new offence provision in to a section of the Act that is not the section where all the related offences are contained.

Part	Section	Description of proposed amendment/s	Position	Response
	s63	A person who carries out an activity on behalf of a licensee, such as an employee or contractor, will also be required to comply with the licence conditions.	Do not support as currently drafted	This section is very broad. There also appears to be an issue here for the person(s) even if they did not know and could not reasonably have known etc. In such instances, they would have committed an offence but may be able to argue for a defence against the offence however it should not be an offence in the first place. This amendment makes sense in the case of contractors or related entities carrying out activities on behalf of the licence holder but extending this personal liability to all employees is not reasonable, particularly as acts of employees would ordinarily be considered to be the act of the holder. **s63(1)** Why is it necessary to introduce a new term 'licensed action' just for this one section on offences? This seems to unnecessarily complicate the drafting.
	s74A	Narrows scope of the defence offered by licence to an offence involving pollution, an emission or the discharging / abandoning of waste where the licence expressly authorised the emission / waste, and any limits on that emission / discharge imposed by the conditions of the licenced have been complied with.	Do not support	Refer to section 4.3 above.
	s74E		Conditionally support	**s74E(2)(b)** Recommend remove subsection (b). There should be no timeframe until a summons is issued.
Part VB – Environmental protection covenants	s86H – s86R	A condition of an EP Act approval may require a person to enter into, or arrange for another person to enter into, an environmental protection covenant, enforceable under the Act. Covenants may be either in perpetuity or for a specified period, may contain positive or negative obligations, and may be amended. Open to appeal.	Conditionally support	Support, in principle, the implementation of environmental protection covenants. **s86M(2)** The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'.
Part VI – Enforcement	s89A	Power for inspectors to use reasonable force to enforce the EP Act where there are reasonable grounds to suspect non-compliance. Reasonable force only to be used against property. CEO consent required where reasonable force likely to result in significant damage.	Conditionally support	Refer to section 5.1 above. **s89A(4)(a)** Current drafting provides that a person assisting an inspector has all of the powers as an inspector, not simply those which are being exercised by the inspector at the time the person is assisting. By definition an assisting person should only have the same powers exercised by the inspector at the time the person is assisting, and any powers must be further limited to those that are necessary in order to do the specific assistance required. Recommend change 'conferred on' to 'exercised by' and 'necessary in order to assist in that instance'.

Part	Section	Description of proposed amendment/s	Position	Response
	s90	Provides inspector with the power to require persons to produce books & other sources of information relating to an emission, or manufacture, sale or distribution for sale of prescribed equipment / material. Does not apply to information relating to environmental harm, clearing, and other potential breaches not involving an emission. Allows an inspector to require a person to attend an interview and answer questions. Allows an inspector to record an interview by electronic means.	Conditionally support	The status of the privilege against self-incrimination should be clarified. If the person is compelled to answer, then the answer should not be able to be used against them (per the MSIA). The person should be entitled to be accompanied by a person of their choosing, including by a person who is legally qualified. If the interview is recorded in writing or electronically, a copy must be provided to the person as soon as practicable after the interview.
	s93	No proposed changes.	Conditionally support	Further clarity needed on how this section will interact with the requirements of the MSIA. Mine site personnel may be exercising their requirements and duties under the MSIA and this may not always align with what a police officer, inspector or authorised person request, or may cause a delay etc. For example, mine site personnel may refuse and obstruct entry inside a blast zone due to a loaded and imminent shot. It will not always be the case that police officers, inspectors and authorised persons will be familiar with hazards associated with the resources sector, nor may they be familiar with the MSIA.
	s99A	Modified penalties to apply to all Tier 2 offences, and non-intentional Tier 1 offences. CEO required to consider the potential, or actual, environmental impact of any conduct giving rise to the alleged offence. CEO to consider each of the criteria listed in s99A(1)(c)-(f), rather than requiring each criterion to be met.	Conditionally support	CME has concerns with the proposed amendments. It does not appear that the CEO needs to lay out concerns to an evidentiary standard for modified penalties which, combined with the low threshold and changes to licences to, for example, require express listing of all emissions, may create issues. It will be disproportionately expensive to challenge matters givens the severity of the penalty and reputational impact of the penalty which may in fact be for an immaterial matter due to the low threshold.
	s99J	Infringement notices to be served within 12 months after the day on which the alleged offence is believed to have been committed.	Conditionally support	**s99J(3)** Increasing from 35 days to 12 months is a large increase. Confirmation on the rationale for this change is needed. Timely resolution is preferable.
