

Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the *Environmental Protection Act 1986* (WA)



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6 May 2016

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BARRISTER

6 May 2016

The Environmental Protection Authority

Dear Members of the Board,

**Legal and Governance Review of Policies and Processes of the
Environmental Protection Authority (EPA)**

I am pleased to provide the Report of the Legal and Governance Review of Policies and Processes of the EPA in relation to Environmental Impact Assessment under the *Environmental Protection Act 1986* (the Review).

As you know the Review was conducted by a Review Team consisting of Mr Eric Heenan, Ms Sunili Govinnage, and myself.

The Report provides an analysis of both the EPA's statutory functions in relation to environmental impact assessment and the current framework of policy instruments maintained by the EPA relevant to those functions. That analysis is, we hope, comprehensive and both theoretical and practical. Following that analysis, we have made a number of recommendations and proposals for reform.

This Report, and the recommendations in it, are intended to be the starting-point, rather than the end-point, of a reform process. They should be considered in that spirit.

The Review Team offers its sincere thanks to the officers of the Office of the EPA (OEPA) who have assisted in the Review. Particular thanks are due to Ms Gretta Lee, who was the Review Team's point of contact with the OEPA and the EPA throughout the course of the Review. We thank also the members of the Board of the EPA for contributing their time and ideas to the Review and for the enthusiasm with which they have approached the opportunity for reform.

Our gratitude is also due to the various stakeholders and interested persons who gave of their time during the Review. Their views and perspectives were of invaluable assistance. Thanks also to Piddington Justice Fellow, Isaac St Clair Burns, who provided much needed assistance in proof-reading the Report in its final stages.

My personal thanks are, of course, particularly due to the other members of the Review Team, Mr Heenan and Ms Govinnage. The Review would not have been possible without their expertise, industry and good humour.

Yours faithfully



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EXECUTIVE SUMMARY

Introduction

The Environmental Protection Authority (“EPA”) commissioned a review into the content, development, and application of its policies and guidelines in fulfilling its statutory duties to undertake environmental impact assessments pursuant to the *Environmental Protection Act 1986* (WA) (“the *EP Act*”) (“the Review”).

The Review was established following the decision the Chief Justice of the Supreme Court of Western Australia in *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482 (“the *Roe 8 Case*”) which held that EPA’s environmental assessment report in relation a proposal to extend the Roe Highway to Stock Road was invalid.

Three legal professionals were appointed to conduct the Review: Peter Quinlan SC, Eric Heenan, and Sunili Govinnage (“the Review Team”).

The Terms of Reference were for the Review Team to consider:

- “1. the EPA’s practices for development of [environmental impact assessment] policies, guidelines and procedures, and specifically:
 - a. whether the current framework for, and intended purposes of, policies, guidelines and procedures is appropriate; and
 - b. is the process for development and review of policies, guidelines and procedures sound.
2. the content, clarity and consistency of [environmental impact assessment] policies, guidelines and procedures specifically:
 - a. whether the content of policies, guidelines and procedures are appropriate for their intended application; and
 - b. whether the policies, guidelines and procedures are written in a way that is likely to achieve their intended purpose.
3. processes to ensure [environmental impact assessment] policies, guidelines and procedures are given due consideration during assessment and in the EPA’s reporting, and specifically:
 - a. the form and structure of a workflow process for consideration and application of policies, guidelines and procedures which:
 - ensures compliance with the Act

- ensures compliance with good administrative law and decision-making principles, and
 - produces a written report or recommendation which is legally robust and consistent.
- b. the content of the report and recommendations to the Minister following the assessment of a proposal.
4. any other matters related to the application of [environmental impact assessment] policies, guidelines and procedures which could affect the EPA’s capacity to fulfil its statutory duties to undertake [environmental impact assessment]”
- (“Terms of Reference”).

The question of “content” in the Terms of Reference did not include review of environmental policy positions taken by the EPA in relation to any environmental issues or factors set out in its policies. It formed no part of the Review to consider whether a policy position taken by the EPA or its environmental impact assessment in any particular case was correct, or justifiable. Rather, the Review was to consider whether the EPA’s policy documents were expressed in a way that is conducive to good decision-making.

Similarly, the Terms of Reference did not require the Review Team to examine or reach conclusions as to the legality or merit of any particular environmental impact assessment carried out by the EPA nor any report or recommendation issued by the EPA under the *EP Act*. The Review Team has not done so, and nothing in this report should be understood as suggesting otherwise.

An appeal by the Minister and the EPA from the ruling in the *Roe 8 Case* was heard by the Court of Appeal on 2 May 2016. At the time of publication of this report, the decision of the Court of Appeal was reserved. The Review Team, of course, expressed no view in relation to the potential success or otherwise of the appeal.

However, whatever the outcome of the appeal, the conclusions reached and the recommendations set out in this report remain unaffected. In that regard, the purpose of the Review was not merely to advise the EPA on making *lawful* administrative decisions but also how to reform its policy suite so as to ensure it

can make *good* administrative decisions. The Review was therefore to consider whether the EPA's policies contributed to consistent decision-making, and focused attention on the statutory functions with which the EPA is entrusted.

The Terms of Reference extended to consideration of the utility and value of the EPA's policy instruments. The Review Team formed the view that policies should contribute to consistent decision-making, which focuses attention on the statutory functions which the EPA is charged to carry out. Policy instruments which do not lead to better, more consistent decisions – or which divert attention from the core statutory functions of the EPA – should be reviewed or abandoned, regardless of whether the EPA is bound to consider them: [1.35].

In that context, the Review took it as axiomatic that, if the EPA is going to prepare and publish policies which relate to its statutory functions, then it should give them “proper, genuine and realistic consideration” in any given case. That requires the development and expression of policy which meaningfully contributes to decision-making and is not merely a perfunctory or “tick a box” exercise: [1.37].

Conduct of the Review

The Review was conducted both in the form of a desktop review of materials provided to the Review Team by the OEPA and by way of submissions from, and consultation with, the EPA and external stakeholders. The Review Team was entitled to call for, and accept, submissions from any person for the purposes of the Review.

Where appropriate, issues arising from those consultations were raised and addressed in the report.

Statutory Context

Throughout the report, the Review Team emphasised that the overriding consideration for the EPA, in performing any of its functions, including its environmental impact assessment function, must always be the terms of the *EP Act*. Any policy, procedure or guideline developed by the EPA must have, as its

touchstone, the requirements of the *EP Act* and the purposes and objectives set out in it: [3.2]. Thus, in order to consider the EPA's practices for development of policies, guidelines and procedures, and appropriateness of the content, clarity and consistency of those documents, the Review Team examined and considered the requirements of the *EP Act*, in particular as they relate to the EPA's role in conducting environmental impact assessment

That examination highlighted the following matters.

The conduct of an environmental impact assessment and resulting report under s 44 of the *EP Act* is clearly "administrative action" that can be subject to judicial review and may be declared invalid where it is occasioned by an error of law. Nevertheless, there are a number of features of the EPA's powers which distinguish it from those usually exercised by administrative bodies: [3.4].

In conducting environmental impact assessments and reporting to the Minister, the EPA's functions are entirely advisory. To use the words of s 44 of the *EP Act*, the EPA provides "information, advice and recommendations" to the Minister but this action, does not, in and of itself, directly affect legal interests: [3.41]. This advisory function of the EPA is to be clearly distinguished from the decision-making functions reposed in the Minister. The different natures of those functions, in turn, affects the manner in which those functions are to be carried out.

The responsibility of the EPA under s 44 is to report on what the EPA considers to be the key environmental factors and recommend whether or not the proposal may be implemented (with or without conditions). These are clearly the matters in relation to which the expertise of the EPA must be applied. The EPA's recommendation is the expression of its considered opinion as to whether a proposal is appropriate to be implemented, having regard to the objective of the *EP Act*, to "protect the environment of the State", and the objectives of the EPA: [3.45].

The decision whether to recommend implementation of a proposal must be made in accordance with the objective facts and by reference to the key environmental

factors identified by the EPA in accordance with the objectives and principles of the *EP Act*. The EPA's function does not include weighing the competing social, commercial or economic benefits of a proposal against the environmental impacts of the proposal: [3.62].

The scheme of the *EP Act* as a whole clearly recognises that, in a particular case, environmental impacts may be outweighed by the social or economic benefits to be gained by the implementation of a proposal. However, the weighing of those competing factors is to be carried out by the Minister (or the Governor in Council), not by the EPA. Policies, procedures, and guidelines developed and applied by the EPA in conducting environmental impact assessment must reflect this aspect of the function the EPA is assigned by Part IV of the *EP Act*: [3.64] to [3.71].

Further, the Review Team noted that the EPA's functions under the *EP Act* are not limited to its role in performing environmental impact assessments. Thus, not every policy, guideline and procedure published by the EPA must necessarily relate, or be relevant, to environmental impact assessments. In particular, Part III of the *EP Act* provides a detailed process for the preparation and approval of Environmental Protection Policies (see [3.72] to [3.78]), and the functions of the EPA under s 16 of the Act include publication of advice, reports, and guidelines for various purposes beyond environmental impact assessment (see [5.69] to [5.71]).

Any reform of the EPA's policy suite should specifically make clear when an instrument is intended for use as part of the environmental impact assessment process, and when it is not: [5.72].

Current Policy Structure

The EPA presently maintains a myriad of different policy instruments, all of which have the potential to affect the exercise of its statutory functions. The sheer number and variety of policy instruments is itself an issue which requires attention in improving the processes of the EPA.

A detailed consideration of all of the policy instruments was beyond the scope of the Review and is, essentially, the work that would need to be done in implementing

its recommendations. Accordingly, the Review Team has not assessed each individual instrument in the EPA's policy suite, but, rather, made general comments and observations intended to guide the restructuring of the policy suite.

The Review Team formed the view that the EPA's current policy structure is inadequate to provide the necessary guidance for all users of the documents and that this situation adversely affects both the use and the development of policy instruments generally: [4.5].

Examination of the current suite of policy instruments maintained by the EPA makes it clear that ([4.2]):

- (a) there are, quite simply, too many instruments;
- (b) there is no clear hierarchy or logical numerical order to the instruments;
- (c) within the nominal framework that currently exists, are several "types" of instruments that have different purposes, objectives, and outcomes; and
- (d) within the different types of instruments there are a range of different forms or "genres" of content.

Failure to link policy instruments produced by the EPA to the principles to be drawn from the *EP Act* and the functions which the EPA discharges under it has led to a mushrooming of policy instruments with a confusing array of acronyms: [4.50] to [4.51]. There is no central source that presents a clear outline of the EPA's policy suite in a standard hierarchy, and which links the policy instruments back to the statutory functions and powers to be undertaken by the EPA: [4.52].

The EPA's website, for example, reveals a labyrinthine collection of various categories and types of instruments in various lists that cross-reference others: [4.4]. As a consequence, navigating the "Policies and guidelines" section of the EPA's website is something of a Kafkaesque experience.

The Review Team's analysis of the structure of the EPA's policy suite and the individual policy instruments also revealed that the documents within the various

existing categories do not always align with the purported purpose of those categories: [5.17].

The Review Team emphasised that criticism of the current policy structure should not be taken as a criticism of the officers of the OEPA charged with the compilation and arrangement of the policies. It was, rather, a product of the policies themselves and the historical nature of their development: [4.8]. Indeed, many of the criticisms of the EPA's policy structure made by the Review Team were not new and had been recognised by the EPA and the OEPA in the past. Similarly, laudable attempts had been made to rationalise the policy instruments and to develop a "policy framework": [4.88].

Those attempts had failed, however, because they had not dealt with the problem root and branch, but had rather tried to make the changes incrementally by building upon existing structures and existing policy instruments. The Review Team concluded that if success was to be achieved in creating a coherent policy framework, a more radical approach was needed: [4.89].

Genres of Content

The Review Team identified six different forms or "genres" of content within the EPA's policy suite ([5.5]):

- (a) content which establishes the procedural framework for assessment of proposals under the *EP Act*;
- (b) content which sets out the EPA's scientific understanding and knowledge in relation to environmental factors;
- (c) content which provides information in relation to the impact of certain kinds of activities;
- (d) content describing particular technical issues in the assessment and monitoring of impacts on environmental factors;

- (e) content which provides guidance as to known or established methods for managing or mitigating particular impacts; and
- (f) content which seeks to set out policy positions that prescribe or predict outcomes in particular kinds of circumstances.

While their utility and effect on decision-making can be expected to be different, these different genres are found interspersed across the whole of the policy suite and thus: [5.6]. Depending upon the genre of the content, decisions of the EPA based on application of a policy instrument may be more, or less, vulnerable to challenge by way of judicial review. It is notable, for example, that all of the policies which were the focus of the *Roe 8 Case*, and in relation to which the EPA was found to have erred, were policies of the final genre: that is, policies which prescribed or predicted outcomes in particular kinds of circumstances: [5.7].

The report contains a detailed analysis of each of the genres of content and their relative importance and significance to the EPA's environmental impact assessment function: [5.22] to [5.131]. This analysis was not intended to suggest that the genres above should form a new list of instrument type that ought to be developed as part of the restructure of the policy suite. It was, rather, intended to provide greater clarity of thought around which genres are truly necessary, and to what extent, in order to properly support all aspects of environmental impact assessment. A better understanding of those genres should, in turn, guide the development of any restructuring process: [5.28].

The conclusions reached by the Review Team following that analysis were:

- (a) any reform of the EPA's policy suite must be conscious of the genre of the content being included in particular policy instruments and the particular function or purpose of that content: [5.8];

- (b) content that establishes the framework for assessment of proposals under the *EP Act* (that is, “process content”) is essential for the EPA to be able to carry out its environmental impact assessment function and to maintain public confidence in the EIA process: [5.40];
- (c) in designing process content, the emphasis should be on clarity and simplicity. Instruments of this nature should be drafted in imperative terms, articulating particular processes to be followed, with reference to exceptional circumstances where necessary. This content should have a minimum of verbiage and “aspirational” language: [5.46];
- (d) process content should be contained in a minimum number of, and preferably centralised, documents: [5.48];
- (e) factual content that articulates environmental factors and an understanding of their significance is a foundational aspect of good environment impact assessment. The identification of such factors is able to guide both a proponent and the EPA’s consideration of the matters that must be the subject of the EPA’s report under s 44(2)(a) of the *EP Act*: [5.60];
- (f) identification of key environmental factors, in the manner currently set out in EAG 8, can be expected to be a relatively stable set of considerations: [5.61];
- (g) factual content at a more specific level is similarly important for providing a consistent context in which proponents are to address key environmental factors of a proposal: [5.63];
- (h) however, policy content that sets out factual context must always remain, in a sense, provisional – and subject to changes in scientific knowledge and changes to the environment itself – and therefore subservient to the broader considerations of the *EP Act* itself: [5.68];
- (i) content that provides information in relation to the impact of certain kinds of activities should be included as part of content about environmental factors: [5.82];

- (j) content which identifies a preferred or required method for the analysis of environmental factors in an area the subject of proposal and the prediction of the impact of the proposal upon those environmental factors should remain relatively fixed in the short to medium term: [5.95];
- (k) content that provides guidance as to the particular ways in which environmental impacts may be avoided or mitigated is better included in material separate from the environmental impact assessment process, such as in material published under s 16(k) of the *EP Act*: [5.106]; and
- (l) content that contains predictions or presumptions as to the conclusion that the EPA will reach in relation to proposals having particular kinds of characteristics or effects should be used sparingly as part of the suite of policy instruments: [5.131].

Recommendations

The Review Team recommended that the EPA should develop and adopt a simplified policy framework that is arranged in a hierarchical manner, with the objectives and principles of the *EP Act* at its apex: [6.17].

Each instrument within the hierarchy should expressly “link back” to the instrument above it in the hierarchy: [6.18].

Content which establishes the procedures and processes for assessment of proposals under the *EP Act* (that is, “process content”), which should remain relatively fixed and stable, ought to be separated entirely from substantive content dealing with environmental factors. That second type of content should be a separate hierarchy: [6.19].

Policy instruments should, so far as possible, be rationalised into single documents so as to reduce the number of policy instruments in the framework: [6.20].

Rather than try to make the changes incrementally by building upon existing structures and existing policy instruments, if a coherent policy framework is to be achieved it must be established from the ground up: [6.22].

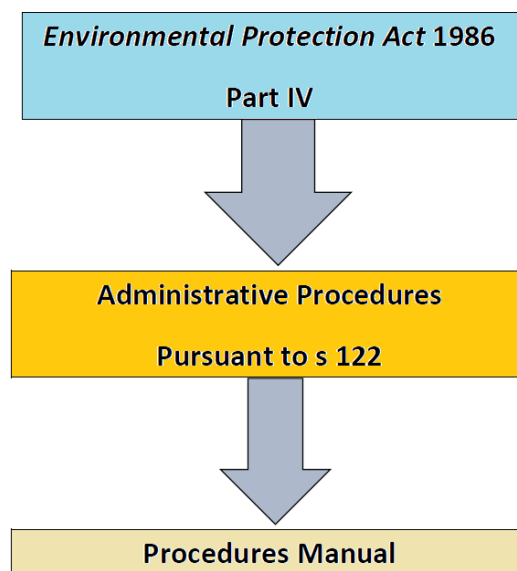
Thus, the Review Team recommended adopting a framework divided into three categories ([6.38]):

- (a) a framework for the process and procedures of environmental impact assessments;
- (b) a framework dealing with the substantive aspects of environmental impact assessments; and
- (c) policies, advice and other documents not included within the environmental impact assessment function.

Process and procedure

The Review Team recommended that the EPA's policy instruments in relation to the process and procedures for environmental impact assessment can, and should, be radically simplified. The Review Team recommended that the EPA consider a simple two-level hierarchy of documents falling within this category: [6.51] to [6.70].

The proposed structure may be represented diagrammatically as follows:



The overriding consideration in relation to the EIA process must be the requirements of Part IV of the *EP Act*. Many of those procedural requirements can

be found, for example, in ss 30, 38A, 39A, and, most importantly, s 40 of the *EP Act*. Those provisions provide the essential framework for the EIA process: [6.54].

The Administrative Procedures created under s 122 of the *EP Act*, being the next level in the hierarchy, should therefore follow closely the scheme set out in Part IV of the *EP Act*, linking their provisions to that scheme. Those Administrative Procedures should set out the essential matters of procedure to be followed as part of environmental impact assessment: [6.55].

In many respects the *Administrative Procedures 2012* already do this by referring, at critical points, to the relevant statutory provisions in Part IV of the *EP Act*. In that regard, the *Administrative Procedures 2012* are generally adequate for their purpose. However, updates to the policy framework since that instrument was published and the changes proposed here are such that it will be necessary to issue a new instrument: [6.56].

The next level, the Procedures Manual, should include *all* relevant guidance in relation to the entire process set out in the Administrative Procedures. Each part of the Procedures Manual should make clear to which part of the Administrative Procedures that part of the Procedures Manual relates. At its most basic level, for example, the Procedures Manual should follow the same order and numbering as the Administrative Procedures: [6.57].

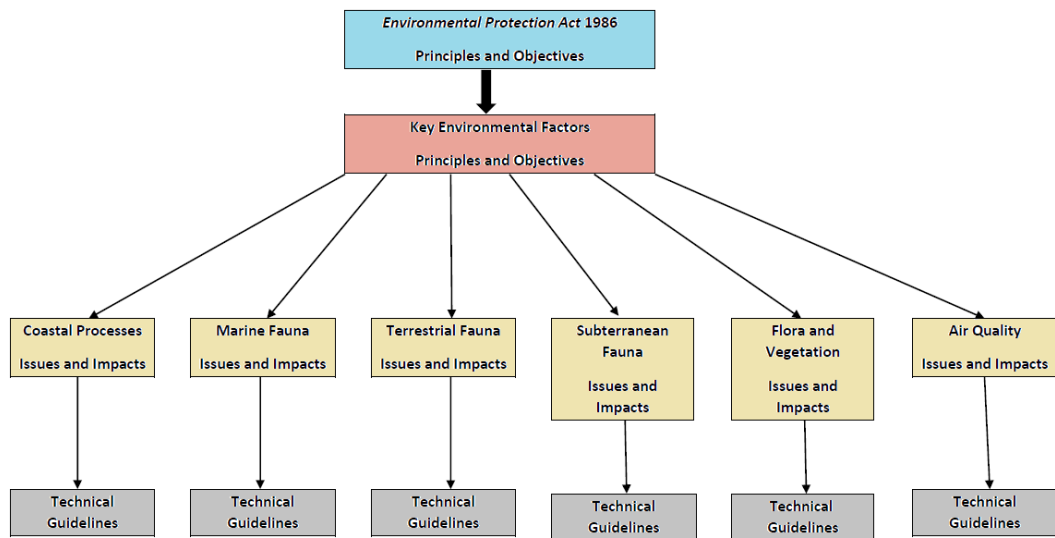
The Procedures Manual would contain all of the kinds of “process content” found throughout the current suite of policy instruments, and it should contain none of the content found in the other genres: [6.58].

