

REPORT OF THE  
DEPARTMENT OF ENVIRONMENT  
AND CLIMATE CHANGE  
OF THE STATE OF WESTERN AUSTRALIA



REPORT OF THE  
STANDING COMMITTEE ON ECOLOGICALLY SUSTAINABLE  
DEVELOPMENT

IN RELATION TO THE

*ENVIRONMENTAL PROTECTION AMENDMENT BILL 1997*

Presented by the Hon Christine Sharp (Chair)

## **STANDING COMMITTEE ON ECOLOGICALLY SUSTAINABLE DEVELOPMENT**

**Date first appointed:**

26 June 1997

**Terms of Reference:**

1. A Standing Committee on Ecologically Sustainable Development is established.
2. The committee consists of 5 members.
3. The functions of the committee are to inquire into and report to the House on:
  - (a) any matter in Western Australia concerning or relating to the planning for or management, use or development of natural resources and the environment having particular regard to demographic, economic, ecological, technological and lifestyle and settlement factors and concerns; and
  - (b) any Bill or matter referred to it by the House.

**Members as at the date of this report:**

Hon Christine Sharp MLC (Chair)

Hon Murray Criddle MLC (Deputy Chair)

Hon Norm Kelly MLC

Hon Ljiljanna Ravlich MLC

Hon Greg Smith MLC

**Staff as at the date of this report:**

Mr Michael Coleman, Advisory/Research Officer

Ms Kelly Campbell, Committee Clerk

**Address:**

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

**ISBN 0 7309 8884 8**

## CONTENTS

<b>1</b>	<b>EXECUTIVE SUMMARY AND RECOMMENDATIONS .....</b>	<b>1</b>
1.1	Executive summary .....	1
1.2	Recommendations .....	1
<b>2</b>	<b>TERMS OF REFERENCE OF THE INQUIRY .....</b>	<b>3</b>
<b>3</b>	<b>ORIGIN OF THE BILL .....</b>	<b>4</b>
<b>4</b>	<b>FORM AND EFFECT OF THE REFERRED CLAUSES .....</b>	<b>4</b>
<b>5</b>	<b>DELIBERATIONS OF THE COMMITTEE .....</b>	<b>5</b>
5.1	Central issues raised by the Bill .....	5
5.1.1	Conflicting responsibilities within the DEP .....	5
5.1.2	Departure from agencies' current roles under the Act .....	5
5.1.3	Separation of functions: the 36th Report .....	6
5.2	Options considered by the Committee .....	6
5.2.1	<i>Committee's preferred option: limiting the role of Waste Management (WA) to the existing sites .....</i>	6
5.2.2	<i>Installing a newly constituted government body as operator .....</i>	7
5.2.3	<i>Installing the Minister for the Environment as operator .....</i>	7
5.2.4	<i>Installing the Water and Rivers Commission as operator .....</i>	8
5.2.5	<i>Installing the Department of Health as operator .....</i>	8
5.2.6	<i>Creating a board to advise the CEO .....</i>	8
5.3	Drafting and other matters .....	8
5.3.1	Proposed new section 110M(5) .....	8
5.3.2	Proposed new section 110O(4) .....	9
5.3.3	Role of "decision making authorities" .....	10
<b>ATTACHMENT: PROPOSED AMENDMENTS TO THE ENVIRONMENTAL PROTECTION AMENDMENT BILL 1997 .....</b>		<b>11</b>

## 1 EXECUTIVE SUMMARY AND RECOMMENDATIONS

### 1.1 Executive summary

The referred clauses of the *Environmental Protection Amendment Bill 1997* ("Bill") establish a body called Waste Management (WA) under the *Environmental Protection Act 1986* ("Act"). The body consists of the Chief Executive Officer ("CEO") of the Department of Environmental Protection ("DEP"). The chief function of Waste Management (WA) is to carry on the existing waste management operations at three sites within the State ("existing sites"). However the Bill also provides that Waste Management (WA) may carry on any other waste management operation that is approved by the Minister.

The Committee has two main concerns about the Bill. The first is that the Bill requires the CEO of the DEP, the State's environmental regulator, to become the operator of an environmentally hazardous operation, giving the CEO potentially conflicting responsibilities. The second is that the performance of the CEO's functions is to be monitored by the Environmental Protection Authority ("EPA"), which could confuse the ongoing relationship between the two agencies.