Part VII – Appeals	s100		Conditionally support	A review should be undertaken of the new / amended provisions to ensure that appeal rights are provided for where appropriate. Refer to section Part VII – Appeals above. **s100(3a)(e)** Recommend move section to under section 100(3) for concision. Recommend change '14 days' to '21 days' for consistency with amendments to sections 100(3a)(a), 100(3a)(b) and 100(3a)(c). **s100(4)** Recommend change '14 days' to '21 days' for consistency with amendments to sections 100(3a)(a), 100(3a)(b) and 100(3a)(c).
	s101	Removal of provision for prevention of implementation / continuation of implementation where an appeal has been lodged by the proponent against implementation conditions changed following an EPA inquiry.	Support	Support amendment to s101(3) as an acknowledgement that appeals on conditions can only be made by proponents and would generally be to clarify or streamline requirements rather than increase environmental management. Therefore, there is low environmental risk in the proponent implementing the proposal under the published conditions while the appeal decision is pending. This removes a potential roadblock for proposal commencement. **s101(1)** Recommend provide Minister express power to uphold an appeal.

Part	Section	Description of proposed amendment/s	Position	Response
	s106	Clarifies the Appeals Convenor is not required to report to the Minister where a committee has been appointed under s106(2) and will report to the Minister. Requires Appeals Convenor to consider submissions received by the Minister from a decision-making authority and appeals committee (where one has been appointed).	Support	
	s107	Removal of provision for the Minister to make a final decision on appeal without receiving or considering a report from the Appeals Convenor or appeal committee.	Support	
	s107B	Enable appeals to be lodged with the Appeals Convenor to improve administrative efficiency.	Support	
Part VIIB – Environmental monitoring programmes	s110K – s110Y	Require industry to contribute financially to the environmental monitoring programs in industrial hubs across the State. Introduce head power for implementing environmental monitoring programs. Establish an Environmental Monitoring Fund.	Conditionally support	Support, in principle, industries' financial contribution to environmental monitoring programs (EMPs) in industrial hubs, however more detail is required on the framework for implementation. CME members look forward to detailed consultation on the Regulations. These Regulations should: • Require the program to comply with relevant standards in relation to monitoring and sampling methodology and equipment. • Detail interactions between the EMP and Part V licensing. • Regarding land access, require DWER to enter into an agreement with the landowner on access to install, maintain and decommission monitoring equipment. • Require DWER to analyse and utilise the data in a timely manner to inform standards, guidance and / or policy development. Any EMP proposed should be of State significance. CME recommend the establishment of new EMPs be by agreement with the CEO and proponents, or otherwise at the decision of the CEO with proponent rights of appeal, with a test to demonstrate the EMP is of State and/or strategic significance. Wherever practicable, methods and equipment which have the potential to invalidate historical datasets should not be used, and, prior to implementation, a process must be determined for data integration and precedence. Consultation with industry on funding arrangements is required. Where the 'polluter pays' principle is applied, the determination of funding allocations should be transparent, based on publicly available data, and re-assessed annually. Under Division 3, there should be an ability for the CEO to assess the cost of a proposed EMP and the appropriateness of the related levies in respect of the EMP's perceived State and / or strategic significance. To avoid potential double-counting, a proponent's involvement in an EMP should be taken into account by the EPA in their recommendation of proposed conditions requiring offsets. **s110L(f)** Further detail is required as to the require content of the report and frequency of publication. For transparency, the report should be made publicly available. **s110P(1)** Can you please confirm from where the 20% rate is derived? **s100R(1)** Please confirm, does this mean if you are one day late paying an instalment, you are then automatically due all other remaining instalments plus a fine of $10,000 plus treble the total amount of all instalments? This seems like a disproportionate penalty for being a day late on an instalment.

Part	Section	Description of proposed amendment/s	Position	Response
Part IXA – Bilateral agreements with the Commonwealth	s124A – s124H	Ensure the State Government's ability to fully implement bilateral agreements. Function of the EPA, Minister for Environment and CEO of DWER to promote implementation of a bilateral agreement or take into account any guidelines / policies established under a bilateral agreement. Fees to be charged - clearing permit processes and Part IV duties (processing referrals, undertaking assessments, approving management plans).	Support	Refer to section Part IXA – Bilateral agreements with the Commonwealth above.