Substantive aspects of environmental impact assessment

The Review Team observed that providing a framework for the substantive aspects of environmental impact assessment, that is, content providing substantive guidance as to the environmental issues likely to arise in environmental impact assessments, is clearly more difficult, given the wide variety of proposals, environmental factors and issues that may be dealt with in that process. Any framework will inevitably be faced with anomalies: [6.72].

The Review Team recommended that the policy framework be “environmental factor focused” rather than “activity focused”: [6.74]. The Review Team therefore recommended a hierarchical structure for substantial aspects of environmental impact assessment whereby the identification of environmental factors and the objectives in relation to those factors is elevated to a preeminent level, with relatively fixed and stable content: [6.76].

A simplified diagram of this proposed structure is as follows:



With the *EP Act* itself at the apex of the hierarchy, the Review Team recommended the next level should be a single document which identifies the key environmental factors relevant to environmental impact assessment analysis, with objectives in relation to each factor explicitly linked to the principles and objectives of the *EP Act*. That is, for example, the document should identify, with greater specificity, how each of the key environmental factors may be expressed in the terms of the five principles identified in s 4A of the *EP Act*: [6.84].

This aspect of the policy suite is “policy” properly so-called. Namely, it is material intended to provide clarity as to the factors and issues that will be taken into consideration as part of the EPA’s exercise of its environmental impact assessment function, in deciding upon whether or not to recommend a proposal be implemented: [6.75].

The next level in the hierarchy would be documents in relation to particular aspects of the environmental factors. Those documents, which are described in the diagram as “Issues and Impacts” would focus more on the general environmental issues facing aspects of the particular factor; that is, setting out the EPA’s understanding of a particular environmental factor, its current “state” and how the factor is affected by natural and human activity: [6.89].

The instruments in this level should be arranged numerically within the category of the particular factor, so that its placement within the hierarchy is clear. More importantly, the content of the instruments should explicitly link back to the principles and objectives identified for that factor in the overarching policy: [6.90].

Specific content in relation to scientific understanding about particular environmental factors, being inherently subject to change and advancement, while important, would be referable to, and as a matter of priority, subservient to, this first level: [6.93].

These two levels principally envisage content within the second identified genre of content. They would also contain content within the third genre and, to a lesser extent, the sixth. The Review Team emphasised, however, that, because the new framework would be “factor focused”, content within the third genre, insofar as it is contained in the environmental impact assessment policy framework, would be found in instruments relating to the particular environmental factor. There would not be, within this framework, any policy instruments dealing with particular activities: [6.94].

Finally, below these levels in the hierarchy would be technical guidance or requirements in relation to the method for the survey or analysis of particular environmental factors and the prediction of the impact of the proposed activities upon those environmental factors: [6.100].

Policies and advice not included within the EIA function

The Review Team emphasised that the proposed structure was not to suggest that the EPA should not prepare reports, information, advice and guidance in relation

to environmental matters attaching to particular activities. The Review Team emphasised that it should, and that such reports are a very important part of its broader statutory functions in providing guidance to government, industry and the public. Nevertheless, such material (and related material setting out known or established methods for managing or mitigating particular impacts), which synthesises issues in relation to various environmental factors, are better prepared outside of the context of its environmental impact assessment function: [6.97].

The EPA should continue to produce the wide variety of information and guidance that is envisaged by the *EP Act*. Indeed, it is imperative that such material be produced, quite apart from guidance in the environmental impact assessment process. The EPA, for example, is entrusted with the function of providing advice to the public and industry generally in relation to environmental matters and its overarching responsibility for the protection of the environment might be lost, or overshadowed, by too narrow a focus on environmental impact assessments: [6.46].

Conclusions as to framework

The structures proposed by the Review Team were intended as a broad framework to guide reform of the EPA's policies and guidelines in relation to environmental impact assessment. They are not intended to be a rigid or prescriptive formula and the Review Team noted that it was entirely foreseeable that, in the course of development, aspects of the suggested framework may need to be varied: [6.106].

Nevertheless, the Review Team emphasised that an overriding consideration of any reform process adopted in response to this review should be that the structure of the policies and guidelines be carefully planned and settled before being populated with particular instruments: [6.107].

Similarly, any reform process should be directed towards creating a policy framework in its entirety. That may require the existing policy suite to be maintained during what may be a lengthy development process for the new policy framework. It may also mean that immediate or urgent changes that are necessary would need to be made to the existing policies while the broader policy development is

underway. Nevertheless, it was better for those things to occur (that is, the current policy suite continues to be used, and managed, in the short to medium term) and to get the new framework and content *right*; rather than creating yet another hybrid of old and new policy documents: [6.108].

Environmental offsets

Given the centrality of the “offsets” policies to the *Roe & Case* and aspects of the nature of environmental offsets that are unusual in the context of environmental impact assessment, the Review Team specifically addressed the issue of environmental offsets.

As defined by the WA Environmental Offsets Guidelines (2014), offsets are actions that provide environmental benefits which counterbalance the significant residual environmental impacts or risks of a project or activity. Unlike mitigation actions which occur on-site as part of the project and reduce the direct impact of that project, offsets are undertaken outside of the project area and counterbalance significant residual impacts.

While the view had been expressed that consideration of environmental offsets has (or ought to have) no part in the EPA’s environmental impact assessment functions under Part IV of the *EP Act*, the Review Team concluded that the consideration of offsets now formed an essential part of good environmental impact assessment. In particular, while the issue of offsets generally arises in circumstances in which social or economic benefits are considered to outweigh particular significant residual environmental impacts, there are nevertheless genuine environmental issues involved in whether offsets *can* be employed to “offset” a particular environmental impact and as to the type of environmental offset which might be available and suitable: [7.50].

The Review Team therefore concluded that the EPA would be abdicating its functions if it put out of its mind consideration of environmental offsets for the purposes of environmental impact assessment. Leaving the question of offsets

entirely to decision-makers to determine would not be conducive to long term environmental protection: [7.53].

Nevertheless, the Review Team acknowledged that the consideration of environmental offsets did occur at the margins (or interface) of the distinction between the role of the EPA and the role of the Minister under Part IV of the *EP Act*: [7.54].

In that regard, it is the Minister who, under the provisions of Part IV, is ultimately responsible for resolving conflicts between protection of the environment and competing considerations. The role of the EPA, in synthesising all of the relevant information and environmental factors, including information in relation to offsets, is to provide its recommendations based on those *environmental* factors. Clearly there is room (indeed significant room) for differences of opinion in relation to whether offsets are appropriate or environmentally acceptable in a particular case.

For that reason, the Review Team noted that it was entirely possible that the EPA may consider a proposal environmentally unacceptable (and unable to be offset) and so recommend (under s 44) against a proposal being implemented, but for the Minister to reach a different conclusion and decide (under s 45) that the proposal *may* be implemented: [7.55].

The Review Team emphasised that the EPA should be alive to this possibility in preparing its reports and recommendations under s 44 of the *EP Act* and that the question of offsets may arise, even where the EPA concludes that it must recommend that a may not be implemented. In such a case, the Review Team advised, it may be appropriate for the EPA, under s 44(2a) of the *EP Act*, to advise the Minister that if, contrary to its recommendation, the Minister decides that a proposal may be implemented that it should be accompanied by certain conditions as to offsets: [7.56].

In relation to policy instruments in this area, the Review Team noted that, the requirement for *early* consideration and identification of proposed offsets, as reflected in the *Administrative Procedures 2012* and current policies, was not only

desirable, from an administrative point of view, but essential for the EPA to be able to assess and consider the particular environmental offsets proposed as part of a proposal in order to discharge its environmental impact assessment function: [7.61].

These considerations suggested that it will generally be inappropriate, as a matter of good decision-making, to defer the identification of offsets until after the proposal has been assessed or approved. Rather, the Review Team concluded that (at least ordinarily) offsets should be identified with specificity in the s 44 report and recommendations themselves. It recommended that this should be emphasised in the procedures relating to offsets: [7.63].

The Review Team also concluded, in relation to the EPA's environmental impact assessment function, that it was important that there be greater structure around the circumstances in which offsets may or may not be an environmentally appropriate response to residual significant environmental impacts. Criteria for assessment of that issue might appropriately be included in the second level of the recommended hierarchy in relation to the substantive aspects of environmental impact assessment, namely the "Issues and Impacts" instruments. In that way, the EPA can focus on the different kinds of offsets that may be appropriate in addressing the different environmental factors: [7.71].

The Review Team did not suggest what those criteria for assessment should be; merely that there *should* be such criteria: [7.72].

Policy development and review

Given the above findings and recommendations concerning the need for wide-scale structural reform of the EPA's policy suite, the report provided only general comments as to processes for policy development. The Review Team identified general principles that should be addressed in the EPA's future approach to policy development and review.

The Review Team concluded that actions proposed and deliverables identified in a 2012 Review by the OEPA generally highlighted sensible practical initiatives that

would assist and guide policy development: [8.7]. What was missing, however, was a properly articulated framework within which to develop policy material: [8.9].

In relation to policy priorities the Review Team noted that priorities ought at all times be guided by the statutory functions of the EPA and the principles and objectives of the *EP Act*. In that respect, considerations such as “Ministerial priorities” and “external drivers” must be treated with caution having regard to the statutory requirement for the EPA to maintain its independence: [8.14].

The Review Team highlighted the importance of consultation throughout the policy development process. The proper articulation of purpose, audience and scope for policy instruments within the new framework will ultimately provide guidance on the nature of the consultation that will be useful for the development of the various kinds of instruments: [8.15] to [8.21].

The Review Team noted, finally, that, in essence, the EPA needed a “policy on policies”: [8.23]. That is, it would be fruitful to develop a “policy manual” to ensure there is adequate “guidance for a consistent process for how EPA/OEPA develop policy”. Such a “policy manual” should set out the practical steps and considerations that would be involved in the policy development and review process. Preferably, it should be made publicly available: [8.24].

The following issues should be addressed in any “policy manual” ([8.26]):

- (a) the status of “draft” material, including whether, and the circumstances in which, such material may be made publically available for consultation or other purposes;
- (b) timeframes for finalisation of material ought to be properly confirmed – even if the principle adopted is that timeframes should be set on a case-by-case basis as part of the development of individual instruments, public confidence will be increased if every venture to develop or review policies has clear and identified timeframes and deliverables;

- (c) the requirements for and extent of consultation for each type of policy instrument (based on the purpose and scope articulated in the policy hierarchy);
- (d) the process for reviewing instruments that have been published and adopted and, subsequently, what processes will be followed if instruments are proposed to be amended or withdrawn.

Particular aspects of the environmental impact assessment process

Finally, the Review Team addressed a number of submissions from stakeholders raising concerns with the particular aspects of environmental impact assessment process which are deserving of separate attention.

The Review Team noted that after the *Roe 8 Case*, the OEPA implemented procedural requirements to ensure that the EPA's policy instruments were duly considered as part of the assessment process. The OEPA provided the Review Team with copies of internal templates and spreadsheets listing documents in the policy suite developed to be "checklists" to ensure compliance: [9.6].

The Review Team observed that such checklists were likely to end up being part of a "tick a box" exercise rather than meaningful engagement with the relevant policies and guidelines. It added, however, that simplification of the structure and number of policy and guideline documents, as recommended in the report, would, in turn, simplify the identification of relevant policies and, it may be hoped, reduce or eliminate the need for such exercises: [9.8].

Several stakeholders, particularly those representing proponents, expressed concern with so-called "retrospective" change or introduction of new policy or guidelines while a proposal was under assessment. Proponents were particularly concerned with uncertainty and disruption caused by changes, or the potential for changes, to what they are required to address during the course of the assessment process: [9.13].

Although the recommendations of the Review regarding the adoption of a policy framework for the processes applicable to the environmental impact assessment process reflect the same desire for certainty evident in the above submission, the Review Team noted that the suggestion that policy should in effect be frozen as at the date of an environmental scoping document reflected a misunderstanding of the nature of the EPA's duty under s 44 when it assesses a proposal: [9.14].

The Review Team observed that adoption of the recommended policy framework should largely ameliorate proponents' concerns with lack of certainty in the environmental assessment process: [9.17].

The Review Team received a submission expressing concern with the adequacy and timeliness in the production of minutes of the EPA. It observed that the public provision of minutes of the EPA's deliberations in a timely fashion was critical to the exercise of rights of appeal and review, and likely to increase public confidence in the EPA's environmental assessment process. Accordingly the Review Team recommended that consideration be given to amendment of Regulation 2B(2) to provide for earlier release of minutes of EPA deliberations: : [9.23].

Finally, the Review Team addressed concerns expressed in relation to the "API Category B" level of assessment provided for in clause 10.1.4 of the *Administrative Procedures*. Some proponents were concerned that the EPA may be exceeding its power under the *EP Act* by seemingly rejecting "out of hand" proposals without due consideration.

Having reviewed the API Category B level of assessment, the Review Team concluded that it was premised on the EPA forming a judgment (that is, assessing the proposal) to conclude that the proposal is fundamentally and fatally flawed. Thus, provided that the EPA actually considered, and therefore assessed, a proposal to reach such a conclusion, it was not apparent that an assessment pursuant to the currently prescribed API Category B level of assessment would necessarily be vitiated by jurisdictional error. For these reasons, the Review Team saw no legal

reason why the API Category B level of assessment should be removed: [9.30] to [9.31].

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CHAPTER I - INTRODUCTION

Background to the Review

- 1.1 This is the report of an independent review into the content, development and application of the Environmental Protection Authority's ("EPA") policies and guidelines in fulfilling its statutory duties to undertake environmental impact assessments pursuant to the *Environmental Protection Act 1986* (WA) ("the *EP Act*") ("the Review").
- 1.2 On 17 December 2015, the Minister for Environment the Hon Albert Jacob ("the Minister") announced that he had requested an independent audit of the EPA's policies and procedures following the decision of the Chief Justice of the Supreme Court of Western Australia in *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482. (This decision is discussed below.) The Minister wrote to Dr Tom Hatton, Chairman of the EPA, on 23 December 2015, requesting advice as to suitably qualified professionals to be appointed to conduct the Review. On 29 January 2016, the Minister announced the appointment of three legal professionals to conduct the Review: Peter Quinlan SC, Eric Heenan, and Sunili Govinnage ("the Review Team").
- 1.3 The Review Team has been engaged directly by the EPA, to report to the EPA.
- 1.4 The statutory context for the conduct of the Review is as follows.
- 1.5 Section 8 of the *EP Act* provides that "subject to the Act", neither the EPA nor the Chairman "shall be subject to the direction of the Minister". Pursuant to s 16 of the *EP Act*, the EPA has a function "to advise the Minister on environmental matters generally and on any matter which he may refer to it for advice". In addition, pursuant to subsection 17(1) of the *EP Act*, the EPA "has all such powers as are reasonably necessary to enable it to perform its functions". Subsection 17(3) then provides that "[w]ithout limiting the

generality of this section, the Authority, if it considers it appropriate or is requested to do so by the Minister, may”, relevantly:

- “(a) invite any person to act in an advisory capacity to the Authority in relation to all or any aspects of its functions; and
- (b) advise the Minister on any matter relating to this Act or on any proposals, schemes or questions that may be referred to it with regard to environmental matters; and
- ...
- (h) exercise such powers, additional to those referred to in paragraphs (a) to (g), as are conferred on the Authority by this Act or as are necessary or convenient for the performance of the functions imposed on the Authority by this Act.”

1.6 Consistent with these provisions, and the *EP Act* as a whole, the Review has been conducted with a view to advising the EPA in relation to the performance of its statutory functions, so as to enable the EPA, in turn, to provide advice to the Minister in relation to those functions. As is the case with the EPA’s functions generally, the Review has been conducted independently of the Executive Government.

Terms of Reference

1.7 In his letter to the EPA dated 23 December 2015, the Minister identified the following issues as ones to be considered as part of the Review:

- “1. the EPA’s practices for development of policies and guidelines;
- 2. the clarity, content and consistency of policies and guidelines;
- 3. processes to ensure policies and guidelines are given due consideration during assessment and in the EPA’s reporting; and
- 4. any other matters related to the application of policies and guidelines which could affect the EPA’s capacity to fulfil its statutory duties to undertake [environmental impact assessment].”

1.8 These issues formed the basis for the Terms of Reference set out in the EPA’s brief to the Review Team dated 3 February 2016 (“the Review Brief”). The Terms of Reference are for the Review Team to consider:

- “1. the EPA’s practices for development of [environmental impact assessment] policies, guidelines and procedures, and specifically:

- a. whether the current framework for, and intended purposes of, policies, guidelines and procedures is appropriate; and
 - b. is the process for development and review of policies, guidelines and procedures sound.
2. the content, clarity and consistency of [environmental impact assessment] policies, guidelines and procedures specifically:
 - a. whether the content of policies, guidelines and procedures are appropriate for their intended application; and
 - b. whether the policies, guidelines and procedures are written in a way that is likely to achieve their intended purpose.
 3. processes to ensure [environmental impact assessment] policies, guidelines and procedures are given due consideration during assessment and in the EPA's reporting, and specifically:
 - a. the form and structure of a workflow process for consideration and application of policies, guidelines and procedures which:
 - ensures compliance with the Act
 - ensures compliance with good administrative law and decision-making principles, and
 - produces a written report or recommendation which is legally robust and consistent.
 - b. the content of the report and recommendations to the Minister following the assessment of a proposal.
 4. any other matters related to the application of [environmental impact assessment] policies, guidelines and procedures which could affect the EPA's capacity to fulfil its statutory duties to undertake [environmental impact assessment]"

("Terms of Reference").

- 1.9 An important feature of the Terms of Reference should be noted at the outset. While the Review is to consider the "content" of environmental impact assessment policies, guidelines and procedures, it is not intended by that reference to "content" that the Review Team should consider or review the environmental policy position taken by EPA in relation to any environmental issue or factor. Rather, it is intended by the Terms of Reference that the

Review should examine the extent and manner in which those positions are articulated in the policy instruments.

- 1.10 Put another way, it forms no part of the Review to consider whether a policy position taken by the EPA, or its findings on an environmental impact assessment in any particular case is correct, or justifiable. Those are matters which are for the EPA to determine, having regard to its independent statutory function. Rather, the Review is to consider whether the policy documents are expressed in a way that is conducive to good decision-making.
- 1.11 Similarly, the Terms of Reference did not require the Review Team to examine or reach conclusions as to the legality or merit of any particular environmental impact assessment carried out by the EPA nor any report or recommendation issued by the EPA under the *EP Act*. The Review Team has not done so, and nothing in this report should be understood as suggesting otherwise.
- 1.12 The term “policies, guidelines and procedures” (which are referred to through this report collectively as “policy instruments”) in the Terms of Reference is taken to mean the following instruments that are currently part of the EPA’s policy suite:
 - (a) *Environmental Impact Assessment (Part IV Division 1 and 2) Administrative Procedures 2012*, which have been published in the Government Gazette in accordance with section 122 of the *EP Act* (“*Administrative Procedures 2012*”);
 - (b) Environmental Protection Policies prepared under Part III of the *EP Act* (“EPPs”);
 - (c) State Environmental Policies prepared under subsection 17(3)(d) of the *EP Act* (“SEPs”);
 - (d) Environmental Assessment Guidelines prepared under subsection 16(k) of the *EP Act* (“EAGs”);

- (e) Environmental Protection Bulletins (“EPBs”);
- (f) Strategic Advice prepared under subsection 16(e) of the *EP Act* (“Section 16(e) Advice”);
- (g) Post Assessment Guidelines (“PAGs”) and post assessment forms prepared for the purposes of providing guidance regarding sections 47 and 48 of the *EP Act*; and
- (h) Policy instruments and documents that are referred to on the EPA’s website under the heading “other” (see webpage at http://epa.wa.gov.au/Policies_guidelines/other/Pages/default.aspx).

1.13 As is apparent from this list, there is a myriad of different policy instruments maintained by the EPA, all of which have the potential to affect the exercise of its statutory functions. As discussed later in this report, the sheer number and variety of policy instruments is itself an issue which requires attention in improving the processes of the EPA.

Save Beelihar Wetlands (Inc) v Jacob

1.14 As noted in the background set out above, the Review was precipitated by the decision of Martin CJ in *Save Beelihar Wetlands (Inc) v Jacob* [2015] WASC 482 (“the *Roe 8 Case*”), in which his Honour held that the EPA’s Environmental Assessment Report dated 13 September 2013 (“the Assessment Report”) in relation to a proposal to extend the Roe Highway to Stock Road (“the Proposal”) was invalid and that, as a consequence, the decision of the Minister that the Proposal may be implemented (subject to conditions) was also invalid.

1.15 It is important to identify precisely what, as a matter of law, was established by the *Roe 8 Case*. That serves to identify both what the *Roe 8 Case* requires of the EPA in relation to its policies and, equally importantly, what it does **not** require.