On the basis that there is merit in seeking to limit the potential conflicts of responsibility and function raised by the Bill, the Committee considered a number of options for amendment of the Bill. The Committee concluded that, given the scale of the proposal:

- the Bill's proposal for management of the existing sites should be adopted as the most expedient option available; but
- the Minister's power to add other waste management operations to the portfolio of Waste Management (WA) should be deleted.

Should the Government intend to establish wider waste management infrastructure, it may be necessary to properly constitute an independent management agency.

### 1.2 Recommendations

*Recommendation 1: that proposed new section 110M(1)(d) of the Bill be deleted and consequential changes made. The Committee's proposed amendments are set out in the Attachment to this Report. (See paragraph 5.2.1)*

*Recommendation 2: that proposed new section 110M(5) be amended so as to ensure that the proposed new Part VIIB, but not other Parts of the Act, should govern Waste Management (WA)'s operations. The Committee's proposed amendments are set out in the Attachment to this Report. (See paragraph 5.3.1)*

*Recommendation 3: that proposed new section 110O(4) be amended to make the EPA responsible for monitoring Waste Management (WA)'s compliance with directions of the Minister under proposed new section 110N. The Committee's*

*proposed amendments are set out in the Attachment to this Report. (See paragraph 5.3.2)*

*Recommendation 4: that if any decision-making authority has responsibility for monitoring any conditions or procedures under Part IV applying to the existing sites, the Bill be amended to allow this responsibility to be exercised. (See paragraph 5.3.3)*

## 2 TERMS OF REFERENCE OF THE INQUIRY

Clauses 22 to 28 of the *Environmental Protection Amendment Bill 1997* were referred to the Committee by the House on the motion of Hon Christine Sharp MLC on 8 April 1998 in the following terms:

**That clauses 22 to 28 of the Environmental Protection Bill 1997 be referred to the Ecologically Sustainable Development Standing Committee and that the Committee report back to the Council these clauses no later than 29 April.**

### 3 ORIGIN OF THE BILL

- 3.1 The Bill was introduced in the Legislative Assembly and passed by that House on 19 November 1997. It was introduced in the Council on 26 November 1997 by Hon Max Evans MLC. Debate on the second reading of the Bill resumed on 8 April 1998, on which date the Bill was read for a second time and the referral to the Committee took place.
- 3.2 The Bill has not been opposed at any of these stages. However a number of concerns were raised in the second reading debate in the Council, some of which relate to the clauses referred to the Committee.

### 4 FORM AND EFFECT OF THE REFERRED CLAUSES

- 4.1 Clause 22 of the Bill inserts a new Part VIIIB into the principal Act. The new Part establishes and sets out the functions and powers of a body called Waste Management (WA), which consists of the CEO of the DEP. Waste Management (WA) forms part of the DEP and its operations are operations of the DEP.
- 4.2 The chief function of Waste Management (WA), described at proposed new section 110M, is to carry on the waste management operations at the existing sites: Mt Walton East in Coolgardie, and the Metropolitan Septage Plant and the Industrial Liquid Waste Treatment Plant in Forrestdale.
- 4.3 An important point is that the management function of Waste Management (WA) is not necessarily limited to the existing sites. Proposed new section 110M(1)(d) provides that Waste Management (WA) may carry on any other waste management operation that is approved by the Minister. Proposed new section 110O provides that the Minister is not to give approval unless the operation has been assessed by the EPA under Part IV of the Act, although there is scope for interim approval under proposed new section 110P.
- 4.4 The Bill in essence gives legislative sanction to the management regime already in operation. As the Committee understands it, the DEP is at present responsible in practice for the management of the existing sites. This arrangement will essentially continue, except that the CEO will be acting as Waste Management (WA) rather than as CEO.
- 4.5 Under proposed new section 110M(4), waste management operations must be carried on in accordance with any applicable conditions and procedures under Part IV of the Act and the directions of the Minister under proposed new section 110N. Proposed new section 110O(4) gives the EPA the task of monitoring the operations and reporting to the Minister.

## 5 DELIBERATIONS OF THE COMMITTEE

### 5.1 Central issues raised by the Bill

The Committee considered two related concerns with the Bill which were discussed in the House and prompted the referral to the Committee. The Committee is grateful for the assistance given by Mr Bryan Jenkins, CEO of the DEP, and Mr Laurie Marquet, Clerk of the Legislative Council.

