A supplementary document on tiered offences and penalties

outlined in the

Amendments to the Environmental Protection Act 1986

June 1997

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PUBLIC CONSULTATION
CHANGES TO ENVIRONMENTAL PROTECTION LEGISLATION

HOW TO HAVE YOUR SAY

This document is one of a series of papers relating to proposed changes to environmental legislation. It has been prepared as part of a wide consultation process. Your views are a vital element in this process of change to the legislation. Your comments are welcome on any of the issues raised in this and other documents. The documents are open for comment until 31 July 1997.

Copies of the papers and summaries are being distributed and will be made available to you at your local shire office and public library. Copies may also be requested from the Department of Environmental Protection.

To assist feedback during this time, the Department of Environmental Protection will host public meetings. These will be held in late June and early July 1997 around Western Australia at regional centres. This will allow you time to read the document and raise issues to be discussed at the public meetings. It will then allow you time to prepare a submission if you wish to do so. A schedule of meetings will be advertised in state and local media.

AMENDMENTS FROM THE REVIEW OF THE ENVIRONMENTAL PROTECTION ACT

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MANAGEMENT AND ASSESSMENT OF CONTAMINATED SITES

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INCORPORATION OF WASTE MANAGEMENT PROVISIONS

Enquiries may be directed to:
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Written comments for both the Amendments to the Environmental Protection Act 1986 discussion paper and the Contaminated sites position paper should be sent to:

Hon Cheryl Edwardes (Mrs) MLA, Minister for the Environment
18th Floor, Allendale Square, 77 St Georges Terrace, PERTH WA 6000

Closing date for comments is 31 July 1997

Copies of the documents and summaries are available from:
Department of Environmental Protection
Tel: (08) 9222 7000
Fax: (08) 9322 1598

Background

The proposed amendments included in the Public Discussion Paper on Amendments to the Environmental Protection Act 1986 released in May 1997 described the concept of tiered offences and penalties.

This document provides further detail on this concept and is distributed as a supplement to the Public Discussion Paper.

The proposed amendments to the Environmental Protection Act 1986, outlined in this document, are designed to update Western Australian environmental legislation and bring it in line with the approach being developed by the Australian and New Zealand Environment and Conservation Council (ANZECC) to achieve consistency within Australia.

The amendments discussed propose to significantly increase penalties under the Act, bringing them in line with moves towards uniform penalties and offences being pursued by ANZECC.

The current maximum penalty in WA is $50,000. Four other states in Australia have maximum penalties, for corporations, for serious and wilful offences of $1 million or more.

It is proposed to introduce a three tiered penalty system. Tier 1 will contain the most serious offences, Tier 2 the moderately serious offences and Tier 3 the minor offences.

This will allow some of the simplest offences to be dealt with by an infringement notice or ticket and some offences in the mid range (currently less than $10,000) to be dealt with by way of a modified penalty, at the discretion of the CEO of the Department of Environmental Protection on prescribed criteria. Serious offences and those with a custodial sentence must be initiated by the Minister for the Environment and must be dealt with by the courts.

The proposed changes will also include a provision in which the Minister will not need to approve all prosecutions under the Act. The Minister will continue to approve prosecution of serious offences under Tier 1, but the CEO will initiate prosecutions for Tier 2 and 3 offences.

These fundamental changes will also require some associated amendments to support the tiered system and related administration.

In reviewing the offences and penalties and assessing the department's experience in enforcing the Act since February 1987, it has been noted that there are three fundamental omissions. One is the inability of the courts to require rehabilitation or restitution of the environment impacted upon by the offence. While the others relate to the provision of an offence of attempting to pollute and powers of seizure or confiscation of waste and equipment. These will be addressed as associated issues.

Increase in penalties

It is proposed to increase penalties under the Act by a factor of 10, for example the current maximum for a corporation is $50,000 - this would rise to $500,000. However these increases will be subject to a review of the relativities set by other West Australian and Australian statutes.

A proposed provision will allow the court to double the penalty on proof of a wilfully committed offence. This would apply to all tiers and penalties dealt with by the courts, with the

exception, that the maximum custodial sentence would remain at five years. This provision would fall in line with the maximum penalties applicable in most other states where offences were proven to have been wilfully committed.

It is considered that the penalty for breach of section 112 (providing false or misleading information), is presently inconsistent with other offences and should be increased above the 10 fold increase. It may also be necessary to adjust other penalties where it can be demonstrated that an anomaly exists.

It is suggested that an offence under section 49 (1) (causing pollution) which currently carries a penalty for individuals of $10,000 and/or six months custodial sentence, should have a maximum of $100,000 and/or five years custodial sentence. For corporations this should be increased from $20,000 to $200,000.

At the lowest end of the penalty scale, the penalty for breach of a regulation will be raised from $200 to $2000. This is particularly relevant due to the recent changes in the licensing system, which have removed the need to licence some 600 premises and provided for these to be now controlled via regulations. The premises included in the licensing changes were those with a low level environmental risk, such as concrete batching plants, fibreglass works and abrasive blasting premises.

Tiered penalty system

One of the recommendations of the 1992 Independent Review of the Environmental Protection Act, was to introduce a tiered penalty scheme. This is consistent with the moves towards uniform penalties and offences being pursued by ANZECC. Several other Australian jurisdictions currently apply a tiered penalty scheme.

There are generally three tiers in such a scheme. Those of a serious nature perhaps resulting in severe environmental impacts or having the potential to do so and bearing the higher range of penalties, including jail, comprise the top tier (Tier 1). This would include breaches of trust offences. Tier 3 comprises simple statutory offences, analogous to a traffic offence and carrying a relatively small penalty. Tier 2 would consist of the balance of offences neither so straight forward as to be ticketable nor so serious as to carry a large penalty. Some of these offences may be categorised as subject to modified penalties.