1.16 While the structure of the *EP Act* is dealt with in more detail in Chapter 3, it suffices for present purposes to note that the *Roe 8 Case* concerned whether

the EPA has made an error of law in issuing its report in relation to the Proposal under s 44 of the *EP Act*. Section 44, relevantly, provides:

- “(1) If the Authority assesses a proposal, it is to prepare a report on the outcome of its assessment of the proposal and give that report (the ***assessment report***) to the Minister.
- (2) The assessment report must set out —
 - (a) what the Authority considers to be the key environmental factors identified in the course of the assessment; and
 - (b) the Authority’s recommendations as to whether or not the proposal may be implemented and, if it recommends that implementation be allowed, as to the conditions and procedures, if any, to which implementation should be subject.”

1.17 The issue which was determinative in the *Roe 8 Case*¹ was whether the Assessment Report was invalid because, in assessing the Proposal, the EPA had failed to take into account considerations which it was bound to take into account, namely, three statements of policy which the EPA had published in relation to environmental impact assessments. The three policy statements were statements concerning circumstances in which “environmental offsets”²

¹ There were a number of grounds of review raised by the applicants in the *Roe 8 Case* which were not upheld Martin CJ, and which are not relevant for present purposes (see the *Roe 8 Case*, at [106], [107]-[122], [212]-[230]).

² While “environmental offsets” is not defined in the *EP Act*, there are various descriptions of the concept:

“Environmental offset means an action or actions undertaken to counterbalance environmental impacts from implementation of a proposal. The action(s) are taken after all reasonable mitigation measures have been applied and a significant environmental risk or impact remains”: *Environmental Impact Assessment (Part IV Division 1 and 2) Administrative Procedures 2012*, clause 2.

“Environmental offsets are actions that provide environmental benefits which counterbalance the significant residual environmental impacts or risks of a project or activity. Unlike mitigation actions which occur on-site as part of the project and reduce the direct impact of that project, offsets are undertaken outside of the project area and counterbalance significant residual impacts”: *WA Environmental Offsets Guidelines, August 2014*, page 3.

relating to a proposal would be regarded as an appropriate response to residual environmental impacts, such that it would be appropriate for the EPA to recommend that the proposal be implemented. The three policies were:

(a) Position Statement 9

This policy document enunciated as policy to the effect that if “the environmental assets affected by the proposal come within the ‘critical’ category, and if the impact of the proposal upon those assets will be significant after all steps at on-site mitigation have been taken, the EPA will proceed on the basis that there is a presumption against recommending approval of the proposal, and the use of environmental offsets will not be considered.”³

(b) Guidance Statement No 19

This policy document “is limited to the use of offsets in connection with biodiversity, is generally consistent with Position Statement No 9, except that it contemplates a category of case in which the residual impacts on critical assets after all attempts to mitigate those impacts have been exhausted are significant, but ‘not significant enough to make the proposal or scheme unacceptable’.”⁴

(c) Environmental Protection Bulletin No 1

The policy document, consistent with Position Statement 9, provided:

“The EPA advises the Minister for the Environment on whether a project should be approved or not. In providing its advice to the Minister, the EPA adopts a presumption against recommending

Given the significance of the environmental offsets to the *Roe 8 Case* and to environmental impact assessment generally, Chapter 7 of this report deals with offsets policy as a separate issue.

³ *Roe 8 Case*, per Martin CJ at [58].

⁴ *Roe 8 Case*, per Martin CJ at [66].

approval of proposed projects where significant adverse environmental impacts affect ‘critical’ assets.”

- 1.18 The effect of these three policy documents was that, in the case of proposals where there were significant residual environmental impacts on critical assets, there was a presumption against recommending approval of the proposal, and the use of environmental offsets will not be considered.
- 1.19 There was no dispute in the *Roe 8 Case* that the wetlands, which would have been adversely affected by the Proposal, were “critical assets”. Accordingly, the policies would, *prima facie*, be relevant to the assessment of the Proposal and give rise to a presumption against recommending approval of it.
- 1.20 There was also no dispute in the *Roe 8 Case* that the EPA had failed to take any account of the policy enunciated by the three policy documents. Counsel for the Minister and the EPA conceded that that was the proper inference to be drawn.⁵ As Martin CJ observed:

“according to the policy, environmental offsets would not be an appropriate means of rendering the Proposal acceptable, and there is a presumption that the EPA would recommend against its acceptance. However, the Assessment Report makes no reference to any presumption against a recommendation that the Proposal be implemented but instead proceeds on the implicit assumption that the Proposal can be rendered acceptable to the EPA if adequate environmental offsets are provided. No attempt is made in the Assessment Report to reconcile the approach taken with the policy enunciated in the three published policy statements to which I have referred.”⁶

- 1.21 The only issue, therefore, in the *Roe 8 Case*, was whether the policies published by the EPA were relevant considerations which the EPA were bound to take into account in reaching its decision in relation to the Proposal. The law is well settled that the failure of an administrative decision maker to take into account a relevant consideration, which the decision-maker is *bound* to take

⁵ *Roe 8 Case*, per Martin CJ at [66].

⁶ *Roe 8 Case*, per Martin CJ at [192].

into account, is an error of law which invalidates the decision.⁷ It is also well settled that whether a decision-maker is *bound* to consider a particular factor or consideration is determined by construction of the statute conferring the discretion or decision-making power.⁸

1.22 In the *Roe 8 Case*, Martin CJ, having reviewed the authorities and the provisions of the *EP Act*, concluded:

“that the subject matter, scope and purpose of the Act compel the conclusion that the EPA was bound to take into account the three published statements of policy to which the applicants refer as a condition of the valid exercise of the jurisdiction to undertake an assessment of the Proposal.”⁹

1.23 This conclusion as to the construction of the *EP Act*, in light of the concession that no account had been taken of the policies, compelled the conclusion that the Assessment Report and the Minister’s Decision were invalid.

1.24 It is a necessary consequence of the conclusion reached by the Chief Justice in the *Roe 8 Case*, that the EPA is bound to take into account all of its published policies when exercising its jurisdiction to undertake an environmental impact assessment.¹⁰

Effect and status of the decision in the *Roe 8 Case*

1.25 As noted above, it is important to recognise both what the *Roe 8 Case* requires of the EPA in relation to its policy instruments *and* what it does **not** require.

1.26 As to the former, it is clear from result in the *Roe 8 Case* that the EPA is bound to take into account all of its published policies when exercising its jurisdiction

⁷ *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 per Mason J at 39; *Roe 8 Case*, per Martin CJ at [128].

⁸ *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 per Mason J at 39-40; *Roe 8 Case*, per Martin CJ at [128].

⁹ *Roe 8 Case*, per Martin CJ at [188].

¹⁰ *Roe 8 Case*, per Martin CJ at [187].

to undertake an environmental impact assessment. Those policies would include each of the types of policy instrument listed in paragraph [1.12] above.

- 1.27 What that requires in any given case, of course, will depend upon the nature of the proposal and what policy instruments may be applicable or relevant to the proposal. As is discussed later in this report, there are also a variety of different “genres” of content that are contained in the EPA’s policy instruments. Depending upon the particular genre of the policy instrument concerned, there may be different degrees to which the policy instrument should be addressed in detail by the EPA.
- 1.28 There is, in this context, some divergence in the case law as to the extent to which a decision-maker must have regard to relevant considerations. One line of authority is to the effect that, provided the relevant matter is given some consideration, the decision-maker’s duty is discharged.¹¹ Alternatively, other cases suggest that the requirement to take into account a relevant consideration is a requirement to give “proper, genuine and realistic consideration” to the relevant matter.¹²
- 1.29 As to the latter issue, it must be clearly stated what the *Roe 8 Case* does **not** require. The conclusion in the *Roe 8 Case* that the EPA is bound to take into account all of its published policies does not mean that the EPA is bound to **apply** those policies. It would be a mistake to conclude, from the decision in the *Roe 8 Case* that the EPA, by publishing a policy that it proposes to follow in relation to environmental impact assessments, is thereby required in every case to follow that policy and apply it to all future assessments.

¹¹ See summary of approaches at *A v Corruption and Crime Commission* (2013) 136 ALR 491 per Martin CJ & Murphy JA at [92]; *Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226 per Pritchard J at [108].

¹² *Khan v Minister for Immigration, Local Government & Ethnic Affairs* [1987] FCA 457; (1987) 14 ALD 291 per Gummow J; *Williams v Minister for the Environment & Heritage* (2003) 74 ALD 124 per Wilcox J at [29]. *Re Shire of Carnarvon; Ex parte Humphrey* [2005] WASCA 182 per McLure JA at [60] (Le Miere AJA agreeing).

1.30 On the contrary, it is in the very nature of a policy that it is intended to operate in general or “run of the mill” cases and that its application must always be subject to the circumstances of each case. Indeed, as a matter of law, were the EPA to regard itself as bound to apply a policy in every case, that would itself constitute an error of law. As Brennan J stated in *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634,¹³ in relation to policies developed by the Minister under the Commonwealth *Migration Act*:

“[I]t would be inconsistent with ... the Migration Act if the Minister’s policy sought to preclude consideration of relevant arguments running counter to an adopted policy which might be reasonably advanced in particular cases. The discretions reposed in the Minister by these sections cannot be exercised according to broad and binding rules ... The Minister must decide each of the cases ... on its merits. His discretion cannot be so truncated by a policy as to preclude consideration of the merits of specified classes of cases. A fetter of that kind would be objectionable, even though it were adopted by the Minister on his own initiative. A Minister’s policy, formed for the purposes of ... the Migration Act, must leave him free to consider the unique circumstances of each case, and no part of a lawful policy can determine in advance the decision which the Minister will make in the circumstances of a given case.”

1.31 The effect of Martin CJ’s decision in the *Roe 8 Case*, therefore, should not be overstated. It does not impose, and should not be regarded as imposing, a fetter on the EPA’s statutory functions. In so far as it requires consideration of published policy instruments of the EPA, it does no more than require, as a matter of law, that which the policy instruments themselves envisage: namely, that they are relevant considerations in relation to environmental impact assessments, but are not binding or determinative.

1.32 Finally, in relation to the status of the *Roe 8 Case*, it should be noted that the Minister and the EPA have appealed the decision of Martin CJ to the Court of Appeal. At the time of publication of this report, the decision of the Court of Appeal is reserved.¹⁴ The Review Team, of course, expresses no view in relation to potential success or otherwise of the appeal.

¹³ This passage is cited by Martin CJ in *Roe 8 Case* at [132].

¹⁴ The appeal was heard on 2 May 2016.

- 1.33 Whatever the outcome of the appeal, however, the conclusions reached and the recommendations set out in this report remain unaffected. This is the case for a number of reasons.
- 1.34 First, as stated above, the only issue in the *Roe 8 Case* was whether the policy instruments published by the EPA were relevant considerations which, as a matter of law, the EPA was bound to take into account in exercising its functions, such that a failure to do so would render any decision invalid. That is the legal question before the Court, in relation to which, in the context of the pending appeal, the Review Team expresses no view. Whether or not that be the case as a matter of law, however, the position remains as a matter of good governance and administration, that the EPA *should* take into account its published policies. That is, there is little point in the EPA preparing and publishing policies in relation to its statutory functions, unless those policies are actually used in the course of the EPA's work.
- 1.35 Secondly, and related to this: the formulation and adoption of policies is (or at least should be) intended to produce not merely *lawful* administrative decisions but also *good* administrative decisions. Policies should, therefore, contribute to consistent decision-making, which focuses attention on the statutory functions with which the EPA is entrusted. A policy instrument which does not lead to better, more consistent decisions – or which diverts attention from the core statutory functions of the EPA – should be reviewed or abandoned, regardless of whether the EPA is bound to consider it.
- 1.36 Finally, as also noted above, there is some divergence in the case law as to the extent to which a decision-maker must have regard to relevant considerations. One route is a minimalist approach, whereby if the relevant matter is given some consideration, the decision-maker's duty is discharged. Such an approach, and the limits of judicial review more broadly, reflects the observance by the Courts of the distinction between judicial review and merits review: namely, the principle that the “merits of administrative action, to the

extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone”.¹⁵

1.37 Not being confined to the *legality* of the EPA’s practices for development and application of policy instruments in fulfilling its statutory duties, the Review extends to the utility and value of those policy instruments. In that context, the Review takes it as axiomatic that, if the EPA is going to prepare and publish policies which relate to its statutory functions, then it should give them “proper, genuine and realistic consideration” in any given case. That requires the development and expression of policy which meaningfully contributes to decision-making and is not merely a perfunctory or “tick a box” exercise.

1.38 The above principles are reflected in the discussion and recommendations that follow.

¹⁵ *Attorney General (NSW) v Quin* (1990) 170 CLR 1 per Brennan J at 36.

CHAPTER II - CONDUCT OF THE REVIEW

Terms and process of the Review

- 2.1 It was an express term of the engagement of the Review Team that the Review be conducted independently of all current and former staff and officers of the EPA or the Office of the Environmental Protection Authority (“OEPA”). In that regard, the Review Team was to be given full and unfettered access to all records of the EPA and the OEPA for the purposes of the Review.
- 2.2 The Review Team was entitled to call for, and accept, submissions from any person for the purposes of the Review. It was acknowledged, however, that the Review Team did not have power to compel the provision of information from any third persons and that all such information could only be provided voluntarily.
- 2.3 The Review was conducted both in the form of a desktop review of materials provided to the Review Team by the OEPA and by way of consultation with stakeholders.

Materials provided

- 2.4 In terms of the materials provided to the Review Team, the OEPA assisted the Review Team throughout the term of the Review. Gretta Lee, Senior Legal Officer the OEPA, acted as a liaison between the EPA, OEPA staff, and the Review Team and assisted with providing material related to the Terms of Reference, and further information requested from time to time.
- 2.5 The initial documentation provided to the Review Team as part of the Review Brief on 3 February 2016 included:
 - (a) Minister’s Letter to the EPA requesting the Review, 23 December 2015;
 - (b) EPA Report Review of the Environmental Impact Assessment Process in Western Australia, March 2009;

- (c) Report of the Environmental Stakeholder Advisory Group to the Minister for Environment in relation to the review of the EPA Role and Structure, August 2009;
- (d) Policy Review Project Plan 2012;
- (e) *The Administrative Procedures 2012*;
- (f) Policy Structure, May 2014;
- (g) List of EPA policies, guidelines and procedures as they relate to environmental factors;
- (h) List of EPA policies, guidelines and procedures as they relate to the EIA procedural steps;
- (i) Journal articles;
- (j) EPA Policy Development Approvals Procedure;
- (k) EPA Policy Development Approvals Procedure – Guiding Principles;
- (l) Diagram - Overview of the EIA process when there is no public review of the proponent’s environmental review report (API (A));
- (m) Diagram - Overview of the EIA process where there is a public review of the proponent’s environmental review report (PER);
- (n) Overview of the EIA process steps, related policy and reference to templates used;
- (o) Detailed explanation of EIA Steps and templates used for API(A);
- (p) Detailed explanation of EIA Steps and templates used for PER;
- (q) “Potential Future Policy Framework” Discussion Paper;
- (r) Case Study 1 – Development of EAG 13; and

- (s) Case Study 2 – Implementation of EAG 17.

2.6 Further information requested by the Review Team and provided to it included:

- (a) Strategic Policy and Planning Division Organisation Chart (15 February 2016);
- (b) Policies listed in “List of EPA policies, guidelines and procedures as they relate to environmental factors”;
- (c) Policies listed in “List of EPA policies, guidelines and procedures as they relate to the EIA procedural steps”;
- (d) Membership of Stakeholder Reference Group (25 October 2015);
- (e) Update on Policy Suite Composition (12 February 2016);
- (f) Review of EIA Administrative Procedures;
- (g) Affidavits referred to in Roe 8 judgement:
 - (i) Affidavit of Alanna Fandry (23 October 2015);
 - (ii) Affidavit of Naomi Arrowsmith (23 October 2015);
- (h) OEPA checklists prepared following Roe 8 judgement:
 - (i) Template - EPA Policy Confirmation Checklist;
 - (ii) Spread sheet - EPA Policy and Key Relevant Considerations Analysis;
- (i) Case Study - Development EAG 8;
- (j) List of WA Government Agencies involved in EIA;
- (k) EPA Policy Framework;

- (l) EPA Report 1565 - Report and recommendations of the Environmental Protection Authority on Western Turner Syncline Iron Ore Project – Revised Proposal (April 2016).

2.7 The Review Team, in addition, obtained further documentation from the publicly available sources, including the EPA’s website: <http://www.epa.wa.gov.au/>.

Consultations

2.8 The Review Team conducted consultations with both the EPA and with external stakeholders. The consultations took the form of both written submissions and meetings between the Review Team and representatives from the EPA, OEPA, and external stakeholders.

Consultation with the EPA

2.9 On 19 February 2016, members of the Review Team met with officers of the OEPA, Naomi Arrowsmith (A/Director, Strategic Policy and Planning Division), Jessica Sheppard (A/Manager, Strategic Policy and Planning Division) and Gretta Lee.

2.10 On 17 March 2016, the Review Team also met with all members of the EPA Board, Dr Tom Hatton (Chairman), Robert Harvey (Deputy Chairman), Elizabeth Carr (Member), Glen McLeod (Member), and Dr Jim Limerick (Member).

Consultations with External Stakeholders

2.11 On 8 February 2016, the Review Team sought comments and submissions from various stakeholders, particularly those who previously had involvement in the EPA’s Stakeholder Reference Group (“SRG”). Those stakeholders included:

- (a) Association of Mining and Exploration Companies (“AMEC”);
- (b) Australian Petroleum and Production and Exploration Association (“APPEA”);

- (c) Chamber of Commerce and Industry (WA) (“CCIWA”);
- (d) Chamber of Minerals and Energy (“CME”);
- (e) Conservation Council of Western Australia (“CCWA”);
- (f) Environmental Consultants Association (WA) (“ECA”);
- (g) Environmental Defenders Office (WA) (“EDO”);
- (h) National Environmental Law Association (“NELA”);
- (i) Urban Development Institute of Australia (“UDIA”);
- (j) The WA Local Government Association Inc;
- (k) The Wilderness Society;
- (l) The World Wildlife Fund.

2.12 Written submissions or comments were received from the following of those stakeholders:

- (a) AMEC – received 4 March 2016;
- (b) APPEA – received 15 March 2016;
- (c) CCIWA – received 29 March 2016;
- (d) CME – received 4 March 2016;
- (e) CCWA – received 15 March 2016;
- (f) ECA – received 23 March 2016;
- (g) EDO – received 29 February 2016;
- (h) NELA – received 29 February 2016;
- (i) UDIA – received 11 April 2016;

- (j) The Wilderness Society – received 4 March 2016;

2.13 In addition, members of the Review Team met with the following representatives of these stakeholders:

- (a) AMEC – Sally Audeyev, Simon Bennison, Troy Collie, Nick Croston, Warren Hallam, Doug Koontz, Graham Short, Tony van Merwyk (11 March 2016);
- (b) APPEA – Steadman Ellis, Damien Wills (11 March 2016);
- (c) CCIWA – Doug Hall, Rowan Fenn, Paul Foley, Andrew Mack, Daniel Mance, Vern Newton, Nada Raphael, Matthew Sargeant, Alastair Trolove (3 March 2016);
- (d) CME – Kirrillie Caldwell, Kane Moyle, Gavin Price, Darren Walsh, Brad Wylynko (29 March 2016);
- (e) ECA – Mat Brook, Jason Hick, Tim Mitchell, Jamie Shaw (11 March 2016);
- (f) UDIA – Justin Crooks, Craig Wallace, Tom Wilson (15 February 2016);
- (g) The Wilderness Society – Peter Robertson (11 March 2016);

2.14 The Review Team also met with Dr Angus Morrison-Saunders, Associate Professor in Environmental Assessment at Murdoch University, on 17 February 2016. Dr Morrison-Saunders also provided useful written material. Dr Morrison-Saunders has previously published academic research in relation to environmental impact assessment in Western Australia¹ and

¹ The following journal articles were provided in the Review Brief:

Megan Jones & Angus Morrison-Saunders (2016): Making sense of significance in environmental impact assessment, *Impact Assessment and Project Appraisal*.

conducts training for consultants and OEPA staff on the environmental impact assessment process.

- 2.15 Other stakeholders contacted either the EPA or the Review Team directly to offer comments and submissions, including the Western Australian Land Authority (“LandCorp”). The Review Team met with Ms Sharon Clark, Manager of Environmental Services, on 10 March 2016 and LandCorp provided a written submission the following day.

Lara Martin & Angus Morrison-Saunders (2015): Determining the value and influence of informal strategic advice for environmental impact assessment: Western Australian perspectives, *Impact Assessment and Project Appraisal*.

Virginia Dahlitz & Angus Morrison-Saunders (2014): Assessing the utility of environmental factors and objectives in environmental impact assessment practice: Western Australian insights, *Impact Assessment and Project Appraisal*.