#### 5.1.1 Conflicting responsibilities within the DEP

The first concern is that the Bill requires the CEO of the DEP, the State's environmental regulator, to become the operator of an environmentally hazardous operation. In doing so the CEO will be acting as Waste Management (WA), the body established by the Bill. Nevertheless, the Committee is of the view that there is potential for conflicts of responsibility to arise if the CEO plays the dual roles of regulator and, in his capacity as Waste Management (WA), operator.

Hon Max Evans MLC acknowledged and responded to this concern in the second reading debate:

*“Some concern has been expressed at having the State’s environmental regulator also acting as an operator. However, the proposed arrangements ensure that the State’s most problematic wastes are managed by the agency with the highest level of relevant expertise, and supervised and monitored by the statutorily independent EPA (with assistance from other Government regulators).”*

Similar (but perhaps less significant) concerns are raised by the Bill's proposal that the Environmental Protection Authority, which is constituted to act as adviser to the Minister for the Environment, become the regulator of the waste management operations contemplated by the Bill.

#### 5.1.2 Departure from agencies' current roles under the Act

The second concern is to do with the fact that the Bill proposes a departure for both the DEP and the EPA from their respective traditional roles under the Act. The agencies currently have clearly defined and separated powers and duties. The Bill's proposal that the performance of the CEO's functions be monitored by the EPA sets up an unfamiliar and significantly different relationship between the two agencies.

There is concern that this will lead to confusion in practice as to how the powers and duties proposed by the Bill fit in with the agencies' existing powers and duties.

### 5.1.3 Separation of functions: the 36th Report

In considering the two issues outlined above the Committee took into account the 36th Report of the Legislative Council's Standing Committee on Government Agencies, titled "*State Agencies: their Nature and Function*". That Committee found that the functions of government agencies could be broadly classified as advisory, regulatory and operational and that it is undesirable as a general rule that a government agency perform more than one of these kinds of functions.

Applying this maxim to the Bill, the Committee is of the view that all other things being equal, it would be preferable to avoid giving the CEO the operational function proposed, and the EPA the regulatory function proposed.

The Bill goes some way to minimising these concerns by:

- creating the entity Waste Management (WA) to be the operator. Even though Waste Management (WA) consists only of the CEO, creating the new entity to be responsible for the operations is preferable to simply ratifying current practice by leaving the responsibility in the hands of the DEP; and
- avoiding the worse scenario wherein the CEO is the regulator of Waste Management (WA)'s own operations, by giving the EPA the regulatory role for this purpose.

## 5.2 Options considered by the Committee

On the basis that there is merit in seeking to limit the potential conflicts of responsibility and function raised by the Bill, the Committee considered a number of options for amendment of the Bill. These are outlined in this section, beginning with the Committee's preferred option, together with a summary of the Committee's conclusions on each.

### 5.2.1 *Committee's preferred option: limiting the role of Waste Management (WA) to the existing sites*

The Committee agrees with the Minister and the CEO that the referred clauses of the Bill address a real need for formalisation of the management of the existing sites. While the Bill is not an ideal solution for the reasons discussed above, each of the other options discussed in this section is also flawed in some way. The Bill has the advantage of reflecting existing practice, which should minimise cost and disruption to management of the existing sites.

Accordingly the Committee endorses the Bill's proposal for management of the existing sites as the most expedient option available.

However, the considerations justifying the Bill's proposal for management of the existing sites do not necessarily apply to waste management operations other than the existing sites. The Committee therefore has concerns about the Minister's power in proposed new section 110M(1)(d) to approve other waste management operations as sites to be managed by Waste Management (WA). As discussed, there are drawbacks to the proposed structure of Waste Management (WA). That structure may not be (and as the Committee understands it, is not claimed to be) the State's best option for dealing with waste management in the long term, or for sites other than the existing sites.

Accordingly, the Committee is reluctant to support the Minister's power under the Bill to add other waste management operations to the portfolio of Waste Management (WA). Deleting this power would mean that any future proposal for management of other waste management operations by Waste Management (WA) would require separate consideration by Parliament.

