

ENVIRONMENTAL PROTECTION LEGISLATION AMENDMENT BILL (NO. 2) 2001

EXPLANATORY NOTES

GENERAL OUTLINE

The Bill's Short Title

Environmental Protection Legislation Amendment Act (No. 2) 2001

Reasons for the Bill

Some stakeholders are of the view that the current definition of waste contained in the *Environmental Protection Act 1994* (the Act) restricts the ability for waste materials, particularly those designated as regulated wastes, to be recycled, reprocessed or otherwise used in a beneficial manner. Under this definition, a thing is defined as a waste whether it is of value or not. Industry has also identified difficulties in marketing products that use waste as a component, or in selling wastes from their processes that may have a beneficial use to another process because of the undesirable connotations associated with the incorporation of “waste” into new products. It is therefore necessary to amend the definition to incorporate a provision that will result in facilitation of reuse and recycling of waste.

Local governments administer section 369 of the *Environmental Protection Act 1994* to approve ‘waste management works’ carried out within their boundaries. Many waste management works are also environmentally relevant activities (ERAs) requiring an environmental authority (licence) from the Environmental Protection Agency (EPA). Both the approval and the environmental authority may have conditions and require payment of a fee. Industry raised concerns that this results in duplication of processes.

In an attempt to resolve the issue, some amendments to this section were undertaken in 1997 but upon further consideration they were not acceptable to local governments. As a consequence their commencement was deferred until 31 January 2002. A Working Group (Waste) comprising representatives from the local governments, industry and community has been formed to establish a policy position acceptable to all stakeholders. This Bill contains amendments that are supported by the stakeholders. Implementation of the agreed policy position will require an amendment to the Act.

The Environmental Impact Statement (EIS) process in Chapter 3 of the EP Act needs to be amended to allow regulations to specify publication requirements to meet the requirements for accredited assessment processes under the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth). Minor amendments to correct drafting errors and clarify intention are also included in this Bill.

Consistency with Fundamental Legislative Principles

The *Legislative Standards Act 1992* outlines a number of fundamental legislative principles. These principles require that the legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament. The Bill is consistent with the fundamental legislative principles.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Short title

Clause 1 states the short title of this Act as being the *Environmental Protection Legislation Amendment Act 2001*.

PART 2—AMENDMENT OF ENVIRONMENTAL PROTECTION ACT 1994

Act amended in pt 2

Clause 2 states that this part amends the *Environmental Protection Act 1994*.

Amendment of s13 (Waste)

Clause 3 amends section 13, definition of “waste”, to make provision for determining that particular resources are not wastes for the purposes of the Act.

Subsection 1 amends section 13(1) to include the wording ‘other than a resource approved under subsection (4)’ into the definition for waste.

Subsection 2 inserts a new subsection (4) stating that the administering authority may approve a resource or a stated resource if it considers that there is a beneficial use for that resource. A beneficial use for subsection (4) may be, for example, reusing or recycling a resource.

The amendment creates provision for a system to allow the administering authority to determine that if there is a beneficial use for a material, an approval for the resource or stated resource may be granted so that it is no longer a waste for the purposes of the approval.

Replacement of ch 3, pt 1, div 1, sdiv 3, hdg (Purposes of EIS)

Clause 4 corrects a drafting error by amending the heading for Chapter 3, part 1, division 1, subdivision 3 from ‘Purposes of EIS’ to ‘Purposes of EIS and EIS process’.

Amendment of s40 (Purposes)

Clause 5 corrects a drafting error by amending section 40 of the Act to include the EIS process.

The EIS process includes not only the document itself but the development of the terms of reference, public notification and comment on

the terms of reference and the EIS, as well as the preparation of an assessment report.

In particular, the EIS does not, in itself ‘allow the State to meet its obligations under a bilateral agreement’ as mentioned in section 40(h), but the EIS process does allow this.

The amendment clarifies that the purposes relate to either the EIS itself or to the EIS process.

Amendment of s41 (Submission)

Clause 6 amends section 41(3)(b) to include an example of persons who may be proposed as an ‘interested person’ for the purposes of a proponent submitting draft terms of reference for an EIS.