CHAPTER III – LEGISLATIVE CONTEXT

Introduction

- 3.1 The Terms of Reference for the Review are, in large part, directed towards providing advice to the EPA on how it can perform its environmental impact assessment functions in a legally robust manner; that is, to ensure that the EPA performs its functions lawfully and in accordance with its statutory functions.
- 3.2 In that context, it cannot be emphasised strongly enough that the overriding consideration for the EPA, in performing any of its functions, including the environmental impact assessment function, must always be the terms of the *EP Act*. Any policy, procedure or guideline developed by the EPA must have, as its touchstone, the requirements of the *EP Act* and the purposes and objectives set out in it.
- 3.3 The requirements of the *EP Act* must also be understood in the context of the general principles of administrative law applicable to any administrative decision maker. Those principles serve to identify the legal concepts and categories within which any challenge to the decisions of the EPA might be brought and which flesh out the legislative provisions in the *EP Act*.
- 3.4 This chapter therefore commences with a brief overview of the principles of administrative law that ought to guide the EPA in ensuring that its policies and practices are legally sound.
- 3.5 Following that overview is a more detailed consideration of the legislative context of environmental impact assessment under the *EP Act*. Any question of whether the EPA's policies, procedures and processes "comply with good administrative law and decision-making principles" ought to come from to a consideration of the statute. The most basic principles of administrative law require that the EPA, as a creature of statute, can only undertake activities within the powers set out in the enabling legislation. Given the Terms of

Reference for the Review, this section will focus on Parts II, III and IV of the *EP Act*.

Principles of administrative law

- 3.6 For a statutory authority, such as the EPA, to engage in legally sound administrative practices, it is, simply, required to avoid errors of law. The key cases highlight that a court's role in reviewing administrative action focuses on the enforcement of the law which determines the limits of exercise of power, as opposed to considering the merits of a decision.¹ This has been described as a focus on "errors of process" as opposed to "errors of substance".²
- 3.7 It is an essential feature of the principles of judicial review that they mark out the boundaries between the judicial arm of government (the Courts) and the other arms of government; the legislature and the executive. Just as the Courts have a duty to pronounce upon the validity of executive action; so too the law makes clear that, in doing so, the Courts may not trespass on those matters that are the province of the executive. In *Attorney General (NSW) v Quin*, at 35-36, Brennan J put the matter this way:

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

- 3.8 Later in his Honour's reasons, Brennan J cautioned against an over-zealous approach to judicial review:

"Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review, especially to provide some check on the Executive Government which nowadays exercises enormous

¹ *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 35-36 per Brennan J.

² Aronson and Groves, *Judicial Review of Administrative Action* (5th ed), 2013, Law Book Co.

powers beyond the capacity of the Parliament to supervise effectively. Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are “unfair” in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ: ... The absence of adequate machinery, such as an Administrative Appeals Tribunal, to review the merits of administrative acts and decisions may be lamented in the jurisdictions where the legislature has failed to provide it, but the default cannot be made good by expanding the function of the courts. The courts - above all other institutions of government - have a duty to uphold and apply the law which recognizes the autonomy of the three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.”

- 3.9 While these remarks were made over a quarter of century ago, they continue to provide a sound rationale for both the importance, and the limits, of the Courts’ jurisdiction to review administrative action.

Jurisdictional error

- 3.10 Many of the principles, and different kinds of error, that have been developed in relation to the judicial review of administrative action may, in the context of administrative bodies such as the EPA, be seen in the context of the broad notion of “jurisdictional error”.³

- 3.11 In relation to such bodies, the High Court has held:⁴

“At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. ...

³ Importantly, it should be noted that different principles apply to jurisdictional error on the part of inferior courts forming part of the hierarchical legal system entrusted with the administration of justice: see *Craig v South Australia* (1995) 184 CLR 163 per Brennan, Deane, Toohey, Gaudron & McHugh JJ at 176-177.

⁴ *Craig v South Australia* (1995) 184 CLR 163 per Brennan, Deane, Toohey, Gaudron & McHugh JJ at 176-177.

If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.”

3.12 Writing extra-judicially, Justice Alan Robertson of the Federal Court has noted that:

“jurisdictional error is now most often to be seen in a failure (often constructive) of the decision-maker to carry out his or her task laid down by the statute (as construed by the court)”⁵

3.13 His Honour continued to list what he considered to be essential questions to identifying whether or not there has been such an error, the first of which can provide a simple framework for developing administrative procedures, processes and practices that adhere to good decision-making principles, ensuring that decisions are made within the powers conferred by law:

“What is the task that the Parliament has given the decision-maker, including procedural imperatives? The answer to that often difficult question is to be found so far as possible in construing the statute.”⁶

Types of jurisdictional errors

3.14 The types of jurisdictional errors that have been identified by the courts include:

- (a) Failure to take into account a relevant consideration being one that the statute expressly or impliedly requires the administrative body to take into account.⁷ As discussed in Chapter 1, this was the error identified by Martin CJ in the *Roe 8 Case*;

⁵ “The Contemporary Approach to Jurisdictional Error” in Mortimer (ed), *Administrative Justice and its Availability*, 2015, Federation Press, 59.

⁶ Ibid.

⁷ *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 per Mason J at 39-40.

- (b) Taking into account an irrelevant consideration, being one that the statute expressly or impliedly requires the administrative body to *not* take into account. An important example of such an error in the context of the *EP Act*, discussed below, is *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; ex parte Coastal Waters Alliance* (1996) 90 LGERA 136;
- (c) Identification of a wrong issue or asking the wrong question. This formed the basis for one of the unsuccessful grounds of challenge in the *Roe 8 Case*.⁸ While that ground was unsuccessful in the particular circumstances of the *Roe 8 Case*, the discussion of that ground in the decision of Martin CJ is instructive (and is referred to below);
- (d) A mistaken assertion, or, alternatively, denial, of the power which the administrative body has under the statute;
- (e) A misapprehension or disregard of the nature or limits of the administrative body's functions and/or powers;
- (f) Mistakes as to the existence of a "jurisdictional fact", a requirement under the statute that must objectively exist as a condition precedent to validly exercising the power;
- (g) Unreasonableness, characterised by the question of whether the decision was so unreasonable that no decision-maker could have made it (from the English decision of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223);
- (h) Irrationality, articulated as the lack of "an evident and intelligible justification", particularly in having regard to the scope and purpose of the power, as was the case in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332;

⁸ *Roe 8 Case*, per Martin CJ at [107]-[122].

- (i) Acting in bad faith, or for an improper purpose; that is, for a purpose otherwise than that identified by the statute;
- (j) Failing to accord natural justice, in breaching the bias or hearing rules. This ground formed the basis for the successful challenge to the EPA’s report in relation to the Browse LNG Precinct Proposal;⁹
- (k) Failing to give reasons, or adequate reasons, where required by the statute. This also formed the basis for one of the grounds of challenge in the *Roe 8 Case*,¹⁰ which in the circumstances was unnecessary for the Court to decide.

3.15 In light of these principles, we move to more detailed consideration of the legislative context of environmental impact assessment under the *EP Act*.

The *Environmental Protection Act 1986*

Objectives and principles

3.16 The EPA was established on 1 January 1972¹¹ and operates under Part II of the *EP Act*.

3.17 The long title of the *EP Act* describes it as:

“An Act to provide for an Environmental Protection Authority, for the prevention, control and abatement of pollution and environmental harm, for the conservation, preservation, protection, enhancement and management of the environment and for matters incidental to or connected with the foregoing.”

3.18 Section 15 of the *EP Act* provides that the objective of the EPA is:

“to use its best endeavours —
 (a) to protect the environment; and

⁹ See *Wilderness Society of WA (Inc) v Minister for Environment* (2013) 45 WAR 471 per Martin CJ at [206] and [221].

¹⁰ *Roe 8 Case*, per Martin CJ at [212]-[214].

¹¹ The EPA was originally established under the now repealed *Environmental Protection Act 1971* (WA); s 7(1) of the *EP Act* provides for the continuation of the EPA under the new legislative framework.

- (b) to prevent, control and abate pollution and environmental harm.”

3.19 This objective aligns with the objective of the *EP Act* as a whole, which is to “protect the environment of the State, having regard to the following principles” set out in s 4A. Those principles provide the fundamental criteria against which all actions of the EPA (including the formation and consideration of policies) must be assessed. They are as follows:

1. *The precautionary principle*

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, decisions should be guided by —

- (a) careful evaluation to avoid, where practicable, serious or irreversible damage to the environment; and
- (b) an assessment of the risk-weighted consequences of various options.

2. *The principle of intergenerational equity*

The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3. *The principle of the conservation of biological diversity and ecological integrity*

Conservation of biological diversity and ecological integrity should be a fundamental consideration.

4. *Principles relating to improved valuation, pricing and incentive mechanisms*

- (1) Environmental factors should be included in the valuation of assets and services.
- (2) The polluter pays principle — those who generate pollution and waste should bear the cost of containment, avoidance or abatement.
- (3) The users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes.
- (4) Environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

5. *The principle of waste minimisation*

All reasonable and practicable measures should be taken to minimise the generation of waste and its discharge into the environment.

3.20 As a matter of statutory construction, all of the EPA’s activities and work, including its policies and guidelines, ought to link back through to these objectives and principles. Later in this report, we discuss the need for a clearer hierarchy of policies under which the EPA should operate. As will be seen, the objective and principles in s 4A of the *EP Act* should be at the apex of that hierarchy.

3.21 Central to this objective and these principles is the definition of “environment” in the *EP Act*. Section 3 of the *EP Act* provides:

“**environment**, subject to subsection (2), means living things, their physical, biological and social surroundings, and interactions between all of these.”

Subsection (2) provides:

“For the purposes of the definition of **environment** in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.”

3.22 The definition of “environment”, and how it affects the meaning of “environmental factors” in s 44 of the *EP Act* was the subject of the decision in *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; ex parte Coastal Waters Alliance* (1996) 90 LGERA 136 (“*Coastal Waters Alliance*”) and is discussed in more detail below.

The EPA’s functions and powers

3.23 The functions and powers of the EPA are set out in ss 16 and 17 of the *EP Act*, respectively. For completeness, the functions of the EPA under s 16 are set in full:

- “(a) to conduct environmental impact assessments; and
- (aa) to facilitate the implementation of bilateral agreements; and
- (b) to consider and initiate the means of protecting the environment and the means of preventing, controlling and abating pollution and environmental harm; and

- (c) to encourage and carry out studies, investigations and research into the problems of environmental protection and the prevention, control and abatement of pollution and environmental harm; and
- (d) to obtain the advice of persons having special knowledge, experience or responsibility in regard to environmental protection and the prevention, control and abatement of pollution and environmental harm; and
- (da) to advise the Minister on the making or amendment of regulations when requested by the Minister to do so or on its own initiative; and
- (e) to advise the Minister on environmental matters generally and on any matter which he may refer to it for advice, including the environmental protection aspects of any proposal or scheme, and on the evaluation of information relating thereto; and
- (f) to prepare, and seek approval for, environmental protection policies; and
- (g) to promote environmental awareness within the community and to encourage understanding by the community of the environment; and
- (h) to receive representations on environmental matters from members of the public; and
- (i) to provide advice on environmental matters to members of the public; and
- (j) to publish reports on environmental matters generally; and
- (k) to publish for the benefit of planners, builders, engineers or other persons guidelines to assist them in undertaking their activities in such a manner as to minimise the effect on the environment of those activities or the results thereof; and
- (l) to keep under review the progress made in the attainment of the objects and purpose of this Act; and
- (m) to coordinate all such activities, whether governmental or otherwise, as are necessary to protect, restore or improve the environment in the State; and
- (n) to establish and develop criteria for the assessment of the extent of environmental change, pollution and environmental harm; and
- (o) to specify standards and criteria, and the methods of sampling and testing to be used for any purpose; and
- (p) to promote, encourage, coordinate or carry out planning and projects in environmental management; and
- (q) generally, to perform such other functions as are prescribed.”

3.24 In relation to its powers, s 17(1) provides that the EPA “has all such powers as are reasonably necessary to enable it to perform its functions”. Subsection 17(3) goes on to provide that, without limiting the generality of s 17, the EPA may “if it considers it appropriate or is requested to do so by the Minister”:

- “(a) invite any person to act in an advisory capacity to the Authority in relation to all or any aspects of its functions; and

- (b) advise the Minister on any matter relating to this Act or on any proposals, schemes or questions that may be referred to it with regard to environmental matters; and
- (c) request the Minister to seek information on environmental management from any other Minister and, on receipt of that information, to give it to the Authority; and
- (d) consider and make proposals as to the policy to be followed in the State with regard to environmental matters; and
- (e) conduct and promote relevant research; and
- (f) undertake investigations and inspections; and
- (g) publish reports and provide information and advice on the environment to the community at large for the purpose of increasing public awareness of the environment; and
- (h) exercise such powers, additional to those referred to in paragraphs (a) to (g), as are conferred on the Authority by this Act or as are necessary or convenient for the performance of the functions imposed on the Authority by this Act.”

3.25 As will be apparent from the structure of ss 15 to 17 of the *EP Act*, the functions of the EPA are conferred upon it in furtherance of its objective to “protect the environment and to prevent, control and abate pollution and environmental harm”. The functions are not intended to be performed for other objectives. The powers, in turn, are to be exercised in performance of those functions and, ultimately, for the purpose of achieving the objectives.

3.26 Two functions with particular relevance to the Terms of Reference, which are considered in more detail below, are the functions of:

- (a) conducting environmental impact assessments (s 16(a)); and
- (b) preparing, and seeking approval for, environmental protection policies under Part III of the *EP Act* (s 16(f)).

Environmental Impact Assessments - Part IV of the *EP Act*

3.27 The conduct of environmental impact assessments is one of the (if not the) most important functions of the EPA under the *EP Act*. As noted above, it is the first of the functions identified in s 16 of the *EP Act* and is the heading of Part IV of the *EP Act*. Surprisingly, “environmental impact assessment” (or “EIA”) is not defined in the *EP Act*. A definition is, however, contained

within the *Administrative Procedures 2012*, which defines environmental impact assessment as:

“An orderly and systematic process for evaluating a proposal (including its alternatives) and its effects on the environment, and mitigation and management of those effects. The process extends from the initial concept of the proposal through implementation to completion, and where appropriate, decommissioning.”

- 3.28 Environmental impact assessment, then, is the process by which certain proposals¹² are assessed upon referral to the EPA for the purpose of providing advice and recommendations to the Minister in relation to whether implementation of a proposal should be allowed.
- 3.29 Part IV of the *EP Act* makes provision both for the referral and assessment of “significant proposals” and “strategic proposals”. The notion of a “strategic proposal” was introduced in 2003 by the *Environmental Protection Amendment Act 2003* in order to provide for early assessment of future proposals which, does not yet have the character of a “significant proposal”. The history and nature of strategic proposals is discussed in *Roe v Director General, Department of Environment & Conservation (WA)* (2011) 180 LGERA 38 per Martin CJ (Murphy JA agreeing) at [12]-[31].
- 3.30 It suffices, for the purposes of this discussion, to deal simply with the referral and assessment of “significant proposals”.
- 3.31 A “significant proposal” means “a proposal likely, if implemented, to have a significant effect on the environment” (s 37B(1)). Section 38 of the *EP Act* provides for various circumstances in which a person may refer a significant proposal to the EPA and also for the circumstances in which a decision-making authority *must* do so (see s 38(5)).

¹² Section 3 defines “proposal” as “a project, plan, programme, policy, operation, undertaking or development or change in land use, or amendment of any of the foregoing, but does not include scheme”.

3.32 When a proposal is referred to the EPA, the EPA is to decide whether or not to assess the proposal. If the EPA decides to assess a proposal there are, in accordance with the *EP Act*, a variety of assessments it may carry out. Section 40(2) & (2a) of the *EP Act* provides:

- “(2) The Authority may, for the purposes of assessing a proposal —
 - (a) require any person to provide it with such information as is specified in that requirement;
 - (aa) require the proponent to provide to the Authority a contaminated sites auditor’s report on the proposal, which complies with any relevant regulations made under the Contaminated Sites Act 2003;
 - (b) require the proponent to undertake an environmental review and to report thereon to the Authority; or
 - (c) with the approval of the Minister and subject to section 42, conduct a public inquiry in such manner as it sees fit or appoint a committee consisting of —
 - (i) Authority members;
 - (ii) Authority members and persons other than Authority members; or
 - (iii) persons other than Authority members,
to conduct a public inquiry and report to the Authority on its findings on the public inquiry.
- (2a) As well as taking one or more of the courses of action set out in subsection (2)(a) to (c), the Authority may make such other investigations and inquiries as it thinks fit.”

3.33 The alternative kinds of assessment carried out by the EPA reflected in s 40 have become known as “levels of assessment”. The levels of assessment are identified in the *Administrative Procedures 2012* and fall into two categories:

- (a) Assessment of Proponent Information (“API”) or;
- (b) Public Environmental Review (“PER”).

3.34 The process for carrying out each level of assessment is prescribed by clause 10 of the *Administrative Procedures 2012*. More will be said in relation to those processes later in this report.

3.35 The critical task of the EPA in relation to environmental impact assessment is found in s 44 of the *EP Act*. The critical provisions of s 44 are as follows:

- “(1) If the Authority assesses a proposal, it is to prepare a report on the outcome of its assessment of the proposal and give that report (the ***assessment report***) to the Minister.
- (2) The assessment report must set out —
 - (a) what the Authority considers to be the key environmental factors identified in the course of the assessment; and
 - (b) the Authority’s recommendations as to whether or not the proposal may be implemented and, if it recommends that implementation be allowed, as to the conditions and procedures, if any, to which implementation should be subject.
- (2a) The Authority may, if it thinks fit, include other information, advice and recommendations in the assessment report.”

3.36 Once a report has been provided to the Minister, the Minister is required to publish the report and provide copies to any other Minister likely to be concerned in the outcome of the proposal, each relevant decision-making authority and the proponent or person who referred the proposal to the EPA (s 44(3)).

3.37 Section 45 of the *EP Act* then sets out a procedure for deciding if a proposal may be implemented. That procedure, which does not form part of the EPA’s functions, includes processes of consultations specified by s 45, including consultation with other relevant Ministers and decision-making authorities.

3.38 While there are various dispute resolution provisions reflected in s 45,¹³ the ultimate decision as to whether a proposal may be implemented rests with the Minister (or in the case of disputes between Ministers, the Governor¹⁴). Either way, and importantly for the purpose of understanding the roles and functions created by the *EP Act*, the ultimate decision-making power under the *EP Act* as to whether a proposal may be implemented rests with the Executive Government, which is politically accountable for its decisions.

¹³ As between the Minister, other Ministers and decision-making authorities.

¹⁴ That is, the Governor in Executive Council: *Interpretation Act* 1984, s 60.

3.39 Having regard to this legislative background, the respective roles of the EPA and the Minister under Part IV of the *EP Act* may be clearly delineated.

The nature of the EPA's role in environmental impact assessment

3.40 The conduct of an environmental impact assessment and resulting report under s 44 of the *EP Act* is clearly “administrative action” that can be subject to judicial review and may be declared invalid where it is occasioned by an error of law. Nevertheless, there are a number of features of the EPA’s powers which distinguish it from those usually exercised by administrative bodies.

3.41 First, the EPA is not a “decision-maker” in the strict sense; that is, in performing its function of conducting environmental impact assessments and reporting to the Minister, the EPA’s functions are entirely advisory. To use the words of s 44, the EPA provides “information, advice and recommendations” to the Minister but this action, does not, in and of itself, directly affect legal interests.

3.42 As discussed below, the advisory function of the EPA is to be clearly distinguished from the decision-making functions reposed in the Minister. The different natures of those functions, in turn, affects the manner in which those functions are to be carried out.

3.43 Secondly, and perhaps more unusually, the assessment report prepared under s 44 is not, strictly, the exercise of a “discretion” by the EPA. In many legislative contexts, decision-makers are given discretions, in the sense that the decision-maker is at liberty to make a choice that will create or affect rights and duties. In such a case, the decision-maker may well be at liberty to exercise the power as he or she chooses, provided that the decision is made lawfully.

3.44 The responsibility of the EPA under s 44, by contrast, is to:

- (a) report on what the EPA considers to be the key environmental factors;
and

- (b) recommend whether or not the proposal may be implemented (with or without conditions).

3.45 These are clearly matters in relation to which the expertise of the EPA must be applied. Whether the EPA recommends that a proposal be or not be implemented is not, ultimately, a matter of a discretionary choice. Rather, it is the expression of the EPA's considered opinion as to whether the proposal is appropriate to be implemented, having regard to the objective of the *EP Act*, being to "protect the environment of the State", and the objectives of the EPA.

3.46 While opinions may differ in relation to these questions that does not mean that the EPA has a free discretion. It must decide whether to recommend the proposal be implemented in accordance with the objective facts and by reference to the key environmental factors identified by the EPA in accordance with the objectives and principles of the *EP Act*.