***Recommendation 1: that proposed new section 110M(1)(d) of the Bill be deleted and consequential changes made. The Committee's proposed amendments are set out in the Attachment to this Report.***

#### **5.2.2 *Installing a newly constituted government body as operator***

This is in some ways a highly desirable option, as it would resolve both the concerns the Committee has about the Bill (discussed at 5.1, above). The Committee has also considered the likelihood that other waste management and contaminated site management functions will need to be addressed in future, potentially giving such a body sufficiently substantial functions to justify its creation.

However the costs involved in the establishment and operation of such a body would be considerably greater than the costs of the proposal under the Bill. A further difficulty is that, according to the CEO, the workload involved in operating a waste management operation is variable, making it inefficient for a body with significant fixed ongoing costs and no other responsibilities to take on the role.

On balance the Committee decided that the advantages of this option are not such as to justify the expense.

However, should the Government intend to establish wider waste management infrastructure, it may be necessary to properly constitute an independent management agency.

#### **5.2.3 *Installing the Minister for the Environment as operator***

The chief difficulty with this option is that the DEP would remain responsible for monitoring the operator's compliance with Ministerial conditions and procedures under Part IV of the Act. That is, the DEP

would have to monitor its own Minister's actions, which is not viable under principles of responsible government.

#### **5.2.4 *Installing the Water and Rivers Commission as operator***

As the Committee understands it the Water Authority of WA was at one time the operator for the existing sites at Forrestdale and the Water and Rivers Commission might be able to resume this role. The CEO informed the Committee that the DEP has discussed this option with the Water and Rivers Commission. The chief difficulty appears to be that the Commission is mandated to operate as a commercial entity and there is no intention at this time to operate the waste management operations on a commercial basis.

#### **5.2.5 *Installing the Department of Health as operator***

As the Committee understands it the Department of Health was at one time the operator for the existing site at Mt Walton East and might be able to resume this role. However the Department of Health is responsible for management of radiological issues and accordingly suffers from a potential conflict of responsibilities similar to that of the DEP.

#### **5.2.6 *Creating a board to advise the CEO***

This option has some attraction, as it would diminish the perception that the CEO is completely autonomous as an operator. However in practice the option amounts to only a marginal diminution of the essential conflict in the CEO's role. There is also no reason to doubt the quality of advice the CEO will receive from within the DEP, making the advice of a board somewhat redundant. It is doubtful whether the additional costs and disruption involved in establishing a board are justified by the marginal gains.

If a proposal to create additional waste management operations were mounted in future, further issues requiring consideration might include, for example, whether Waste Management (WA) should have an expanded formal structure, or whether more formal advisory procedures should be introduced.

### **5.3 Drafting and other matters**

In addition to the central issues discussed in sections 5.1 and 5.2 above, the Committee considered the following matters in relation to the Bill's drafting.

#### **5.3.1 *Proposed new section 110M(5)***

Proposed new section 110M(5) provides in part that:

*“. . . Waste Management (WA) is taken to comply with all of the provisions of this Act when carrying on a waste management operation under subsection (1).”*

This provision appears to mean that whatever Waste Management (WA) does when carrying on a waste management operation complies with the Act. All the provisions of the Act (including proposed new sections under the Bill) which impose any constraints whatsoever on Waste Management (WA) are therefore arguably redundant, because under this provision Waste Management (WA) is “taken to comply” with them, regardless of whether it does so in fact.

The provision appears to be part of an attempt to ensure that under the proposed new Part, failure by Waste Management (WA) to comply with the provisions of the Part is not an offence. While this might appear to weaken the provisions of the Bill, the Committee accepts that this approach is necessary, as the possibility of the CEO prosecuting himself (as Waste Management (WA)) for an offence under section 114 of the Act is clearly untenable.

However, it appears unnecessary to go further than this, as proposed new section 110M(5) does, and remove all constraints whatsoever from Waste Management (WA)’s operations. In the Committee’s view a better approach is to give the provisions of this Part some force by requiring Waste Management (WA) to comply with them, while accepting the approach taken by the Bill that non-compliance should not lead to prosecution.

To achieve this, the Committee proposes that the provision under discussion be amended to provide that only the proposed new Part VIIB should govern Waste Management (WA)’s operations. This will exclude the operation of other Parts of the Act, including provisions relating to offences.