Section 41(3) provides that the proponent must provide a ‘list stating the name and address of each person the proponent proposes as an interested person for the project’ when submitting draft terms of reference to the chief executive.

However, the term ‘interested person’ as defined does not give any guidance to proponents as to who such a person may be. The amendment proposes the insertion of an example to provide clarity regarding the intention of the section.

The example given is that of an ‘unincorporated community or environmental body with a financial or non-financial interest in the local government area that the operational land is in’. [Note that sections 43 and 51 also provide for notification of ‘affected persons’. These have been clearly defined in detail in section 38 including, for example, adjoining landholders, local governments and a person or body with status under the *Native Title Act 1993*.]

Replacement of s369 (Waste removal etc. by private contractors)

Clause 7 omits the existing section 369 of the Act and replaces it with the following amendments:

369 Restrictions on performing waste management works

Subsection 1 states that a person must not, for fee or reward, perform waste management works in a local government's area unless the waste management works are undertaken by or for the local government (under a written contract) or under an approval given under section 369A of the Act or under a development approval given under the *Integrated Planning Act 1997* or as an environmentally relevant activity under the Act.

Subsection 2 states the maintenance of the requirement for an approval under section 369A for regulated waste transport activities (ERA 83).

Waste management works that are carried out on a mining tenement and that are not ERAs, and not for the purpose of dealing with waste that is covered by the mining activity, will require a section 369A approval.

369A Obtaining approval to perform waste management works

Subsection 1 states that a person may apply for approval to perform waste management works within a local government area.

Subsection 2 states that the application to perform the waste management works must be made in the approved form and be accompanied by any fee that is required by the local government to consider the application.

Subsection 3 states that the local government cannot require a fee that is an amount in excess of the lesser of either the reasonable cost of considering the application or the maximum fee that is prescribed under a regulation.

Subsection 4 states that the local government must consider and decide the application as soon as is practicable after the application is received.

Subsection 5 states that if the local government does not make a decision within 60 days of receiving the application, the approval is taken to have been refused.

Subsection 6 states that the local government has the right to impose any relevant conditions on the approval that it considers necessary or desirable.

Subsection 7 states that, once a decision to grant the approval is made, the local government must notify the applicant, in writing, within seven days of making the decision.

Subsection 8 states that, within 10 working days of the decision being made, the local government must give the applicant a written information notice containing advice on refusal of the approval or any decision to impose additional conditions on the approval.

Subsection 9 states that an information notice, containing any other applicable conditions, may accompany or form part of the approval.

369B Amendment or cancellation of approval

Subsection 1 states that a local government can, at any time, amend an approval given under section 369A if that amendment is for one of three reasons:

- to amend a clerical or formal error; or
- if it does not adversely affect the interest's of the holder of the approval; or
- if it is at the written request of the approval holder.

Subsection 2 states that the local government must notify the approval holder in writing of these amendments.

Subsection 3 states that a local government may also cancel or amend, other than for the previously stated reasons, an approval given under section 369A, if the appropriate procedure set out in section 369B is complied with. However, an approval can be cancelled if a condition of that approval as not been complied with.

Subsection 4 states that, if an approval is to be amended or cancelled, the local government must give the approval holder written notice stating the action that the local government proposes to take and, in the case of amendment, the proposed amendment. The local government must also give the reasons for the action being taken and the facts and circumstances surrounding the action being taken. The written notice must also state that the approval holder can make written representations to show why the action should not be taken. This is the show cause period.

Subsection 5 states that the show cause period must end at least 28 days after the approval holder is given the written notice.

Subsection 6 requires that the local government must consider any representations that are made to it during the show cause period.

Subsection 7 states that, if the local government decides to take action, it must, within 10 business days of making the decision, give the approval holder an information notice regarding the decision. In the case of an amendment to the approval, the information notice will contain the amendments and form part of the original approval.

Subsection 8 states that the decision takes effect when the information notice is given to the approval holder, or former approval holder in the case of a decision to cancel the approval.