3.47 In *Re Minister for Planning; Ex parte City of Canning* (1998) 101 LGERA 284, where the Full Court was required to consider whether the use of a shop as a pharmacy was incidental to the use of the balance of the land in question as a health centre was a discretionary decision, Anderson J, at 296 stated:

"The question whether the use for the purposes of a pharmacy was incidental to the use for the purposes of the medical complex, was simply a question of fact and degree. It was not a discretionary decision in any relevant sense. The determination whether or not a particular use is incidental to another use had to be made by the Council and in accordance with the objective facts. It was not a discretionary process in the sense that the Council was at liberty to make a judgment that would create rights and duties. It is not to the point to say that opinions may differ on the question."

3.48 Similarly, in relation to a report under s 44, while it is clear that the EPA's opinion determines the matters set out in the assessment report (and so it is in that sense subjective), it is an opinion to be reached in light of the objective facts as to the environmental factors identified in the course of the environmental impact assessment.

3.49 In this context, Martin CJ's consideration in the *Roe 8 Case* of the first ground of review is instructive. The first ground of review was that:

“the EPA failed to ask itself whether an offsets package was capable of rendering the Proposal environmentally acceptable before addressing the adequacy of the offsets package which should be provided by the proponent.”¹⁵

3.50 While Martin CJ rejected this ground of review on the basis that there is nothing in the *EP Act* capable of supporting the proposition that consideration of environmental offsets imposes a particular condition upon the exercise of the EPA's jurisdiction,¹⁶ his Honour nevertheless identified a number of important features of the task entrusted to the EPA under Part IV of the *EP Act*.

3.51 In that regard his Honour noted that the first step in the Applicants' argument was as follows:

“The first step in the argument is the proposition that before recommending that a proposal may be implemented, the EPA must form a concluded view that the proposal is environmentally acceptable. That proposition is said to flow from the Acts long title, the object of the Act enunciated in s 4A, the objects of the EPA enunciated in s 15 of the Act, the provisions of s 7(2) and s 8 of the Act which require the EPA to have expertise in environmental matters and to function independently of the Minister, and the power conferred by s 44(2) of the Act to recommend that a proposal not be implemented.”¹⁷

3.52 Importantly, Martin CJ recognised that this first step in the argument was “hardly controversial”.¹⁸

3.53 His Honour went on to describe the second step in the Applicants' argument as involving:

¹⁵ *Roe 8 Case*, per Martin CJ at [106(a)].

¹⁶ *Roe 8 Case*, per Martin CJ at [118].

¹⁷ *Roe 8 Case*, per Martin CJ at [110].

¹⁸ *Roe 8 Case*, per Martin CJ at [111].

“The assertion that before forming a view as to whether a proposal is environmentally acceptable, it is necessary for the EPA to assess the impact that the proposal is likely to have on the environment if implemented.”¹⁹

3.54 Again his Honour regarded this as hardly controversial.²⁰

3.55 Martin CJ concluded, in relation to this ground of review, that:

“even though the various steps in the applicants’ argument ... may be accepted, they do not either singly or in combination support the proposition which underpins this ground of review, which would require the EPA to separately and discretely address the question of environmental acceptability independently of any assessment of the conditions and procedures which might be attached to the implementation of a proposal. That proposition is fundamentally inconsistent with the powers conferred upon the EPA by s 44 of the Act, which includes the power to recommend implementation of a proposal subject to specified conditions and procedures.”

3.56 While the discussion of the process required by s 44 of the *EP Act* did not result in invalidity in the *Roe 8 Case*, it did serve to emphasise that the assessment by the EPA as to whether to recommend implementation of a particular proposal is an objective matter to be determined in accordance with the environmental factors identified in the course of the assessment and “environmental acceptability” of the proposal.

3.57 The EPA’s assessment in this regard is not, as it were, “at large”.

3.58 An instructive illustration of the limits of the EPA’s jurisdiction in this context can be seen in the decision of the Supreme Court in *Coastal Waters Alliance*.²¹

3.59 In that case, the EPA, in providing a report under s 44 and recommending a proposal for sand dredging, had sought to resolve a conflict between the proposal’s effect on the environment and the adverse economic and

¹⁹ *Roe 8 Case*, per Martin CJ at [112].

²⁰ *Ibid.*

²¹ *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; Ex parte Coastal Waters Alliance* (1996) 90 LGERA 136.

commercial effect upon the proponent if the proposal were not to be implemented.

- 3.60 The Supreme Court held that, in doing so, the EPA had exceeded its power, by considering factors that were not, properly understood, “environmental”. Rowland J (with whom Malcolm CJ and Franklyn J agreed) described the nature of a report under s 44 as follows:

“The report sought by the Minister pursuant to s 44 of the Act was not a report on all factors relevant to the “proposal”. It was a report limited pursuant to the provisions of that section to “the environmental factors relevant to that proposal”. Whatever may be the meaning of the expression “economic surroundings” in s 3(2), it seems to me that, in context, they must be related to the physical area involved in the proposed dredging. It is not a relevant environmental matter if it be the fact that no other shell sand material is available to Cockburn to fulfil its contracts. It is not an environmental factor that Cockburn will suffer loss if it is unable to dredge and that its work force will suffer if it is unable to dredge. These are no more than the results of the failure to obtain approval to dredge because of the impact on the environment. Those matters will, of course, be relevant to the question of whether the proposal is permitted by the Minister to go ahead and, if so, on what conditions. These extraneous commercial considerations have nothing to say in relation to the environmental factors which will apply to the general surrounds of the area in question and how the proposed activity will impact on all things and creatures that are in that area.

...

An overview of the Act would seem to confirm that there is some limit to the powers of the EPA. There is nothing in s17 which sets out the EPA powers which would indicate a function that its advice is to be given on other than “environmental matters” in that s 17(3)(b), in particular, so limits the matter. ... In my view, there is nothing in the Act which would enable the EPA to make recommendations on other than environmental factors as I have limited them.

It is true that the EPA, in its report, has pointed out the prospect of damage to the immediate environs where dredging is to take place, and likewise it has made recommendations as to conditions and procedures which would be useful in limiting damage if the proposal were to be implemented. It has, however, gone further and purported to resolve the conflict between the need for the resource and protecting the environment. It may be that if the proposal is refused by the Minister, Cockburn will suffer and its work force will suffer. In my respectful opinion, that is not an environmental impact. Rather, it is a

consequence of Cockburn not being given permission to damage the environment of this area of Cockburn Sound.”²²

3.61 Accordingly, the references in s 3(2) of the *EP Act* to the “economic and social surroundings of man” in the context of the definition of “environment” are limited to those related to the direct area of the proposal. They are not related to the broader social or economic benefits of a particular proposal.

3.62 The decision in *Coastal Waters Alliance* makes clear that, in conducting an environmental impact assessment, the EPA’s function does not include weighing the competing social, commercial or economic benefits of a proposal against the environmental impacts of the proposal. Rather, the “recommendation” to be made by the EPA in any given case is to be made on the basis of the environmental factors alone.

3.63 That is not to say that broad social, commercial or economic factors are irrelevant to the final decision as to whether a proposal should or should not be implemented. On the contrary; the scheme of the *EP Act* as a whole clearly recognises that, in a particular case, environmental impacts may be outweighed by the social or economic benefits to be gained by the implementation of a proposal. However, what the scheme of the *EP Act* also recognises is that the weighing of those competing factors is to be carried out by the Minister (or the Governor in Council).

The nature of the Minister’s role

3.64 It follows from the above discussion in relation to the EPA’s role under Part IV of the *EP Act* that the Minister’s role ²³ in relation to the implementation of proposals involves a much broader discretionary judgment. Furthermore, in exercising his or her discretion, the Minister may

²² *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; Ex parte Coastal Waters Alliance* (1996) 90 LGERA 136 per Rowland J at 150-151.

²³ For the purposes of what follows, references to the Minister include references to the Governor in Council, in circumstances in which s 45(2) of the *EP Act* applies.

have regard to considerations which go beyond the effects of a proposal on the environment.

- 3.65 In accordance with the provisions of Part IV, for example, it is entirely legitimate, so long as the lawful procedures are followed and all relevant matters are taken into account, for the Minister to conclude that a proposal should be implemented, notwithstanding that it will have a significant impact on the environment, where the Minister concludes that the impact on the environment is outweighed by social or economic benefits from the proposal.
- 3.66 This is reflected in the provisions of Part IV in a number of ways.
- 3.67 First, as noted above, the EPA's role under s 44 of the *EP Act* is to provide "advice and recommendations". The EPA's recommendation in relation to a proposal does not, and cannot, finally determine whether the proposal may be implemented. Indeed it is in the nature of a recommendation that it is open to the recipient to accept or reject the recommendation in the circumstances of a particular case. The structure of Part IV of the *EP Act* as a whole makes clear that the Minister may allow the implementation of a proposal, notwithstanding that the EPA has recommended that it not be implemented. Conversely the Minister may determine that a proposal may not be implemented, notwithstanding a recommendation by the Authority that the proposal may be implemented. In so determining the Minister may have regard to both to environmental and non-environmental factors.
- 3.68 Secondly, as reflected in *Coastal Waters Alliance*, by contrast to the role of the EPA, the Minister's decision-making power under s 45 is not constrained by express statutory criteria. This reflects the broad nature of the discretion reposed in the Minister, and the range of considerations to which he or she may have regard. In *Coastal Waters Alliance* itself, for example, in relation to the commercial considerations and employment opportunities attached to the proposal in that case, Rowland J stated that "those matters will, of course, be

relevant to the question whether the proposal is permitted by the Minister to go ahead and if so on what conditions” (at [150]).

- 3.69 Similarly, Malcolm CJ in *Coastal Waters Alliance* described the attempt by the EPA in that case to find a political or commercial compromise as being:

“of a kind which the relevant Ministers themselves should be responsible for finding with the assistance of other advisors, having received a report on environmental factors”.²⁴

- 3.70 Thirdly, the very fact that the ultimate decision-making power is reposed in the Minister points to the wide discretion reposed in Ministers of the Crown, and the Executive Government more generally, to make decisions in the public interest. As the discussion of judicial review in the *Attorney General (NSW) v Quinn* (1990) 170 CLR 1 reveals, the policy considerations involved in balancing the interests of the public at large, the interests of the environment and the interests of minority groups and individuals are reposed in the administrative bodies who are “subject to political control”.²⁵ Ministers, and the Governor in Council, are clearly subject to the ultimate political control: the ballot box.

- 3.71 Finally, it is noteworthy that while various actions of the EPA under Part IV, including the content of an assessment report, may be the subject of an appeal under Part VII of the *EP Act*, no comparable appeal is available in relation to the decision of a Minister²⁶. Subject to the Minister’s decision having been made lawfully, the Minister’s decision is final.

²⁴ *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; Ex parte Coastal Waters Alliance* (1996) 90 LGERA 136 per Malcolm CJ at 140-141.

²⁵ *Attorney General (NSW) v Quinn* (1990) 170 CLR 1 per Brennan J at 36.

²⁶ There is a right of appeal by proponents in relation to conditions of an approval (pursuant to s 100(3) of the *EP Act*. There is, however, no right of appeal, by proponents, from a decision that an approval may not be implemented and no right of appeal, by other persons, against a decision that the proposal may be implemented.

Environmental Protection Policies – Part III of the *EP Act*

3.72 Given the centrality of policies to the Review, it is important to note that Part III of the *EP Act* makes express provision for the creation of statutory Environmental Protection Policies (“EPPs”). The preparation of EPPs is, as noted above, an express function of the EPA pursuant to s 16(f) of the *EP Act*.

3.73 Part III of the *EP Act* provides a detailed process for the preparation and approval of EPPs. By way of summary that process is as follows:

- (a) The EPA prepares a draft of the EPP, having regard to the description of and requirements of an approved EPP set out in s 35 (s 26(1)(c));
- (b) The EPA causes to be published in both the Gazette and other media notices containing particulars of the draft EPP (s 26(1)(d));
- (c) The EPA makes reasonable endeavours to consult in respect of the draft EPP with such public authorities and persons who are likely to be affected by it (s 26(1)(e));
- (d) Persons may make representations to the EPA on the draft EPP (s 27);
- (e) After a prescribed period, the EPA is to consider representations, prepare revisions and cause the draft EPP again to be published and submitted, together with a report to the Minister (s 28(1));
- (f) Following receipt and consideration of the draft EPP, the Minister may appoint a committee (which may include those members of the EPA and other persons) to hold a public inquiry into the draft EPP (s 29(1));
- (g) The committee following the public inquiry shall report on the draft EPP to the Minister (s 29(3));
- (h) The Minister is also required to make reasonable endeavours to conduct other consultations in relation to the draft EPP (s 30);

- (i) After the Minister has completed those enquiries and considered the report of any committee of inquiry, the Minister is to remit the draft EPP to the EPA for reconsideration, approve the draft EPP with or without amendments, or refuse to approve the draft EPP (s 31);
- (j) Where the Minister has remitted a draft policy to the EPA the process described above commences again (s 32); and
- (k) Finally, s 42 of the *Interpretation Act* 1984 applies to the order approving the EPP. That is the order is required to be tabled before each House of Parliament and is subject to disallowance by either House of Parliament (s 34).

3.74 Once an EPP has been approved, and subject to s 42 of the *Interpretation Act* 1984, the EPP has the force of law as if it were enacted under the *EP Act* (s 33).

3.75 Section 35 of the *EP Act* sets out the matters for which an EPP may provide, and expressly stipulates that an approved policy may create offences and provide penalties.

3.76 It is important to recognise that the preparation and creation of EPPs under Part III of the *EP Act* is a function quite separate and distinct from the environmental impact assessment function of the EPA under Part IV of the *EP Act*. That is, it is quite possible for an EPP to be prepared and approved which does not relate to environmental impact assessments *at all*. Rather an EPP, having the force of law, may provide independent protection for the environment above and beyond the approval of proposals pursuant to Part IV.

- 3.77 The process for the preparation of EPPs is cumbersome and time consuming. Perhaps for this reason, there are very few EPPs currently in force in Western Australia.²⁷
- 3.78 Paradoxically, notwithstanding the complex and public process for the approval of EPPs, the process for the revocation of an EPP is very simple. Section 33(2) provides that the Minister, having obtained and considered the advice of the EPA in the matter may by order revoke an approval.

The statutory basis for other policies issued by the EPA

- 3.79 This Review is, of course, concerned with a far broader range of policy instruments than EPPs. In that regard it is notable that, save for s 122 of the *EP Act* enabling the Authority to draw up administrative procedures for the purposes of the *EP Act*, and “in particular for the purpose of establishing the principles and practices of environmental impact assessment”,²⁸ there is no clear and express provision for the preparation or promulgation of other policy instruments by the EPA under the *EP Act*.
- 3.80 This is not to say that the EPA may not create such policies. On the contrary, there is ample statutory authority for the preparation and adoption, by the EPA, of policies or guidelines in relation to environmental impact assessments.
- 3.81 As the Full Court of the Federal Court concluded in *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, there is an imputed legislative intention that policies or guidelines will be developed by administrative bodies in relation to their powers. As French and Drummond JJ observed, at 206:

²⁷ At the time of the Review there were only four EPPs in force: *Environmental Protection Goldfields Residential Area Sulphur Dioxide Policy & Regulations 2003*; *Environmental Protection (Kwinana) (Atmospheric Wastes) Policy 1999*; *Environmental Protection Peel Inlet-Harvey Estuary Policy 1992*; and *Environmental Protection (Western Swamp Tortoise Habitat) Policy 2011*.

²⁸ The *Administrative Procedures 2012* were made pursuant to this provision.

“The imputed legislative contemplation of such policies ... must be limited to those which are consistent with the general purposes and requirements, express or implied of the legislation in question.”

3.82 Secondly, as Martin CJ held in the *Roe & Case*, other provisions of s 16 and s 17 of the *EP Act* provide sufficient legislative basis for the creation of policy instruments. In that regard his Honour stated at [204]:

“[I]n my view the powers conferred by s 122 of the Act, to draw up administrative procedures ‘in particular for the purpose of establishing the principles and practices of environmental impact assessment’, the power conferred by s 16(j) to ‘publish reports on environmental matters generally’, by s 16(n) to ‘establish and develop criteria for the assessment of the extent of ... environmental harm’, the conferral upon the EPA of ‘all such powers as are reasonably necessary to enable it to perform its functions’ by s 17(1), and the authority to ‘exercise such powers ... as are necessary or convenient for the performance of the functions imposed’ on the EPA by the Act conferred by s 17(3)(h), are quite sufficient, in combination, to provide express sources of the power to issue the three policy instruments relevant to this case.”

Conclusions in relation to legislative context

3.83 It was emphasised at the outset of this chapter that the overriding consideration for the EPA, in performing any of its functions, including the environmental impact assessment function, must always be the terms of the *EP Act*. Any policy, procedure or guideline developed by the EPA must have, as its touchstone, the requirements of the *EP Act* and the purposes and objectives set out in it.

3.84 There is a need to return, as it were, to “first principles”.

3.85 Having regard to discussion which then followed, the following principles, drawn from the *EP Act* must necessarily guide the performance of the EPA’s functions and the creation and application of any policy, procedure or guideline developed by the EPA.

3.86 First, the performance of functions must be consistent with the objective of the *EP Act* as a whole, which is to “protect the environment of the State”, having regard to the principles set out in s 4A. All of the EPA’s activities and

work, including its policies and guidelines, ought to be referable to these objectives and principles.

- 3.87 Secondly, in conducting environmental impact assessments, the EPA is not a “decision-maker” in the strict sense. The EPA’s role in conducting environmental impact assessments and reporting to the Minister is entirely advisory.
- 3.88 Thirdly, while the conduct of environmental impact assessments are matters in relation to which the expertise of the EPA must be applied and opinions may differ, whether the EPA recommends that a proposal be, or not be, implemented is not, ultimately, a matter of discretion. Rather it is the expression of the EPA’s considered opinion as to whether the proposal is appropriate to be implemented, having regard to the objective of the *EP Act*, being to “protect the environment of the State”, and the objectives of the EPA.
- 3.89 Fourthly, the assessment by the EPA, as to whether to recommend a particular proposal be implemented, must be determined in accordance with the objective facts and the environmental factors identified in the course of its assessment of the “environmental acceptability” of the proposal.
- 3.90 Fifthly, the EPA’s function does not include weighing the competing social, commercial or economic benefits of a proposal against the environmental impacts of the proposal. Rather, the recommendation to be made by the EPA in any given case is to be made on the basis of the environmental factors alone (including the “economic and social surroundings” directly related to the area of the proposal).
- 3.91 Sixthly, the scheme of the *EP Act* as a whole clearly recognises that, in a particular case, environmental impacts may be outweighed by the social or economic benefits to be gained by the implementation of a proposal. The weighing of those competing factors, however, is a matter to be carried out by the Minister or the Governor in Council.

- 3.92 Seventhly, the structure of Part IV of the *EP Act* makes clear that the Minister may allow the implementation of a proposal, notwithstanding that the EPA has recommended that it not be implemented. Conversely the Minister may determine that a proposal may not be implemented, notwithstanding a recommendation by the Authority that the proposal may be implemented. In so determining the Minister may have regard to both to environmental and non-environmental factors.
- 3.93 Finally, any policy, procedure or guideline developed by the EPA, must be consistent with the general purposes and requirements, express and implied, of the *EP Act*, including the preceding principles.
- 3.94 In light of these principles, we now turn to an analysis of the history and structure of the EPA's suite of policies, procedures and guidelines.

CHAPTER IV – EPA POLICY FRAMEWORK HISTORY AND ANALYSIS

Introduction

- 4.1 The Review Brief notes that there are “around” 50 environmental impact assessment policy and guidance documents and that the “EPA recognises that this is a complex suite of instruments that needs rationalisation” (page 11).
- 4.2 That is something of an understatement. Indeed, an examination of the current suite of policy instruments maintained by the EPA makes it clear that:
- (a) There are, quite simply, too many instruments;
 - (b) There is no clear hierarchy or logical numerical order to the instruments;
 - (c) Within the nominal framework that currently exists, are several “types” of instruments that have different purposes, objectives, and outcomes; and
 - (d) Within the different types of instruments there are a range of different forms or “genres” of content.
- 4.3 As discussed in Chapter 3, the *EP Act* provides the EPA with ample power to establish its own administrative arrangements and prepare policies and guidelines in the form of policy instruments. However, a significant issue arising from an examination of the EPA’s current EIA policy structure is the proliferation of different types of policy and guidance documents.
- 4.4 There is some attempt to provide a hierarchy for these documents in the EPA publication “Policy Structure infosheet” dated May 2014 (Document 6 in the Review Brief; also available on the EPA website). However, upon review of the individual policy instruments, it is apparent that there are overlapping purposes and forms of content within the documents, notwithstanding their nominal designations. A cursory inspection of the EPA’s website reveals a

labyrinthine collection of the various categories and types of instruments in various lists that cross-reference others and are difficult to navigate.