Some offences under the same section of the Act may fall within all three tiers (based on the potential range in their significance). Accordingly, provision to transition offences from Tier 1 to other tiers will be necessary. For example a very minor breach of a licence condition should be able to be dealt with by way of a modified penalty, whereas a breach of licence resulting in significant pollution should be a matter dealt with by the Minister as a Tier 1 offence.

The proposed new offence of unauthorised environmental harm (outlined in the general discussion paper on Act amendments) will be integrated with the tiered penalty scheme.

Tier 1 offences

Tier 1 will consist of penalties up to $250,000 for individuals (with or without a custodial sentencing option which only relates to section 49 (1) (mentioned above) and $500,000 for bodies corporate.

The most serious level of offences should include such matters as:

- section 49(1) causing pollution;
- section 6 breach of ministerial exemption order;
- section 45 breach of ministerial conditions following a formal assessment by the EPA;
- section 58 breach of licence conditions;
- section 65 breach of pollution abatement notice; and
- section 69 breach of a ministerial stop order.

These are offences which are essentially now at the highest level of fine or a custodial sentence option. Only the Minister should have the power to initiate these prosecutions on the recommendation of the CEO. It should be possible for the prosecution to elect to have the offences heard summarily.

A due diligence defence will be added for this tier.

The Minister should have the power to transition offences from this tier to lower tiers, in cases where the minor nature of the issue is not significant enough to be treated in this highest category.

Tier 2 offences

Most offences under the Act will fall into this category which carries penalties between $10,000 and $100,000.

The CEO will be empowered to initiate prosecutions for offences under Tiers 2 and 3.

Offences of a technical nature, not wilfully committed and not resulting in serious environmental harm may be dealt with at the election of the CEO by means of a modified penalty or fine. The recipient of the notice may elect to either pay the fine or contest the summons which would issue after the lapse of a specified time.

The guidelines for the exercise of this power by the CEO will be laid down in regulation or under the Act. The CEO should have the power to issue modified penalties down to levels similar to ticketable offences in Tier 3, for minor cases. This will avoid the necessity of transitioning such cases to Tier 3.

Under this tier a modified penalty of up to 30 per cent of the maximum could be imposed, this could be anywhere between $3,000 and $30,000.

An accused who did not want to accept the modified penalty would have the option of having a case heard by a court. Where a modified penalty was set and paid, no offence under the Act would be recorded.

Provision should be made to deal with cases involving modified penalties where rehabilitation or clean-up of the environment is required. Where agreement is reached between the CEO and the accused, the action required may be able to be reflected in a section 73 direction or a section 65 notice. Where agreement cannot be reached, the whole matter could be dealt with by a court.

Tier 3 offences

Tier 3 will consist of minor offences carrying a penalty of less than $5000.

All offences under regulations and some similarly structured clear cut offences under Tier 3 such as section 78 interference with an anti-pollution device on vessels or vehicles are to be ticketable. That is, following the guidelines set out in regulations or administrative instructions, the prosecuting authority may issue an infringement notice either by hand or by post. The power for an inspector to require names and addresses will be essential to a ticket system.

It will be up to the ticket recipient to elect to pay the fine or contest the offence in court. The maximum amount for the ticket would be 10 per cent of the statutory maximum penalty for the offence up to $500.

The following sections are examples of issues which will fall into this category:

- Breach of regulations;
- section 77(2) discharges from a vessel or vehicle not complying with prescribed standards;
- section 84(1) when an owner or driver of a vessel or vehicle doesn't comply with prescribed noise standards;
- section 96(2) provision of information regarding the construction of vehicles or vessels; and
- section 97(2) making vessel, vehicle or equipment available for testing.

Associated provisions

In establishing a tiered penalty system and incorporating the concept of ticketable offences, certain other associated amendments to the Act are required. In addition, in reviewing offences and penalties, certain shortcomings in the Act have been identified and should be included in the amendments.

These associated amendments include:

1. Introduction of penalties for attempting to commit an offence.

   The penalty for attempting to commit an offence will be half the maximum penalty for committing the offence. This will be a significant improvement in the functioning of the Act, as at present officers have to wait for an offence to be committed (including the act of polluting), before they have the power to act. This is clearly an undesirable situation and is inconsistent with the objectives of the Act.

2. For many offences there is a daily penalty for an ongoing breach, but the Act does not specify when or how the imposition of this penalty is triggered. This will be rectified.

3. The amendments will include the power for inspectors to require the names and addresses of persons involved in a suspected offence, whether committed or attempted. A penalty for failure to provide name or address will be provided. Other aspects of powers of inspectors will also be reviewed, clarified and updated.

4. The amendments will include the power for a court to order the costs of rehabilitation of the environment, either in addition to, or instead of any another penalty.

   The failure to apply such funds to rehabilitation of the environment, was the main criticism from the legal profession following the McMurtry case. In the McMurtry case the defendant was found guilty and imprisoned under Section 49 (1) of the Act for discharging industrial waste into the environment, however the damage caused by the pollution has not been rectified.

   Therefore, because of the high cost of restoration, it is desirable if rehabilitation costs are in addition to, and be allowed to be in excess of the maximum penalty set.

5. The issue of dealing with companies which have no assets or are bankrupt, and the inability of the present Act to effectively deal with such bodies corporate, should be addressed.

6. The power to seize equipment and waste used in the commission or attempted commission of an offence will be introduced. Also attendant provisions, including the recovery of costs for seizure, transport, storage, management, treatment or disposal are required. The question of forfeiture as well should be considered, similar to the provisions of the Fisheries Act.

7. A duty for those in positions of responsibility to report a breach of the Act should be examined.

8. The question of dealing with and protecting informants and whether any special provisions are required should also be examined.