*Recommendation 2: that proposed new section 110M(5) be amended so as to ensure that the proposed new Part VIIB, but not other Parts of the Act, should govern Waste Management (WA)’s operations. The Committee’s proposed amendments are set out in the Attachment to this Report.*

### 5.3.2 Proposed new section 110O(4)

Under proposed new section 110O(4) the EPA may monitor:

*“. . . the implementation of any proposal of which Waste Management (WA) is the proponent insofar as that implementation is subject to any conditions or procedures which are set out in the relevant statement served under section 45(5) for the purpose of*

*determining whether or not those conditions or procedures have been or are being complied with . . . ”*

That is, the EPA may monitor compliance with section 45(5) statements.

However, turning to proposed new section 110M(4), the obligation imposed on Waste Management (WA) is to carry on a waste management operation in accordance with:

- conditions and procedures under Part IV (which would include section 45(5) statements); and
- directions of the Minister under proposed new section 110N.

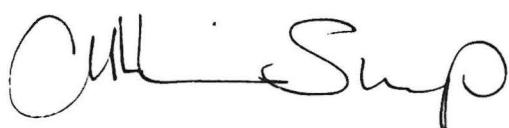
It is not clear why 110O(4) makes the EPA responsible for monitoring compliance with the first, but not the second of these. This appears to be an oversight and, if so, should be corrected.

*Recommendation 3: that proposed new section 110O(4) be amended to make the EPA responsible for monitoring Waste Management (WA)’s compliance with directions of the Minister under proposed new section 110N. The Committee’s proposed amendments are set out in the Attachment to this Report.*

### **5.3.3      Role of “decision making authorities”**

For completeness, the Committee notes that the Bill differs from the approach taken in existing Part IV of the Act in not allowing for the possibility that a decision-making authority (as defined) might have responsibility for monitoring conditions or procedures determined under that Part in relation to the waste management operations at the existing sites. The Committee has not seen the conditions or procedures applying to the existing sites and does not know whether any decision-making authority in fact has such responsibility. If so, the Bill will require amendment to account for this.

*Recommendation 4: that if any decision-making authority has responsibility for monitoring any conditions or procedures under Part IV applying to the existing sites, the Bill be amended to allow this responsibility to be exercised.*



**ATTACHMENT: PROPOSED AMENDMENTS TO THE ENVIRONMENTAL PROTECTION AMENDMENT BILL 1997**

Note: references are to the copy of the Bill marked "No. 82 - 2B".

**Clause 22**

Page 50, lines 15 to 18, to delete the words after the word "means" and substitute the words "a waste management operation referred to in section 110M(1)".

Page 52, lines 1 to 10, to delete the lines.

Page 52, line 18, to delete the words "Except as provided in subsection (1) (d),".

Page 52, line 21, to insert before the word "Waste" the words ", subject to this Part,".

Page 52, line 28, to delete the words "the Chief Executive Officer" and substitute the words "Waste Management (WA)".

Page 53, line 6, to delete the words "the conditions and procedures" and substitute the words "a condition or procedure".

Page 53, line 14, to delete the words "**Environmental impact assessment and monitoring**" and substitute the words "**Monitoring of waste management operations**".

Page 53, lines 15 to 29 and page 54, lines 1 and 2, to delete the lines.

Page 54, lines 4 to 6, to delete the words -

"implementation of any proposal of which Waste Management (WA) is the proponent insofar as that implementation is subject to any conditions or procedures which are set out in the relevant statement served under section 45 for",

and substitute the words -

“carrying on by Waste Management (WA) of a waste management operation insofar as the carrying on of that waste management operation is subject to:

- (a) any conditions or procedures under Part IV; or
  - (b) any directions of the Minister under section 110N,
- for”.

Page 54, line 9, to delete the words “or procedures” and substitute the words “, procedures or directions”.

Page 54, line 11, to delete the words “or procedure” and substitute the words “, procedure or direction”.

Page 54, line 16, to delete the words “or procedure” and substitute the words “, procedure or direction”.

Page 54, line 18, to add after the figure “48(4)” the words -

“as if that section applied to the carrying on of a waste management operation in accordance with section 110M(2)”.

Page 54, line 19, to delete the words “or direction”.

Page 54, lines 24 to 30 and page 55, lines 1 to 29, to delete the lines.

Page 58, line 9, to delete the words “to be” where they occur after the word “is”.

Page 58, line 12, to delete the words “to be”.

**Clause 24**

Page 60, lines 9 to 30, to delete the lines.

**Clause 25**

Page 61, line 6, to delete the line.

Page 61, lines 11 to 20, to delete the lines.