- 4.5 The Review Team is of the view that the EPA's current policy structure is inadequate to provide the necessary guidance for all users of the documents and that this situation adversely affects both the use and the development of policy instruments generally.
- 4.6 Many of stakeholder submissions commented upon the policy framework. The effect of many of those submissions was that the number and organisation of the policy instruments can make engagement with the EIA process difficult for proponents, environmental consultants or practitioners, community organisations and the general public.
- 4.7 Criticism of the policy structure was not uniform. Nor was it suggested that policy instruments were not appropriate or should be abandoned. A number of submissions provided positive feedback in relation to the policy approach of the EPA, particularly from stakeholders who could be described as "high volume" users of the EIA process. The stakeholder submissions, as a whole, therefore recognised the need for general policy instruments to be developed to provide guidance in the EIA process. It was rather, a matter of degree as to, how many, and what type, of policy instruments were appropriate.
- 4.8 Nor should criticism of the current policy structure be taken as a criticism of the officers of the OEPA charged with the compilation and arrangement of the policies. It is, rather, a product of the policies themselves and historical nature of their development which has given rise to the current situation. Many of the policy instruments, for example, appear to be the product of a particular issue what was current at the time of its publication and a response to that issue, without necessarily being placed within a coherent framework for policy development. The result is a collection of documents that has "grown like Topsy".

- 4.9 This chapter commences with an examination of the evolution of the EPA's EIA policy suite since the last comprehensive review of the EPA's policies, which commissioned in 2008 and completed in 2009. A further review was conducted in 2012. Consideration of the development of the EIA policy suite over this time is necessary so as to be able to understand, as it were, "how we got to where we are today".
- 4.10 While there was acknowledgement in those reviews of the need to develop a systematic policy framework to guide policy development, the attempted implementation of recommendations to rectify the situation over the course of these earlier reviews appears to have added to, rather than lessened, the complexity.
- 4.11 Following that examination of previous reviews, this chapter then concludes with an analysis of the different kinds of policy instrument, the structure of the current policy suite, and coherence of that structure. Issues more properly described as "content" will then be addressed in the next chapter.

The 2009 Review on Policy Framework

- 4.12 In 2008, the EPA commenced a review into its environmental impact assessment processes and underpinning policy framework. The review included extensive stakeholder consultation (through a stakeholder forum and submissions). The report of the Review of the Environmental Impact Assessment Process in Western Australia was released in March 2009 ("2009 Review"). The report sets out findings and recommendations on both the policy framework and EIA processes.
- 4.13 The 2009 Review was commissioned in response to the "increasing pressure and complexity of environmental impact assessment", particularly in the context of the resources boom and the land development and infrastructure projects that followed it. Those factors had affected the EPA's workload, and there had been "concerns expressed about delays, process information

requirements and the adequacy of some current policies integral to the EIA process in WA”.¹

4.14 The objectives of the 2009 Review were to:

- (a) Review and develop key EIA policies;
- (b) Identify and address key issues raised by stakeholders;
- (c) Review the EPA’s short and long term workload;
- (d) Prepare an EIA Review implementation plan;
- (e) Highlight matters that may require further consideration.²

4.15 The terms of reference of the 2009 Review included a number of matters relevant to the present Review.³

¹ 2009 Review, page 1.

² 2009 Review, page 3.

³ Including to:

- (a) Review and report on appropriate environmental policy settings to inform the setting of environmental objectives and outcome-based conditions [Part A (a)];
- (b) Review and make recommendations on improvements to the following steps in the EPA’s proposal assessment process:
 - (i) scoping of environmental issues/factors, proponent documentation and environmental assessment
 - (ii) scope and guidance for EMPs and,
 - (iii) outcome-based recommended conditions [Part A(b)];
- (c) Review and revise the 2002 EPA Administrative Procedures to reflect legislative changes and agreed process changes resulting [from the items above] [Part A(f)];
- (d) Advise and make recommendations on environmental assessment approaches for strategic / cumulative impact project(s) [Part B];
- (e) Make recommendations on amendment to Divisions 1 and 2 of Part IV of the *EP Act* that would, inter alia, give legislative effect to process improvements arising from Part 1 and 2 above [Part C].

Findings of the 2009 Review on Policy Framework

4.16 The 2009 Review identified the following types of documents in the EPA's policy framework at the time of the review:

- (c) *Environmental Protection Policies* ("EPPs")⁴ – these have a statutory basis under Part III of the *EP Act*. The 2009 Review noted:

“Legal practice with respect to EPPs has also evolved in recent years. Today EPPs are drafted by Parliamentary Counsel and are only used:

- i. to provide a clear statement of intent to use the enforcement powers of the Act, when required, in order to adequately address an environmental issue; or
- ii. to provide the ability in certain areas under controlled conditions to permit activities that would otherwise be unclear under the Act.”⁵

- (d) *State Environmental Policies* ("SEPs") – the 2009 Review considered SEPs to be a function of s 17(3)(d) of the *EP Act*, which provides that the EPA “may consider and make proposals for policy to be followed in the State with regards to environmental matters”. However, the 2009 Review also noted:

“In 2004 the EPA developed the State Environmental Policy (SEP) as a policy instrument to fill a need to have a more general and flexible policy mechanism. There is no statutory process spelt out for the development of these policies although a guide has been produced. As flexible mechanisms, SEPs could be implemented using statutory components such as EPPs, environmental impact assessment, licensing and/or regulations.

It remains open to the EPA to use Section 17(3)(d) in other ways.”⁶

- (e) *Administrative Procedures* – section 122 of the *EP Act* provides a statutory basis for this instrument, which is published in the Government Gazette

⁴ That is the policies discussed in Chapter 3, paragraphs [3.72] to [3.78] above.

⁵ 2009 Review, page 10.

⁶ 2009 Review, page 10.

and establishes the principles and practice of environmental impact assessment.

- (f) *Position Statements* – these documents do not have a statutory basis; the 2009 Review notes these have been published by the EPA to:

“set out its views on matters of environmental importance and inform the public about environmental values and visions for the future. These statements were also originally to provide a basis for the development of associated guidance statements.”⁷

- (g) *Guidance Statements* – these documents also do not have a statutory basis; the 2009 Review notes these have been published by the EPA to:

“provide an indication of the matters that the EPA takes into consideration when assessing impacts on environmental factors. They are meant to assist proponents and the public generally, to understand the minimum requirements, for protection of elements of the environment that the EPA expects to be met.”⁸

- (h) *Guidelines and others* – this category is used in the 2009 Review to identify draft guidelines that were being prepared at the time of the review.

4.17 The 2009 Review “found that the [then] current policy framework lacks a systematic and rigorous approach to policy development” and set out the following observations:

- “there is no overarching State Environmental Strategy within which orderly policy development could take place. A key component of any environmental policy framework is to set the strategic context for the development of EPA environmental assessment and operational policies. Currently there is no such context and no requirement under the *EP Act* to prepare one.
- administrative or operational policies addressing matters of process such as timelines, guidance on preparation of EIAs, scoping documents etc are not adequately addressed.

⁷ 2009 Review, page 10.

⁸ 2009 Review, page 10.

- currently there is some confusion as to the difference between and the objectives of Position Statements, Guidance Statements and guidelines.
- there is no practice of making pronouncements by the EPA on matters that need to be clarified urgently.
- there is a view that there should be a policy instrument more binding than that of an SEP but less onerous than an EPP.”⁹

Recommendations of the 2009 Review on Policy Framework

4.18 The 2009 Review set out three main recommendations to restructure the policy suite at the time:

- (a) Replace the existing framework with the proposed structure illustrated below;

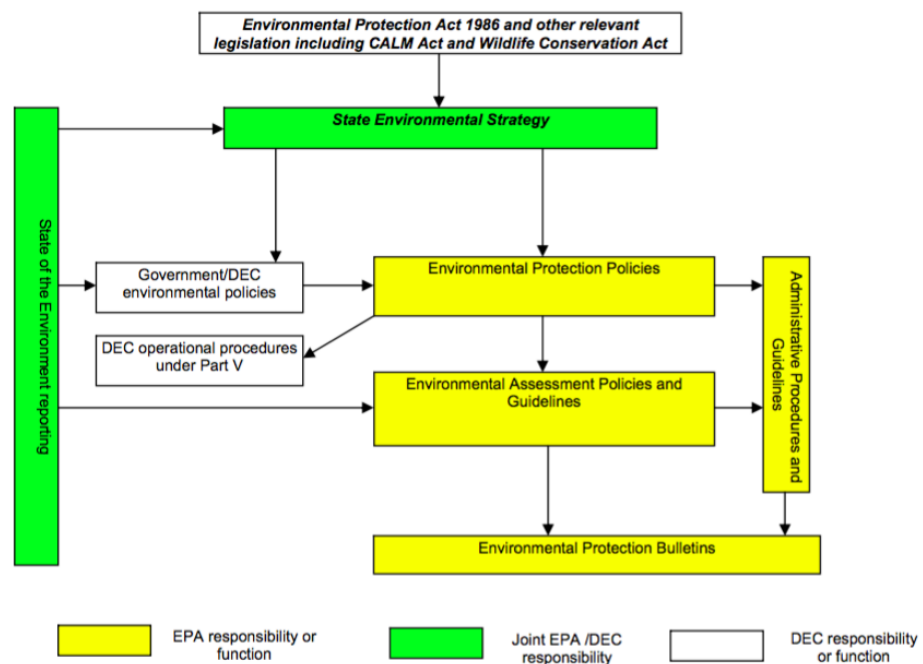


Figure 2 Proposed EPA policy framework

- (b) Migrate the content of Position Statements and Guidance Statements into the new instruments to be developed under the proposed structure; and

⁹ 2009 Review, page 11.

- (c) Prepare a “State Environmental Strategy (SES)” in order to “provide a strategic context for the development of environmental policies” though the identification of environmental protection priorities that can be addressed through such policies.¹⁰

4.19 The framework proposed in the 2009 Review set out the following types of instruments to be developed following the rationalisation of the then-existing policies:

- (a) *State Environmental Strategy* – to be developed jointly by the EPA and the Department of Environment and Conservation;
- (b) *Binding EPPs with regulatory powers* – as set out in Part III of the *EP Act*, however, the recommendations note:

“A simplified process for the preparation of EPPs should be considered as an option to expedite the development of EPPs but amendments to the *EP Act* may be required to enable this to occur.”¹¹

- (c) *Other statutory policies that may bind decision makers only*¹² – while the 2009 Review stated that “[t]he preparation of less regulatory policies (SEPs) under Section 17(3)(d) may continue”, it suggested the following two options:
 - (i) make SEPs binding on decision-makers, which would require changes to the *EP Act*; or

¹⁰ 2009 Review, page 11.

¹¹ 2009 Review, page 12.

¹² Peculiarly, policy instruments meeting this description do not appear in the proposed policy framework in Figure 2 of the 2009 Review (Reproduced above).

- (ii) enforce SEPs through the use of “existing powers under the *EP Act* or other legislation to achieve their objectives, e.g. regulations”.¹³

This recommendation also noted “Rationalisation of these two existing EPP policy instruments should be pursued to reduce confusion and to clarify their purpose and scope”, although there was no indication as to how this ought to be done.

- (d) *Environmental Assessment Policies and Guidelines* – the 2009 Review proposed two separate types of non-statutory documents for the EIA process:

- (i) *Environmental Assessment Policies* (EAPs), which would outline criteria for environmental assessment, concepts, and activities or sectors; and
- (ii) *Environmental Assessment Guidelines* (EAGs), which would address technical aspects such as methodologies and approaches.

The recommendations specified that both types ought to be prepared by way of a consultative process involving public review. It was suggested that there be further consideration as to whether EAPs ought to be given a statutory basis, and made “legally binding on the EPA and Appeals Convenor by requiring they have due regard for them when making decisions or providing advice”, along the lines of Statements of Planning Policy under the *Planning and Development Act 2005*.¹⁴

- (e) *Environmental Protection Bulletins* (EPBs) – which were to be “of necessity be advisory and not statutory” and “intended to provide an avenue for the EPA to make statements or make its position clear on matters of

¹³ 2009 Review, Page 12.

¹⁴ 2009 Review, Page 13.

process or policy requiring urgent attention.” The recommendations also suggested “EPBs may also be used to establish interim policy while the formal process for policy development is being completed”.¹⁵

- (f) *Administrative Procedures and Guidelines* – the 2009 Review recommended, in relation to regarding the administrative procedures:

“Administration procedures prepared under Section 122 of the *EP Act* should address in broad terms the assessment process and the form and content of environmental impact assessments. Administrative guidelines would be non-statutory and address assessment process matters in more detail but consistent with any legislative requirements. Topics would include guidance on preparation of Section 45C applications, referrals and scoping documents, EIA documents and condition setting.

The process for the preparation of these guidelines would be an internal consultative process with external consultation as required.”¹⁶

Assessment of the 2009 Review and its implementation

4.20 Arguably, both the recommendations of the 2009 Review and the partial implementation of its recommendations contributed to the current policy morass.

4.21 In relation to the transitional arrangements, for example, the 2009 Review noted that:

“Existing Position and Guidance Statements that are not subject to current EIA review should be migrated directly (without restructuring or amendment) across to the new framework as appropriate. There are some Position Statements and Guidance Statements (for example environmental offsets) that cover the same topic that will require rationalisation between policy (objectives and measures) and guidelines which indicate how to comply with the policy.”¹⁷

¹⁵ 2009 Review, Page 13.

¹⁶ 2009 Review, Page 14. We note that further recommendations regarding the Administrative Procedures are set out in Part 8 of the 2009 Review – this discussion is not relevant now as the Administrative Procedures have been updated twice since.

¹⁷ 2009 Review, page 14.

- 4.22 This articulation of the difference between policy and guideline instruments is perhaps the closest the 2009 Review came to a clear explanation of the purposes and aims of different types of instruments in the policy suite: the difference between policy and guidelines.
- 4.23 The “migration” of existing policy instruments into a new framework, alongside new types of policy instrument was likely to lead, at least in the short term, to more, rather than less, complexity. There was also the problem of existing documents not adequately reflecting the aims and structure of any new policy framework.
- 4.24 It is somewhat prophetic that the 2009 Review specifically identified, as policy instruments requiring rationalisation, Position Statements and Guidance Statements related to environmental offsets: that is, the very instruments that the EPA was found to have failed to consider in the *Roe 8 Case*.
- 4.25 The 2009 Review was also problematic for several other reasons.
- 4.26 First, there is no adequate discussion of the statutory context (or basis) for the policy documents. Without such consideration of the legislative context of the EPA’s functions and powers, the recommendations set out in the 2009 Review could not have a sufficient basis to establish a “systematic and rigorous approach to policy development”.
- 4.27 Secondly, the transitional arrangements set out in the 2009 Review failed to properly guide the restructure of the policy suite. Migrating the older documents “directly (without restructuring or amendment)”, as noted above, was apt to cause difficulty. Changing the Position Statements and Guidance Statements into the proposed EAP and EAG instruments, which are described in some detail, for example, would require substantial amendment. The recommendations for the EAP instruments, for instance, suggest a proposed outline for the content and structure of the instrument. On the face of the recommendations, the scope and purpose of the EAPs and EAGs do not directly reflect those of the existing Position Statements and Guidance

Statements.¹⁸ The direction to transfer the older instruments “across to the new framework as appropriate” would require careful consideration of the intended scope and purpose of the existing material rather than simply renaming or re-categorising them within a new structure.

4.28 Thirdly, the proposed structure as set out in Figure 2 of the 2009 Review, did not adequately identify or articulate the interrelation between, and hierarchy of, the different kinds of instruments. For example, it is unclear how EAPs/EAGs and the Administrative Procedures would (or could) be drawn from EPPs. Substantively, there is no connection between the different instruments. EAPs/EAGs and the Administrative Procedures are specifically part of the EIA process, while EPPs focus on particular environmental issues. EPBs, according to the text of the 2009 Review, appears to be intended as an instrument that would develop “interim policy” or new positions that would eventually be developed into full EAPs/EAGs, as opposed to being subsidiary to existing instruments, a matter not reflected in the proposed policy structure.

4.29 Notwithstanding these criticisms, the 2009 Review and its implementation has been a worthwhile exercise. It did identify the need for greater structure surrounding the policy instruments and for greater clarity around the different types of instrument. The OEPA (which was itself established as a result of further consideration about the role and structure of the EPA as a result of the 2009 Review¹⁹) has also clearly appreciated the need for rationalisation of

¹⁸ Arguably, Position Statements are more akin to the proposed EPB instrument, and the OEPA has since been transferring older Position Statements into EPBs (see the discussion at paragraph [4.38] below regarding policy rationalisation conducted in 2012; see also Review Brief, Document 4, page 2). However, there is nothing in the recommendations of the 2009 Review that could lead to the conclusion that EPBs were intended to replace Position Statements.

¹⁹ Report of the Environmental Stakeholder Advisory Group to the Minister for Environment in relation to the review of the EPA Role and Structure, August 2009 (Document 4 of the Review Brief).

the various policy instruments and has worked towards that goal, including by the following developments.

2012 Developments

Administrative Procedures 2012

4.30 The *Environmental Impact Assessment (Part IV Division 1 and 2) Administrative Procedures 2012* (“*Administrative Procedures 2012*”) were published in the Government Gazette on 7 December 2012. The *Administrative Procedures 2012* replaced previous versions from 2002 and 2010, and introduced new levels of assessment for proposals. The application of the *Administrative Procedures 2012* is limited to proposals falling within Division 1 and Division 2 of Part IV of the *EP Act*, being significant proposals and strategic proposals.

4.31 Clause 4 of the *Administrative Procedures 2012* sets out the following “principles” of environmental impact assessment for the EPA, which seek to ensure that:

- “1. there is published guidance on the types of proposals likely to require assessment, the levels of assessment and the form, content and timing of the environmental review required;
2. assessment timelines, negotiated with the proponent and other key participants, are proposal-specific, reasonable and achievable;
3. the total and cumulative effects of using or altering environmental assets receive due consideration;
4. public comment relating to proposals is sought and promoted, where appropriate;
5. advice is sought from relevant [decision-making authorities] and other government agencies, where appropriate, in relation to the environmental impacts of a proposal;
6. the process is procedurally fair and that all relevant EPA policies, guidelines and procedures are publicly available and are applied fairly and consistently;
7. proponents have an opportunity to respond to the substance of information provided to the EPA where this information is credible, significant and relevant to the decision or recommendation to be made by the EPA, and where the preliminary view of the EPA is that its

decision or recommendation is likely to be adverse to the interests of the proponent;

8. predicted environmental impacts are monitored, the results assessed and feedback provided to improve ongoing environmental management of proposals; and
9. there is continuous review of the EIA process to improve efficiency and effectiveness and to promote the use of best practice.”

4.32 As a legislative instrument prepared under s122 of the *EP Act*, the *Administrative Procedures 2012* are, ostensibly, the best way for the EPA to provide clear and consistent guidance on in relation to matters of process in relation to EIA. As discussed in Chapter 6, greater use of the Administrative Procedures in dealing with matters of process in relation to EIA is to be therefore encouraged.

The 2012 Policy Review

4.33 The OEPA also initiated a further policy review in 2012. A copy of the *Comprehensive Policy Review and Contemporary Policy Framework Project Plan* (“2012 Review”) was provided in the Review Brief (Document 4). The 2012 Review was part of the OEPA Corporate Plan (2012-2014), which identified “the need for a comprehensive policy review”.

4.34 The background and scope to the 2012 Review noted the findings of the 2009 Review, in particular, that:

- “EPA policy initiation and development lacks a systematic and rigorous process;
- Operational policies relating to EIA are not appropriately organised;
- There is confusion regarding the intent of current policies (e.g. position statements, guidance statements, guidelines, etc.); and
- There is limited capacity for the EPA to make pronouncements.”²⁰

²⁰ 2102 Review, page 3.

4.35 Relevantly, the 2012 Review observed that “there remains a lack of clearly displayed and readily understood symmetry between what types of policies the EPA has (EAG; EPB) and what these policies are designed to achieve (technical guidance, policy position/guidance, EPA or OEPA position, information update)” and that the policy suite is “disorganised both internally and in their presentation to the public”.²¹

4.36 The 2012 Review acknowledged that it was necessary to have “a robust, contemporary and relevant suite of policies that are maintained on a regular basis, and added to in response to emerging issues or business needs”.²²

4.37 The project plan for the 2102 Review proposed a seven-month timeframe for implementation, from September 2012 to March 2013. The scope of the review was to involve three activities – policy rationalisation, development of a policy framework, and the development of a policy development and review methodology – with the following deliverables:

- “1. Definitive policy list formatted to make sense to the outside world
2. List of policy gaps and priorities
3. Updated website
4. Policy bank
5. Policy manual.”²³

Policy rationalisation following the 2012 Review

4.38 The action steps for the policy rationalisation objective in the 2012 Review were straightforward and appear, *prima facie* to be sound and reasonable steps to evaluate and monitor the policy suite. Those steps identified were:

²¹ 2012 Review, page 3.

²² 2012 Review, page 3.

²³ 2012 Review, page 5.