Part IX – Transitional	s133A – s133Q		Conditionally support	Transitional arrangements must include provisions for the maintenance of existing registrations under Part V and other such instruments and orders. **s133D(1)** Remove reference to s73C(2) as this section does not exist, recommend change 'section 73C(2)' to 'section 99ZC(2)'. **s133D(3)** Remove reference to s73C(3) as this section does not exist, recommend change 'section 73C(3)' to 'section 99ZC(3)'.
Schedule 2 – Matters in respect of which regulations may be made	cl.5A	Introduction of head powers for the certification of environmental professionals, and the requirement of documents submitted under the Act to be certified by an accredited practitioner.	Do not support	Refer to section 8.1 above.
	cl.26 – 26A	Schedule 1 of EP Regulations to prescribe activity and threshold level.	Conditionally support	Schedule 1 of the EP Regulations review should be issued for consultation in parallel with the EP Act Amendments final Bill. The implications for changes in threshold quantities need to be considered.
Schedule 6 – Clearing for which a clearing permit is not required	cl.1, 10, 11A, 15 & 16	Exemption for clearing refers to clearing that is done to give effect to a requirement to clear under prescribed written law, specifically listing the legislation to which the exemption applies.	Conditionally support	This exemption relies on prescribed exemption lists (new Schedule to the EP Regulations, Schedule 6 in the EP Act) rather than the more flexible 'under a written law' exemption. If so, lists in themselves may not cover all circumstances or legislation yet to be enacted. The list must be made available as soon as possible (and in line with the timing of the final Bill) to ensure that no exemptions currently in place will inadvertently be lost due to poor drafting or oversight.
Various		Minor amendments to address a range of administrative inflexibility and inefficiencies throughout the EP Act.	Conditionally support	Support, in principle, amendments to address administrative inflexibility and inefficiencies.

Part	Section	Description of proposed amendment/s	Position	Response
		Modernise requirements for advertising, publishing and confidentiality: a) Ensure consistency between advertising and publishing requirements. b) Providing for use of alternative means of publishing (e.g. internet). c) Prescribe further types of information and documents that must be published. d) Confidentiality test under s39 removed, criteria to apply to the entire EP Act. e) Process for request for exemption from publishing. f) Application of prescribed copyright requirements to any documents submitted under the EP Act.	Support	Confidentiality is considered important. Support the modernisation of advertising and publishing requirements, and the broader application of confidentiality claims to the whole of the EP Act. Concerns exist regarding the proposal to allow regulations to prescribe further types of information and documents that must be published. Consultation on these regulations and what documents may be included is needed.
Further issues for consideration				
New ideas		Include new provisions under the EP Act to ban certain products or product classes.	Do not support	Insufficient detail as to what these provisions could extend to, or how banned products could be added. Further, this would seem a duplication of regulations already existing. For example, the State has recently instigated a ban on light weight plastic bags and this did not require any Act amendments in order to take effect. The State should not seek to amend an Act where this is unnecessary to achieve a policy objective.
		Resources provided for third party and community participation in environmental impact assessment and environmental regulation.	Do not support	Insufficient detail as to how this would be funded, what would be the scope (whether it would be just for advice or via comments in the approvals processes), and the definition of roles.
		DWER administers funds in some areas as a result of approvals under the EP Act but there are no specific head powers or hypothecation of the funds specifically provided for under the EP Act.	Support	Support the provision of head powers for DWER's administration of funds acquired as a result of approvals under the EP Act. For example, this may assist with the management of biodiversity offset funds and ensuring that any interest accrued due to this fund is available for biodiversity offsets and administration of the fund rather than channelled back in to the Consolidated Accounts.
Delegations		Clearly control any delegation of decision-making to non-environmental agencies or officers, to ensue these powers are exercised to protect the environment.	Conditionally support	Clarification is needed regarding what is meant by 'clearly control' the delegation of decision-making.
Role of the Environmental Protection Authority		Require the EP Act to prepare and publish its policies on environmental impact assessment and environmental protection in a manner consistent with the objects and principles of the Act, and ensure that these published policies are mandatory considerations.	Do not support	Only Regulations and Acts should be mandatory. Due to the different standing of Acts and Regulations, these go through the parliamentary review process and managed in a manner that supports their mandatory nature. EPA policies are not the same as an Act or a Regulation. Part III of the EP Act is available should a situation arise in the future that warrants a Policy of this nature which will therefore ensure it goes through a robust parliamentary process.