Subsection 9 provides clarification for the use of ‘amend’ in this section (section 369B). In this section, ‘amend’ an approval includes the amendment of an existing condition on the approval or the addition of a new condition on the approval.

Amendment of 520 (Dissatisfied person)

Clause 8 amends section 520 of the Act.

Subsection 1 amends section 520(1)(h) of the Act to remove reference to section 369 and replace it with section 369A, as section 369, as amended, now does not relate to the approval mechanism.

Subsection 2 amends section 520 (1) to insert further information concerning a dissatisfied person. Inserted subsection (r) states that a dissatisfied person for an original decision or review decision is the applicant for, or holder of, the approval, if the decision is about an approval, or an application for an approval, under section 13(4).

Amendment of 558 (Publication of decision or document by administering authority)

Clause 9 allows for regulations to specify publication requirements.

Subsection 2 provides for the renumbering of the section to replace 2A to 4 with 3 to 5.

The Environmental Impact Statement (EIS) process in the *Environmental Protection Act 1994* is proposed for accreditation for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) for projects requiring approval under the Commonwealth Act and subject to Chapter 3 of the *Environmental Protection Act 1994*. Accredited assessment processes must meet certain requirements set out in

the *Environment Protection and Biodiversity Conservation Regulations 2000*. These include, for example, specifications for the way of publication and the contents of notices about the draft terms of reference and the draft EIS.

It is proposed that these specific requirements will be detailed in regulations under the *Environmental Protection Act 1994*. However, if the regulations are to provide for publication in a particular way for projects requiring approval under the Commonwealth Act, section 558 of the Act needs to be amended to require that publication must be made by the way prescribed under the regulations. Without this amendment, publication is at the discretion of the chief executive, which would not accord with the mandatory requirements of the *Environment Protection and Biodiversity Conservation Regulations 2000*.

Amendment of 580 (Regulation-making power)

Clause 10 amends section 580(2), to insert a new subsection (t) to provide for the ability to make a regulation in relation to approvals under section 13(4). A regulation may be made about, for example:

- procedures for a person to apply for an approval
- matters that the administering authority must consider in deciding the application
- conditions that may be imposed on an approval and
- the amendment, cancellation or suspension of an approval.

Amendment of sch 1 (Original decisions)

Clause 11 amends schedule 1 of the Act.

Subsection 1 amends schedule 1, part 2, division 1, to make reference to 13(4), where there has been a decision made to refuse an application or where conditions have been imposed on the application.

Subsection 2 amends schedule 1, part 2, division 3, reference to 369(3), 369(5) and (6) and 369(6) are removed, and replaced with 369A(4) or (5) - Refusal to grant an application for an approval; 369A(6) - Imposition of condition on approval; and 369B(2) - Decision to amend or cancel an approval.

Amendment of sch 3 (Dictionary)

Clause 12 amends definition of standard criteria contained in the dictionary.

Subsection 1 amends paragraphs (g) and (h) of the definition for standard criteria.

Subsection 2 amends paragraph (k) of the definition for standard criteria.

Section 58 of the *Environmental Protection Act 1994* provides that the chief executive must consider the standard criteria in preparing an EIS assessment report. However, the lead words in the definition in Schedule 3 indicate the standard criteria are applicable only 'for an environmental authority, management program, protection order or removal permit'. That is, the lead words do not specify that the standard criteria are applicable to the preparation of an EIS assessment report. The amendment removes these limitations in the lead words. The applicability of the criteria is then specified as appropriate in the relevant sections throughout the Act.

PART 3—AMENDMENT OF ENVIRONMENTAL AND OTHER LEGISLATION AMENDMENT ACT 1997

Act amended in pt 3

Clause 13 amends the *Environmental and Other Legislation Amendment Act 1997*.

Amendment of s 2 (Commencement)

Clause 14 amends s2 (Commencement) of the *Environmental and Other Legislation Amendment Act 1997*.

Subsection 1 amends section 2(1) in relation to the commencement of amendments to s118B.

Subsection 2 removes section 2(2).

Omission of s20 (Amendment of s369 of Act No. 80 of 1997)

Clause 15 removes section 20 of the *Environmental and Other Legislation Amendment Act 1997*.