- “Outline and consolidate the types of policy and what each policy is designed to achieve.
- Identify the different applications that can be used for each policy type.
- Identify when each policy was last reviewed and/or created. A large portion of this work was commenced in two separate undertakings in 2008 and 2010.
- Create a list and prioritise draft policy OEPA is currently working on.
- Clarify and prioritise which policies require review/amendments.
- Clarify which drafts require discarding or finalisation.
- Make recommendations for archiving of redundant policies.”²⁴

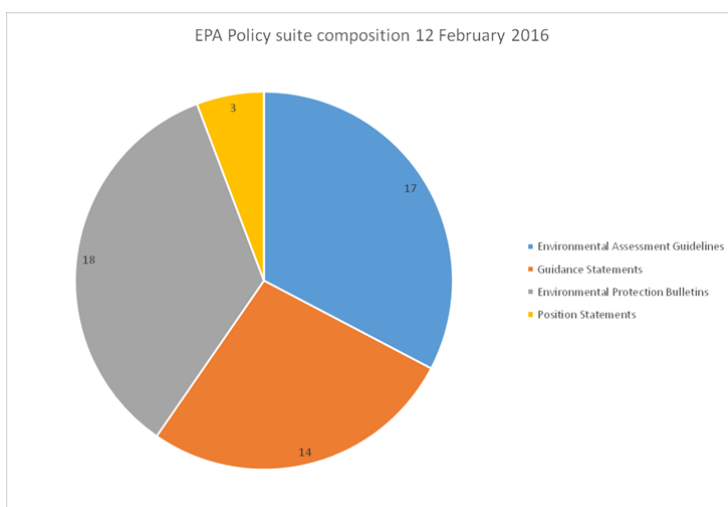
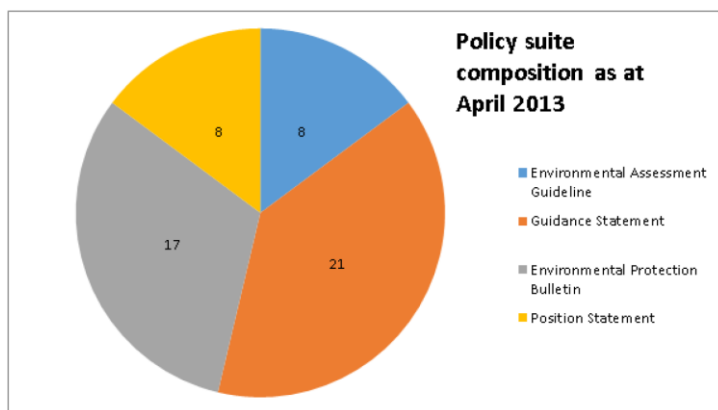
4.39 The Review Brief advised that following the adoption of the project plan for the 2012 Review, the EPA commenced a process of “phasing out of Guidance Statements and Position Statements, which are being replaced over time with Environmental Assessment Guidelines (EAGs) and Environmental Protection Bulletins (EPBs), respectively” (page 8). This process is also mentioned in the “Policy Structure infosheet”²⁵ and described in some detail in the Affidavit of Naomi Jane Arrowsmith dated 23 October 2015 filed in the *Roe & Case*.²⁶

4.40 That “rationalisation” process has been ongoing. The OEPA provided the Review Team with charts showing the evolution of the composition of the policy suite from April 2013 to February 2016, showing the shift from Guidance Statements to EAGs and Position Statements to EPBs:

²⁴ 2012 Review, page 4.

²⁵ Review Brief, Document 6, page 2.

²⁶ See paras [17]-[18] and [21]-[22].



Policy development and review methodology following the 2012 Review

4.41 The action steps for this objective in the 2012 Review were:

“Develop an organised/systematic approach to initiation of policy development including consideration of:

- EPA and Ministerial priorities
- emerging issues
- incoming and current roadblocks in assessments and compliance
- the need and/or problem we are trying to solve and what type of policy will fit the purpose
- the audience we are endeavouring to engage
- prioritisation of policy gaps to identify policies requiring development
- prioritisation of policies requiring review

Develop guidance for a consistent process for how EPA/OEPA develop policy including:

- how to identify the policy gap and its relationship to available resources and priorities;
- an annual policy gap analysis exercise aligned to EPA strategic planning;
- the correct type of policy that should be used to fit each purpose;
- key steps (particularly internal) to follow for the relevant policy type, however this will largely be driven by the purpose of the policy
- different level of consultation/communication required for policies and which (if any) DMA's require involvement – based on the purpose of the proposed policy
- systematic way of collecting feedback on drafts or finals requiring review
- a policy maintenance schedule”.²⁷

4.42 A notable deliverable, in addition to the “definitive policy list formatted to make sense to the outside world” and “updated website” identified in the 2012 Review was the creation of a “policy manual”.

4.43 The Review Team requested a copy of the policy manual listed in the deliverables, and was advised that no such document was in fact created. Rather, the documents set out in the Review Brief entitled “EPA Policy development approvals process” (Document 10 of the Review Brief) and “EPA Policy development and approvals policy: Guiding Principles” (Document 11 of the Review Brief) “were considered to be the key documents needed after the project was initiated”.²⁸ Further discussion of these documents and the matter of the EPA and OPEA’s practices for policy development is set out in Chapter 8.

Policy framework following the 2012 Review

4.44 The action steps for the policy framework objective in the 2012 Review were:

²⁷ 2012 Review, page 5.

²⁸ Letter from OEPA, 18 February 2016.

- “Develop a framework to guide and inform external presentation of policy on EPA website. This will be driven by outcomes of the policy rationalisation and based on key steps of the environmental impact assessment process and the outcomes of the factors and objectives project.
- Framework will include external policies that are considered relevant to each factor etc. and, through the website, will provide links to key legislation, regulations or guidance of other agencies where this is relevant to an environmental factor.
- Develop an internal policy bank which will result from policy rationalisation. It can be updated by custodians of policy demonstrating when created, last reviewed and when due for next review.”²⁹

4.45 The presentation of the policy documents on the EPA’s website appears to have been one of the key outputs of this work. As discussed below, the presentation of the policy material on the EPA’s website could not be described as a great success. This is hardly the fault of those responsible for the website, it is the function of the lack of a clearly identified policy hierarchy itself.³⁰

4.46 Of more significance, following the 2102 Review, was the development of EAG 8 – “Principles, Factors and Objectives” and EAG 9 – “Application of a significance framework in the environmental impact assessment process”. The two instruments were identified as supporting the “development of a policy framework and presentation of policies on the internet by policy objectives”.³¹

²⁹ 2012 Review, page 4.

³⁰ See, for example, the following submission from the ECA (ECA Submission, page 2):

“The ECA applauds the current initiative to update the current web site to a more user friendly platform. As a result of the range of policy genre and topics, it is very difficult to intuitively find a certain document that is known to exist.”

³¹ See “Review of EPA’s Environmental Principles, Factors & Objectives - Project Plan” (21 March 2012), page 3.

- 4.47 As discussed immediately below, these are key documents and the use of factors and objectives as the overarching framework to guide the policy suite is a sensible approach.
- 4.48 As also discussed, however, the framework into which those documents have been introduced remains amorphous and, as a consequence, the documents have not resulted in the clarity which had been hoped for.
- 4.49 With that historical background, the examination of the EPA's policies then turns to the current framework for the EIA policy instruments.

Current policy framework – structure and hierarchies

- 4.50 As discussed in Chapter 3, the EPA has ample power under the *EPA Act* to develop policies and practices. It is apparent, however, that, over time, the various types of policy instruments have not been systematically linked to the principles to be drawn from the *EP Act* as a whole, and the functions which the EPA discharges under it.
- 4.51 This has led to a proliferation of policy instruments with a confusing array of acronyms: EPBs, SEPs, EAGs, EPBs, PAGs and the amorphous “Other”. It is noteworthy, and telling, that Review Brief notes that the “EPA currently has *around* 50 EIA policy and guidance instruments” (emphasis added).³² The fact that, at a given point in time it is not possible to say, with precision, how many policy instruments are currently in existence itself suggests a policy framework that has become unwieldy.
- 4.52 There is, moreover, no central source that presents a clear and hierarchical outline of the EPA's policy suite, which links the policy instruments back to the statutory functions and powers to be undertaken by the EPA.

³² Review Brief, page 11.

4.53 This is explicit in the “Guiding Principles for EPA Policy development and approvals process”, which has been referred to as one of the “key documents” developed following the 2012 Review.³³ That document states:

“EPA Policy is developed ‘fit for purpose’ and the nature of the issue will dictate the type of policy (e.g. EAG, EPB, etc.). Consequently, there is no ‘hierarchy’ of importance or priority for the various non-statutory EPA policies. The purpose and intended outcome from the policy will also dictate the level and type of public or stakeholder consultation conducted during the development process.”³⁴

4.54 There being no hierarchy, the policy instruments can be, and have been, analysed and presented in several ways. This is the result of a lack of a clear guiding framework. Over time, policies, guidelines and procedures have been promulgated for various reasons and slotted into various matrices, as described below.

4.55 The “Policy Structure infosheet”,³⁵ for example, provides an outline of the types and purposes of the various instruments in the EPA’s policy suite. It lists the following types of policy, and provides, where relevant, an indication of which organisation is responsible for the instrument, enforcement status, legislative basis under the *EP Act*, and the purpose of the policy:

³³ Letter from OEPA, 18 February 2016.

³⁴ Review Brief, Document 11.

³⁵ Review Brief, Document 6 (also available on the EPA website).

Policy type	Whose policy?	Enforcement status	Provisions in the EP Act	What is the purpose of the policy?
Environmental Protection Policies (EPPs)	Government	Statutory instrument carrying the force of law	Part III	Establish environmental values and quality objectives for a particular environment or environmental factor
State Environmental Policies (SEPs)	Government	Non-statutory but implemented through the powers of the EP Act	ss 17(3)(d)	Establish environmental values and quality objectives for a particular environment and define environmental performance criteria
<i>Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2012</i>	EPA	Official procedure published in the Government Gazette	ss 122	Establish principles and practices of environmental impact assessment (EIA), to provide guidance on the form, content, timing and procedures for EIA
Environmental Assessment Guidelines (EAGs)	EPA	Guidance	ss 16(k)	Provide advice to proponents and the public generally on the procedures and minimum environmental requirements that the EPA expects to be met during the EIA process
Environmental Protection Bulletins (EPBs)	EPA	Guidance	ss 17	Provides the position of the EPA for proponents and the public on various environmental matters
Strategic Advice	EPA	Advice	ss 16(e)	Advice to the Minister for Environment on a specific environmental issue
Post Assessment Guidelines (PAGs) Post assessment forms for proponents	OEPA	Guidance	To provide guidance for ss 47 & 48	Provide proponents with guidance in meeting their statutory requirements

4.56 The document then goes on to identify the three “levels” of policy instruments:

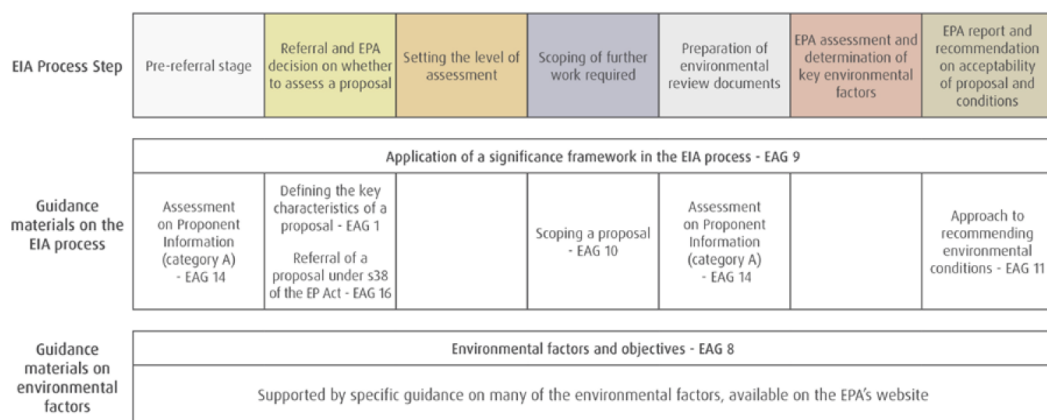
- (a) Government policy, developed on behalf of the Government, being the EPPs and SEPs;
- (b) EPA policy, categorised into seven kinds of instruments, including three forms of guidance not listed in the above table: “Technical reports”, “Forms and templates” and “Factsheets”; and
- (c) OEPA policy, which are the Post Assessment Guidelines (“PAGs”) and post assessment forms which refer specifically to sections 47 and 48 of the *EP Act*.

4.57 Notably, key instruments that are relevant to the EPA’s environmental impact assessment processes, such as whole of government policies (for example, the WA Environmental Offsets Policy and Guidelines³⁶) and joint policies with

³⁶ Discussed in Chapter 7.

other agencies or authorities (for example, the Guidelines for Preparing Mine Closure Plans, developed with the Department of Mines and Petroleum) are not included. That such instruments are relevant to the EIA process is only revealed by way of references in other material.

4.58 The other key representation of the policy framework is in EAG 9 – “Application of a significance framework in the EIA process”. The following diagram provides an indication of the application of various instruments though the various stages of the environmental impact assessment process:³⁷



4.59 This diagram in EAG 9 represents perhaps the most useful approximation of a “hierarchy” of the EAGs that provide guidance on the EIA process. However, it only refers to certain instruments and does not present a complete picture.

4.60 The Review Team considered several other representations and descriptions of the EIA policy suite in various documents. The OEPA, for example, prepared a diagram, entitled “EPA Policy Framework”,³⁸ which describes the purpose and features of EPBs and EAGs as follows:

³⁷ EAG 9, Page 3.

³⁸ Review Brief, electronic copy, Documents 7 and 8.

EPA Policy Framework

Policy Type	Policy Purpose	Policy Features		Example
Environmental Protection Bulletins (formerly Position Statements)	Provide the position of the EPA on various environmental or EIA matters.	Short, succinct statements of position.	By Environmental Factor *	EPB 22 - Hydraulic Fracturing
			By EIA Process Step **	EPB 17 - Strategic and Derived Proposals
Environmental Assessment Guidelines (formerly Guidance Statements)	Provide advice to proponents and the public on environmental requirement or procedures that the EPA expects to be met in the EIA process.	Detailed guidance related to EIA.	By Environmental Factor *	EAG 13 - Consideration of environmental impact from noise
			By EIA Process Step **	EAG 17 Preparation of Environmental Management Plans

4.61 This framework was then supported by a further two spreadsheets, identifying “Environmental Policy and Guidelines by Factor”³⁹ and “Environmental Policy by EIA process”,⁴⁰ which together make an attempt arrange the policy instruments into a coherent scheme. However, not all of the EIA policy instruments were listed on these matrices.

4.62 The next presentation of the policy suite is that which appears on the EPA’s website on the page entitled “Major EPA guidance related to environmental factors”⁴¹. It is based on the framework set out in “Environmental Policy and Guidelines by Factor” matrix. While this appears to be a major output of the 2012 project to develop a “policy framework”, that particular page does not make it clear that EAG 8 and EAG 9 are the sources of the framework as presented. The menu option on the policies and guidelines section then lists links to the various categories of policy instruments, and then on each of those

³⁹ Review Brief, Document 7.

⁴⁰ Review Brief, Document 8.

⁴¹ See EPA Website:
http://epa.wa.gov.au/Policies_guidelines/Pages/MajorEPAGuidancerelatedtoenvironmentalfactor.aspx?cat=Major%20EPA%20guidance%20related%20to%20environmental%20factors&url=Policies_guidelines_.

pages, the policy documents are listed in what appears to be a reverse-chronological order.

4.63 Navigating the “Policies and guidelines” section of the EPA’s website is something of a Kafkaesque experience. This whole section does not present a user-friendly repository of the policy documents. Withdrawn instruments are listed on certain pages (for example, the EPBs page) but not others (only the three Position Statements that remain in effect are listed on that page). The page for Guidance Statement contains a numerical index with a link to the PDF files of those instruments as well as a list with summary information in a completely unintelligible order. The “Other” section does not provide adequate information about the status of the documents listed therein.

4.64 Finally, an attempted taxonomy of policy instruments was made in a document entitled “Overview of Implementation of Procedures, Policies, Guidance and Practices during Environmental Impact Assessment (EIA)” (“the Overview”).⁴² This document perhaps best reflects the problem of, rather than a solution to, the complexity of the current policy structure.

4.65 As the Overview reveals, there appears to be no rhyme or reason to the numbering of the Environmental Assessment Guidelines applicable the EIA process. There are, for example, five “process” EAGs identified for the referral and assessment stage:

- (a) EAG 16 – “Referral of a Proposal”;
- (b) EAG 1 – “Defining a Proposal”;
- (c) EAG 6 – “Timelines”;
- (d) EAG 8 – “Principles, Factors and Objectives”; and
- (e) EAG 9 – “Significance Framework in EIA”.

⁴² Review Brief, Document 14.

- 4.66 As a matter of enumeration alone the policy instruments do not evidence a coherent structure. Common sense would dictate that the policy instruments be presented in a logical order, most obviously, commencing with overarching principles and objectives to be met in the EIA process.
- 4.67 The policy instrument which best meets that description, EAG 8 – “Principles, Factors and Objectives”, appears somewhere in the middle of the list of policies, notwithstanding that it deals with a matter that provides a direct link to the EPA’s statutory function in EIA.
- 4.68 EAG 8 is the policy which identifies “environmental factors” and articulates the objectives in relation to each of those factors as set out below:

Theme	Factor	Objective
Sea	Benthic Communities and Habitat	To maintain the structure, function, diversity, distribution and viability of benthic communities and habitats at local and regional scales.
	Coastal Processes	To maintain the morphology of the subtidal, intertidal and supratidal zones and the local geophysical processes that shape them.
	Marine Environmental Quality	To maintain the quality of water, sediment and biota so that the environmental values, both ecological and social, are protected.
	Marine Fauna	To maintain the diversity, geographic distribution and viability of fauna at the species and population levels.
Land	Flora and Vegetation	To maintain representation, diversity, viability and ecological function at the species, population and community level.
	Landforms	To maintain the variety, integrity, ecological functions and environmental values of landforms.
	Subterranean Fauna	To maintain representation, diversity, viability and ecological function at the species, population and assemblage level.
	Terrestrial Environmental Quality	To maintain the quality of land and soils so that the environment values, both ecological and social, are protected.
	Terrestrial Fauna	To maintain representation, diversity, viability and ecological function at the species, population and assemblage level.
Water	Hydrological Processes	To maintain the hydrological regimes of groundwater and surface water so that existing and potential uses, including ecosystem maintenance, are protected.

Theme	Factor	Objective
	Inland Waters Environmental Quality	To maintain the quality of groundwater and surface water, sediment and biota so that the environmental values, both ecological and social, are protected.
Air	Air Quality and Atmospheric Gases	To maintain air quality for the protection of the environment and human health and amenity, and to minimise the emission of greenhouse and other atmospheric gases through the application of best practice.
People	Amenity	To ensure that impacts to amenity are reduced as low as reasonably practicable.
	Heritage	To ensure that historical and cultural associations, and natural heritage, are not adversely affected.
	Human Health	To ensure that human health is not adversely affected.
Integrating Factors	Offsets	To counterbalance any significant residual environmental impacts or uncertainty through the application of offsets.
	Rehabilitation and decommissioning	To ensure that premises are decommissioned and rehabilitated in an ecologically sustainable manner.

4.69 These are key matters, in terms of applicable policy in relation to environmental impact assessment. They link directly to the EPA’s statutory obligation to report on what “it considers to be the key environmental factors” in relation to an assessment (*EP Act*, s 44(2)(a)).

4.70 Not only was the notion of clearly defining and articulating the potential range of environmental factors generally supported by the stakeholder consultations, there is empirical research to support the utility of environmental factors in EIA in Western Australia. In a journal article entitled “Assessing the utility of environmental factors and objectives in environmental impact assessment practice: Western Australian insights”, the authors concluded:

“It is evident that there is a great deal of value in using factors and objectives such as clear focus, structure and communication for EIA, all of which help to understand which issues are significant and to assist with decision-making throughout the process.”⁴³

⁴³ Virginia Dahlitz & Angus Morrison-Saunders (2014): Assessing the utility of environmental factors and objectives in environmental impact assessment practice: Western Australian insights, *Impact Assessment and Project Appraisal*, page 5.