		Part 2 should include eligibility criteria for the appointment of EPA Board members as a schedule to the EP Act, which is developed following public and professional consultation.	Do not support	Support the current process, eligibility criteria for public servants already exist. In the absence of understanding the problem this is trying to solve, recommend current Act with amendments already covers this and therefore no further amendments are justified.

Part	Section	Description of proposed amendment/s	Position	Response
		Remove duplication issues between the EP Act and the *Heritage Act 2018* [sic]. The EPA is not the best entity to assess heritage or culture.	Conditionally support	Support the specific exclusion of heritage as a consideration for social surroundings on the basis that it is covered by the AH Act and best managed under the AH Act.
Environmental Protection Policies		Section 33 of the EP Act be amended to require public input into the EPA's advice to the Minister on the revocation of any existing environmental protection policy.	Do not support	Parliamentary and public consultation processes already exist around Part III. Further consultation requirements are not considered necessary.
		Parliamentary approval should also be required to validate the Minister's decision as in the case for any new environmental protection policy.	Do not support	Support Ministerial discretion.
		Revise Part III to facilitate the broader adoption of environmental protection policies.	Conditionally support	Support, in principle, if aligned with objects of the Act. CME notes there are only limited EPPs currently (suggesting they are of limited use or an unfavoured tool). There are also issues regarding the seven (7) year review cycle for existing EPPs.
Assessment		The EP Act be amended so that the EPA's criteria for determining significance are contained in the body of the Act rather than in the separate administrative procedures.	Do not support	Do not support narrowing definition of 'significance' as the definition is expected to evolve over time and undermines the case-by-case assessment approach.
		Section 38A of the EP Act be amended to make it mandatory for the EPA to explicitly consider and report on the cumulative impacts of every proposal it receives.	Do not support	Do not support the mandatory consideration of cumulative impacts of all proposals, each proposal should be assessed on merit. Approved proposals may never be implemented in their entirety, and so cumulative assessment may be inherently overly conservative. Cumulative impacts can be insignificant. Further, the potential exists for best practice (and beyond) operators to be disadvantaged by operators with poor practices.
		Section 44(3) be amended to clarify that the government may not request or direct the EPA to alter the content of any of its reports prior to publication.	Do not support	Decision-making authorities should be unfettered in providing advice to the EPA. The EPA still has the ability to make its own determination on what to include.
		A review of section 48A of the EP Act be undertaken, together with an amendment of the regulations requiring the EPA to seek public comment on the content of its assessment of planning schemes.	This is specific to a scheme, and therefore has not been considered by CME.	
		The current separation applied to planning schemes in the EP Act should be removed, and these should be subject to Part IV in the same way as other significant proposals.	This is specific to a scheme, and therefore has not been considered by CME.	
		A confidential peer review process be introduced as a requirement of the EP Act to assess environmental review documents prepared by proponents, similar to the process used for academic publications, with costs recovered.	Do not support	Do not support making any aspect of the assessment process confidential (with the exception of the existing commercial confidentiality provisions), as this would decrease the transparency of the assessment process. This may also limit procedural fairness and natural justice.
		Broader powers for strategic assessments to allow cumulative impacts to be more fully considered and regionally important environmental values protected.	Conditionally support	Properly applied cumulative impacts should be considered in strategic assessments i.e. before the activity has taken place. Further information on what is proposed in needed in order to fully assess this proposal.

Part	Section	Description of proposed amendment/s	Position	Response
Decision-making		The EP Act be amended to require decisions made under Parts III, IV and V give effect to the objects and principles as contained in section 4A.	Do not support	These principles are considerations but cannot be given effect in all proposals. For example, how much evidence would be required to overcome the precautionary principle. This would undoubtedly create a significant administrative burden for the regulator with limited difference in environmental outcome as the risk-based approach already applied through EPA and DWER processes focuses on the objects of relevance to the specifics of the proposal.
		Include statutory criteria for decision-makers to have regard to when making decisions under the EP Act.	Do not support	Further detail is required on this proposal before it can be fully assessed. This is likely to create an additional administrative burden that may be excessive and is unlikely to alter the environmental outcomes. Additionally, this would create a potential new grounds for legal challenge.
		Require all decision-makers under the Act to provide written reasons where requested.	Conditionally support	CME supports transparency and clarity around decision-making processes. Further information is required on this proposal before it can be fully assessed.
		Add statutory criteria for recommendations by the EPA as to whether a proposal may be implemented.	Do not support	Further detail is required on this proposal before it can be fully assessed. This is likely to create an additional administrative burden that may be excessive and is unlikely to alter the environmental outcomes. Additionally, this would create a potential new grounds for legal challenge.
		Section 46 of the EP Act be amended to allow the Minister to revoke an environmental approval if new evidence about the potential for significant environmental harm becomes available.	Do not support	Sufficient powers already exist under Part V for the management and mitigation of environmental harm.
		The power to amend works approvals, licences, land clearing permits or implementation agreements or decisions should be limited to administrative changes. Any substantive changes to such approvals should be subject to robust environmental assessment conditions.	Do not support	Proposed amendments to the EP Act already cover this such that significant amendments are subject to review.
		Require that any significant amendment of implementation conditions be assessed by the EPA at the same level of public consultation as occurred when the original proposal was assessed.	Do not support	Good drafting is required for implementation conditions to avoid the need for significant amendment. Furthermore, the scope of change of conditions is typically more focussed than the original proposal and would therefore not warrant an equivalent level of consultation. This recommendation negates proposed changes under s46C(1A). Each submission should be assessed on its own merits.
		Section 44 of the EP Act be amended to require that, wherever possible, the EPA impose clear and objectively verifiable conditions so that compliance can be assessed and monitored using measurable outcomes.	Conditionally support	Support, in principle. Further information required.
		Clarify how the time limit for implementation of a proposal works.	Support	Support further clarity on the definition of substantial commencement, and whether the five-year substantial commencement timeframe is extended upon DWER's receipt of an application to extend within the five-year period, or otherwise their approval of the application.
		Additional post approval administrative powers that could enable multiple Ministerial Statements to be rolled into one, or conversely to split a proposal into two or more Ministerial Statements.	Support	Strongly recommend inclusion of express powers to supersede, combine and/or split Ministerial Statements. This amendment would provide commercial flexibility to split projects and change proponent. Further, this should also include a mechanism to allow Derived Proposals to be superseded, combined and/or split.
		Clarification in respect to derived proposals, including that they are subject to a Ministerial Statement.	Conditionally support	Support further clarity on derived proposals. Further information required.

Part	Section	Description of proposed amendment/s	Position	Response
		Clarify revised proposal provisions, including constraints to decision-making and implementation.	Conditionally support	Support, in principle. Further information required.
		Where the EPA relies on other regulators to achieve its environmental objectives, it must verify and substantiate the level of environmental protection achieved through such third parties. It also must not have the effect of diminishing community and third-party participation through reductions in transparency, consultation or appeal rights.	Conditionally support	Support, in principle, providing it does not preclude removal of regulatory duplication. Further information required.
		DWER and EPA to not make decisions or allow activities that are inconsistent with Recovery Plans under the Biodiversity Conservation Act or EPBC Act, or which would result in increasing threat to a listed species or habitat or increase a threatening process.	Conditionally support	Support to the extent that this doesn't extend past these requirements. Proponents are already required to meet other regulatory requirements. Further information required.
Offsets		The EPA's policies and guidelines be amended to regulate and minimise the use of offsets and make explicit the circumstances under which they can be applied.	Conditionally support	A single national scheme for the creation, use and trade of offsets is supported. Further information is required as to how state and federal offsets can work together. The State has already initiated (nearly completed) a review in to offsets policies, the findings of which are expected to better inform a position on this recommendation.
Clearing of native vegetation		The clearing provisions should be moved to a standalone part of the Act to ensure that the specific protection of native vegetation and biodiversity conservation is the focus of regulation (rather than pollution and environmental harm).	Do not object	It is unclear how this would alter environmental outcomes so unclear on need for this reform but do not object.
		Alternatively, a purpose-specific native vegetation Act could be developed to regulate the clearing of native vegetation and to provide for arrangements relating to carbon farming.	Do not support	Do not support additional regulation. This would only add another layer of regulatory complexity without necessarily improving native vegetation protections. Any modifications should be made within the constructs of the EP Act. Native vegetation clearing is intimately linked to biodiversity outcomes so it would seem impractical to separate native vegetation clearing from other flora and fauna (etc.) considerations. It is common for multiple interlinked environmental factors to necessarily be considered as part of the overall environmental impact assessment for a significant proposal so separation in to multiple different Acts would be unhelpful and prevent holistic review. It is unclear how separation of clearing in to an entirely new Act would improve environmental outcomes (as opposed to just create more administrative burden and red tape).
		Reform of the clearing provisions in Part V and in supporting regulations is necessary to avert continued degradation of native vegetation across the State, particularly in highly cleared areas such as the Wheatbelt and the Perth and Bunbury metropolitan areas.	Conditionally support	Further information required. Native Vegetation in WA review is currently underway, the findings of which are expected to better inform a position on this recommendation.
		Areas of reform should include exemptions, principles and definitions applying to clearing.	Conditionally support	Further information required. Native Vegetation in WA review is currently underway, the findings of which are expected to better inform a position on this recommendation.
Industry regulation		Include a power to license mobile plant and equipment.	Support	This recommendation is covered in proposed amendments to Part V. See comments above. (Hence it is unclear what further amendments beyond that already identified are needed to enable this outcome.)

Part	Section	Description of proposed amendment/s	Position	Response
Compliance and enforcement		The amended EP Act should require financial assurances to be imposed on all approvals under the EP Act. This is necessary to protect against environmental impacts and to address financial risks to the Government.	Do not support	Financial assurances should only be applied where commensurate with the impact / risk. This provision is already in place under the *Mining Act 1978* and such an amendment would represent an unreasonable duplication in this regard. Additionally, where lands are not subject to the provisions of the *Mining Act 1978*, the EPA already has the powers to recommend assurances through the EPA processes and the Minister already does in such circumstances enforce these through Ministerial Statements.
		Modernise enforcement options including review of the offences and defences, consideration should be given to introducing civil penalties and civil remedies and the option of third-party enforcement.	Do not support	Support, in principle, the modernisation of enforcement options, however do not support third-party enforcement. Third-party enforcement was suggested at one stage for the new Workplace Health and Safety legislation and was staunchly opposed because it would undermine the role of the government regulator. CME support ensuring that the government regulator is adequately resourced to enforce the Act and does so in accordance with clear and transparent enforcement policies. Further information is required regarding the introduction of civil penalties and civil remedies.
		The funding arrangements for the EPA be reviewed to ensure that the auditing and compliance is able to be carried out effectively.	Do not support	Proposed amendments to the EP Act already include cost recovery for Part IV. Part V licensing fees cover compliance and enforcement activities for operations.
Appeals		The current structure of Part VII is currently not optimal in terms of clarity and logic, which is in large part due to the initial drafting of this Part and also due to numerous sets of Part VII amendments made from 1994 to 2010. It is recommended that it be restructured to streamline and modernise the format, reduce duplication, and clarify intent.	Support	Support redrafting of Part VII. Consideration should also be given to prescribing timeframes for finalising appeals. The uncertainty created by having appeals pending for significant periods of time is not in the interests of any party, particularly where the appeal outcome may impact the viability of a significant capital project or expansion.
		Third party appeals should be allowed against decisions to not assess proposals; decisions not to assess schemes, decisions on whether to implement proposals (not only conditions), decisions on works approvals and licences (not only conditions.	Do not support	The purpose of an independent body is to provide objective, expert advice. Additional third-party appeal only serves to increase regulatory burden.
Other recommendations				
Gendered language		Recommend transition towards gender-neutral language throughout the EP Act (e.g. change ‘his’ and ‘Chairman’ to ‘his or her’ and ‘Chairperson’), as noted in comments in Appendix II: Detailed Comments and Responses on the Exposure Draft Bill.		
Numbering / sequence		The sequence / numbering of sections and Parts (AA, AB, A, BA, etc) is inconsistent. For example, sequence of s38 to s38A (s38, s38AA, s38AB, s38A) differs from sequence of s39 to s39B (s39, s39A, s39AA, s39AB, s39B). Recommend review numbering / sequence of sections and Parts for consistency.		
Contemporise language (shall v must)		Recommend the contemporisation of language throughout the EP Act, including updating “shall” to “must”.		
Cost recovery mechanism		Where reference is made to the Consolidated Account, recommend update cost recovery mechanism.		

Appendix II: Detailed Comments and Responses on the Exposure Draft Bill