- 4.71 The identification of the key environmental factors in Western Australia, and the concrete objectives in relation to their protection, is a matter which ought to be at the apex of the EPA's policy structure; not confined to one guideline among many, in relation to which "there is no 'hierarchy' of importance or priority".⁴⁴
- 4.72 The numerical order of the policy instruments appears to be, in part, due to the chronological development of the various instruments. The Review Team heard from various stakeholders that the evolution of policies on certain subject matters were the result of, among other things, the particular focus of EPA members at a particular time, or certain particular types of development occurring frequently over a particular period. Those historical explanations are valid. Nevertheless, the numerical complexity of the policy instruments is also the result of the lack of an appropriate framework and structure to guide the development of the instruments.
- 4.73 Similarly, when one turns to the policy instruments that can be identified in relation to particular environmental factors, there is little rationale to the various types of policy instrument, how those types of policy instrument differ and how they interact.
- 4.74 When the Overview seeks, for example, to identify the relevant EIA policies and guidance in relation to the factor "Terrestrial fauna" it must refer to:
- (a) an EEP (Western Swamp Tortoise Habitat);
 - (b) three Guidance Statements: GS 20, GS 56 and GS 7 (one of which also relates to the Western Swamp Tortoise);
 - (c) a Policy Statement (PS 3);
 - (d) a Technical Guide (Terrestrial fauna surveys); and

⁴⁴ Review Brief, Document 11.

(e) two Environmental Protection Bulletins (EPB 20 and EPB 21).

- 4.75 As can be seen from this example alone, the “relevant” policies to which the EPA would need to take into account range across a variety of policy instruments, some of which deal with species, some with locations, some with types of proposals etcetera, with little indication why the policy instrument is of one type rather than another – or what difference (if any) it makes to the EIA process.
- 4.76 There is also, in the Overview, but also in the other attempts at a “framework”, a high degree of overlap and anomaly.
- 4.77 To take one illustration of the degree of overlaps, it is worthwhile comparing EAG 3 – “Protection of Benthic Primary Producer Habitat in Western Australia’s Marine Environment” with EAG 7 – “Environmental Assessment Guideline for Dredging Proposals”, both of which are identified as relevant to both the “Benthic communities and habitat” and “Marine environmental quality” factors in the “Sea” theme in the “Environmental Policy and Guidelines by Factor” matrix (amongst others).
- 4.78 On their face, EAG 3 and EAG 7 would appear to have a different focus, the former relating to a particular feature of the environment (that is, benthic primary producer habitat) while the latter to a particular kind of proposal (that is, marine dredging) and is therefore an “activity based” instrument.
- 4.79 On closer inspection, however, while EAG 7 might be thought to deal with guidance on the full range of environmental considerations relevant to marine dredging, it is in fact limited to the impacts of dredging on benthic communities or habitats. That is, while it lists a range of environmental impacts, it explicitly states:

“This EAG is solely concerned with providing guidance for the presentation of predicted impacts of dredging activities on benthic communities and habitats.”⁴⁵

4.80 The degree of overlap is then reflected in the content of the instruments themselves. EAG 3, for example, provides:

“The EPA expects the following hierarchy of principles to be addressed by all proponents applying this EAG and the EPA will apply these to its consideration of proposals that could cause damage/loss of benthic primary producer habitats:

1. All proponents should demonstrate consideration of options to avoid damage/loss of benthic primary producer habitats, by providing the rationale for selection of the preferred site and broad project design for example.
2. Where avoidance of benthic primary producer habitats is not possible, then design should aim to minimise damage/loss of benthic primary producer habitats (e.g. through iterative design and demonstrable application of Principle 3 below). Proponents will be required to justify that design in terms of operational needs and environmental constraints of the site.
3. Proponent’s will need to demonstrate ‘best practice’ design, construction methods and environmental management aimed at minimising further damage/loss of benthic primary producer habitats through indirect impacts and minimising potential for recovery.
4. The EPA’s judgement on environmental acceptability with respect to damage/loss of benthic primary producer habitats and the risk to ecological integrity will be based primarily on its construction of the proponent’s application of principles 1 to 3 and calculations of cumulative loss of each benthic primary producer habitat type within a defined local assessment unit (the most realistic scenario), together with supporting ecological information, and expert advice, as required.”⁴⁶

Whereas EAG 7 provides:

“The following principles are aimed at protecting benthic communities and habitats from the effects of dredging proposals. Assessment documentation should detail how the hierarchy of principles below have been considered in advance of presenting predictions of environmental impact:

⁴⁵ EAG 7, page 5.

⁴⁶ EAG 3, pages 5-6.

1. There should be demonstrable consideration of options to avoid impacts on benthic communities by dredging, for example, by providing the rationale for selection of the preferred site and the proposed dredging methods.
2. Where impacts cannot be avoided, then proposed project design should aim to minimise impacts (e.g. through iterative design and demonstrable application of Principle 3 below) and the proposed design should be justified in terms of operational needs and environmental constraints of the site.
3. Best efforts should be made to demonstrate in EIA documentation the application of ‘best practice’ in all aspects of proposals, including design, selection of construction methods and environmental management aimed at minimising predictive uncertainty and environmental impacts.

The EPA’s judgement on environmental acceptability will take into account the level to which proponents demonstrate the principles of impact avoidance and minimisation and application of best practice in all aspects of their proposals.”⁴⁷

4.81 While the “content” of passages such as this is addressed in the next chapter, as a matter of structure and coherence, it is remarkable that there are two policy instruments, apparently dealing with the same issue which are in almost identical terms, but for which there are some substantive differences.

4.82 The fact that the policy articulated in the documents is so similar begs the question: “Why have two policies?” And, if there is some justification for two policies: “Why repeat essentially the same content?” Repetition of this kind in the policy instruments provides no substantive benefit and is apt to lead to confusion.

4.83 The differences in the wording, however, is even more troubling. No doubt the passages reproduced above were intended to reflect the same process. The approach suggested by the different wording, however, creates a number of subtle differences:

- (a) EAG 3 provides that proponents will be “required” to justify iterative design in terms of operational needs and environmental constraints of

⁴⁷ EAG 3, pages 5-6.

the site (that is, in mandatory terms), whereas EAG 7 uses more permissive language (they “should” do so);

- (b) EAG 3 provides that “proponent’s will need to demonstrate ‘best practice’” (again, emphatic language), whereas EAG 7 merely provides for proponents to use “best efforts”;
- (c) EAG 3 provides that the EPA’s judgement on environmental acceptability “will be based primarily” on its construction of the proponent’s application of principles 1 to 3 and calculations of cumulative loss, whereas EAG 7 provides that the EPA will merely “take into account” the level to which proponents demonstrate the principles.

4.84 While these differences are subtle, and may not (in most cases) result in a different outcome, there may well be circumstances where these differences are critical. In circumstances in which the EPA is bound, as a matter of law, to take into account Environmental Assessment Guidelines and is faced with EAG 3 and EAG 7, it could be forgiven for asking “Which one?”

4.85 The complexity does not, however, end there:

- (a) EPB 14 – “Guidance for the assessment of benthic primary producer habitat loss in and around Port Hedland”, provides for a specific Local Assessment Unit to be used for the application of EAG 3 in Port Hedland (although it does not refer to EAG 7); and
- (b) EAG 15 – “Protecting the Quality of Western Australia’s Marine Environment” creates the Environmental Quality Management Framework (“EQMF”), which in turn incorporates by reference EAG 3 and EAG 7, while identifying circumstances in which EAG 15 will, but EAG 7 will not, apply.⁴⁸

⁴⁸ See EAG 15, page 15.

4.86 As the number and complexity of the policy instruments relevant to environmental impact assessments increases, so too does the risk that the EPA moves away from its core function: reporting on the environmental factors identified in relation to a proposal and providing its considered opinion as to whether the proposal is appropriate to be implemented, having regard to the objective of the *EP Act*, being to “protect the environment of the State”.

4.87 When considered as a whole, we conclude in relation to the current policy structure that:

- (a) There are, quite simply, too many policy instruments;
- (b) There is no clear hierarchy or logical numerical order to the instruments;
- (c) Within the nominal framework that currently exists, are several “types” of instruments that have different purposes, objectives, and outcomes; and
- (d) The number and organisation of the policy instruments are apt to make engagement with the EIA process difficult for proponents, environmental consultants or practitioners, community organisations and the general public.

4.88 As demonstrated by the previous reviews, many of these criticisms of the EPA’s policy structure are not new and have been recognised by the EPA and the OEPA in the past. Similarly, laudable attempts have been made to rationalise the policy instruments and to develop a “policy framework”.

4.89 Unfortunately those attempts have not dealt with the problem root and branch, but have rather tried to make the changes incrementally by building upon existing structures and existing policy instruments. If success is to be achieved in creating a coherent policy framework, a more radical approach is needed.

4.90 Before moving to those issues, it is necessary to focus more directly on the content of the existing policy instruments.

CHAPTER V- EPA POLICY CONTENT FORMS AND GENRES

Introduction

5.1 The Terms of Reference ask the Review Team to consider:

“the content, clarity and consistency of EIA policies, guidelines and procedures specifically:

- a. whether the content of policies, guidelines and procedures are appropriate for their intended application; and
- b. whether the policies, guidelines and procedures are written in a way that is likely to achieve their intended purpose.”

5.2 As noted in Chapter 1,¹ a footnote in the Review Brief notes that the term “content”, for the purposes of the Review, “does not include a review of the EPA’s environmental policy position, but rather its articulation”. The Review is, therefore, to consider whether the policy documents are expressed in a way that is conducive to good decision-making.

5.3 One of the challenges in examining the content of the suite of policy instruments is the sheer volume and number of the documents. A detailed consideration of all of the policy instruments is beyond the scope of the Review and is, essentially, the work that would need to be done in implementing its recommendations. Accordingly, this Chapter does not include an assessment of each individual instrument in the policy suite, but rather sets out general comments and observations (with reference to those documents) intended to guide the restructuring of the policy suite.

5.4 The previous Chapter was concerned with the broad issue of the policy structure or “policy framework”. In the course of that analysis, a range of policy types was identified. Those policy types are able to be arranged in lists

¹ Paragraphs [1.9] to [1.10].

according to the designated “type”. This chapter commences with further consideration of the different policy “types”.

5.5 What is notable, however, is that, within the different policy types there are different forms or “genres” of content, the issue discussed in the second part of this Chapter. In its analysis of the policy instruments, the Review Team has identified six main genres of content that may be found in the individual instruments. The six genres, discussed in more detail below, are:

- (a) content which establishes the procedural framework for assessment of proposals under the *EP Act*;
- (b) content which sets out the EPA’s scientific understanding and knowledge in relation to environmental factors;
- (c) content which provides information in relation to the impact of certain kinds of activities;
- (d) content describing particular technical issues in the assessment and monitoring of impacts on environmental factors;
- (e) content which provides guidance as to known or established methods for managing or mitigating particular impacts; and
- (f) content which seeks to set out policy positions that prescribe or predict outcomes in particular kinds of circumstances.

5.6 What becomes clear when the content of the policy instruments is analysed in this way, is that the different genres are found interspersed across the whole of the policy suite and that their utility and effect on decision-making can be expected to be different.

5.7 It is also the case that, depending upon the genre of the content, decisions of the EPA may be more, or less, vulnerable to challenge by way of judicial review. It is notable, for example, that all of the policies which were the focus of the *Roe & Case*, and in relation to which the EPA was found to have erred,

were policies of the final genre: that is, policies which prescribed or predicted outcomes in particular kinds of circumstances.

- 5.8 In the view of the Review Team, any reform of the EPA’s policy suite must be conscious of the genre of the content being included in particular policy instruments and the particular function or purpose of that genre.

Nominal designations of policy types

- 5.9 As discussed in Chapter 4,² the “Policy Structure infosheet”³ provides an outline of the types and purposes of the various instruments in the EPA’s policy suite. It lists the following types of policy, and provides, where relevant, an indication of which organisation is responsible for the instrument, enforcement status, legislative basis under the *EP Act*, and the purpose of the policy therein.

- 5.10 To summarise, the policy instruments described in the “Policy Structure infosheet” that are relevant to the EPA’s environmental impact assessment process are as follows:⁴

- (a) *Administrative Procedures* “have been detailed by the EPA to establish the principles and practices of EIA under Part IV, Divisions 1 and 2 of the *EP Act*. The procedures provide additional information regarding administration of Part IV of the *EP Act* generally.”
- (b) *EAGs* “support and address technical or procedural aspects of the EIA process under Part IV of the *EP Act*. The content of the EAGs includes methodologies for environmental investigations, consultation, rehabilitation, monitoring and guidance as to the EPA’s approach to assessing environmental factors. The EAGs replace the EPA’s former

² Chapter 4, [4.55].

³ Review Brief, Document 6 (also available on the EPA website).

⁴ Review Brief, Document 6, page 2.

Guidance Statements. Any existing Guidance Statements will be progressively revised and replaced with EAGs.”

- (c) *EPBs* “are short statements of the EPA’s position on environmental matters or other matters relating to the EPA’s objectives, functions and powers under the *EP Act*. EPBs are non-technical publications designed for a general audience. EPBs supersede the EPA’s former Position Statements. Any existing Position Statements will be progressively revised and replaced with EPBs.”
- (d) *Strategic Advice* “from time to time, the EPA publishes specific advice to the Minister for Environment about an important or emerging topic to provide context for decision-making. The Minister for Environment can request advice, or the EPA may initiate advice.”⁵

5.11 While the EPBs do not generally include statements of purpose, the introductions to most EAGs published in or after 2012 contain a paragraph along the lines of the following (taken from EAG 1 – “Defining the Key Characteristics of a Proposal”):

“Environmental Assessment Guidelines (Guidelines) are developed by the Environmental Protection Authority (EPA) to provide advice to proponents, consultants and the public generally about specific procedures, methodologies

⁵ As noted in Chapter 4, the “Policy Structure infosheet” also provides descriptions of other material that are part of the EIA policy suite, being “various forms of information and guidance that support the above policies” (pages 2-3):

- (a) ***Technical reports***, which “provide information of a technical or scientific nature and cover a range of matters pertinent to environmental protection in Western Australia. Technical reports may detail the collection, analysis and interpretation of scientific data, or describe procedures for monitoring or making measurements of environmental variables in the field.”
- (b) ***Forms and templates***, which “have been prepared to help proponents, the public and decision-making authorities with various aspects of submitting information to the EIA process.”
- (c) ***Factsheets***, which “are non-technical documents which provide supporting information on a variety of matters, both environmental and administrative.”

and the minimum requirements for environmental management which the EPA would expect to be met by the proponents of proposals it considers during the environmental impact assessment (EIA) process.”⁶

5.12 The above descriptions reflect the recommendations of the 2009 Review, but it is clear from an examination of the current policy instruments within these nominal categories that the purpose and scope of the material therein crosses over.

5.13 This has been recognised within the OEPA. An internal discussion paper prepared after the *Roe 8 Case* provided to the Review Team, described as “Potential Future Policy Framework for the EPA” (“the Discussion Paper”) notes:⁷

“While the EAGs have proved to be a good policy instrument to provide detailed information to support the EIA process, the role of EPBs has never been particularly clear.

The 2009 review suggested EPBs were intended to be short statements of EPA policy which could be develop[ed] quickly to respond to issues quickly, and that they could be for a range of purpose[s]. Accordingly they have been used for a wide range of purposes including to advocate for a certain environmental outcome or requirement, to provide information, to provide general or specific guidance for EIA, and to clarify roles and responsibilities across agencies.

Therefore, both EPB and EAGs (and also section 16(e) advice) contain policy positions of relevance to EIA and which are taken into account through the assessment process.”

5.14 The Discussion Paper accepts the confusing nature of the EIA policy materials, remarking that the *Roe 8 Case* can be seen as “an opportunity to rethink the EPA’s policy instruments, with a view to providing great clarity and consistency on the purpose of policy and ensure those relevant to EIA are readily recognised and applied.”⁸

⁶ EAG 1, page 1.

⁷ Review Brief, Document 17, page 1.

⁸ Review Brief, Document 17, page 1.

5.15 The Review Team agrees with the assessment that the provision of policy across a wide range of document types is confusing. The mixture of content is also more widespread.

5.16 In that regard, the Review Team examined the following 58 policy instruments, which are all available on the EPA's website:

Environmental Assessment Guidelines (EAG):
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<p>EAG - Guidelines for Preparing Mine Closure Plans</p> <p>EAG 01 - Defining the Key Characteristics of a Proposal</p> <p>EAG 02 - Changes to Proposals after Assessment - Section s45C of the <i>EP Act</i></p> <p>EAG 03 - Protection Of Benthic Primary Producer Habitat in Western Australia's Marine Environment</p> <p>EAG 05 - Protecting Marine Turtles from Light Impacts</p> <p>EAG 06 - Timelines for environmental impact assessment of proposals</p> <p>EAG 07 - Marine Dredging Proposals</p> <p>EAG 08 - Environmental principles, factors and objectives</p> <p>EAG 09 - Application of a significance framework in the environmental impact assessment process</p> <p>EAG 10 - Scoping a proposal</p> <p>EAG 11 - Recommending Conditions</p> <p>EAG 12 - Consideration of Subterranean Fauna in EIA WA</p> <p>EAG 13 - Environmental Impacts from Noise</p> <p>EAG 14 - Assessment on Proponent Information (Category A);</p> <p>EAG 15 - Protection the Quality of Western Australia's Marine Environment</p> <p>EAG 16 - Referral of a Proposal Under s38 of the <i>EP Act</i></p> <p>EAG 17 - Preparation of Management Plans Under Part IV of the <i>EP Act</i> 1986</p>

Environmental Protection Bulletins (EPB):

<p>EPB 01 - Environmental Offsets</p> <p>EPB 02 - Port Hedland Dust and Noise</p> <p>EPB 05 - Guidance for Development Inland Drainage in the Wheatbelt</p> <p>EPB 06 - The Natural Values of the Whicher Scarp</p> <p>EPB 10 - Geraldton Regional Flora and Vegetation Survey</p> <p>EBP 11 - Consultation on Conditions Recommended by EPA</p> <p>EPB 12 - Swan Bioplan - Peel Regionally Significant Natural Areas</p> <p>EPB 13 - Guidance for use of Albany Regional Vegetation Survey</p> <p>EPB 14 - Guidance for the assessment of benthic primary producer habitat loss in and around Port Hedland</p> <p>EPB 16 - Minor or Preliminary work or investigation work</p> <p>EPB 17 - Strategic or derived proposals</p> <p>EPB 18 - Sea level rise</p> <p>EPB 19 - EPA Involvement in Mine Closure</p> <p>EPB 20 - Protection of Naturally Veg Areas through Planning and Development</p>
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Environmental Protection Bulletins (EPB):	
EPB 21 -	Guidance for Wind Farm Developments
EPB 22 -	Hydraulic Fracturing for Onshore Natural Gas from Shale and Tight Rocks
EPB 23 -	Guidance on the EPA's Landforms Factor
EPB 24 -	Greenhouse Gas Emissions and Consideration of Projected Climate Change Impacts in the EIA Process

Environmental Protection Policies (EPP):	
EPP -	Goldfields Residential Areas – Sulfur Dioxide
EPP -	Kwinana Atmospheric Wastes
EPP -	Peel Inlet-Harvey Estuary
EPP -	Western Swamp Tortoise Habitat

Guidance Statements (GS):	
GS 01 -	Protection of Tropical Arid Zone Mangroves along Pilbara Coastline
GS 03 -	Separation Distance between Industrial and Sensitive Land Uses
GS 06 -	Rehabilitation of Terrestrial Ecosystems
GS 07 -	Protection of the Western Swamp Tortoise Habitat Upper Swan Bullsbrook
GS 10 -	Natural Areas within System 6 Region and Swan Coastal Plain portion of System 1 region
GS 20 -	Sampling of Short Range Endemic Invertebrate Fauna
GS 28 -	Protection of Lake Clifton Catchment
GS 33 -	Environmental Guidance for Planning and Development
GS 41 -	Assessment of Aboriginal Heritage
GS 49 -	Assessment of Development Proposals in Shark Bay World Heritage Property
GS 51 -	Terrestrial Flora & Vegetation Surveys for EIA WA
GS 54a -	Sampling Methods and Survey Considerations for Subterranean Fauna in WA
GS 56 -	Terrestrial Fauna Surveys for EIA in WA

Position Statements (PS):	
PS 02 -	Environmental Protection of Native Vegetation in WA
PS 03 -	Terrestrial Biological Surveys as an Element of Biodiversity Protection
PS 04 -	Environmental Protection of Wetlands

Miscellaneous - Other Policies and Guidance:	
State Environment Policy (SEP) - Cockburn Sound	
Technical Guide on Terrestrial Vertebrate Fauna Surveys for Environmental Impact Assessment	
WA Environmental Offsets Guidelines	
WA Environmental Offsets Policy	

5.17 An analysis of both the structure of the EPA's policy suite, as discussed in Chapter 4, and the individual policy instruments themselves, reveals that the

documents within the various categories do not always align with the purported purpose of those categories.

5.18 EPB 1 – “Environmental Offsets”, for example, sets out the EPA’s position in adopting the WA Environmental Offsets Policy and WA Environmental Offset Guidelines, a matter which *prima facie* is appropriate for an Environmental Protection Bulletin. However, it then goes on to provide detailed “minimum requirements” for all proposals and guidance and advice as to other matters that should be included. This would seem to material generally contemplated to be an Environmental Assessment Guideline, or Administrative Procedure.

5.19 Other EPBs that contain a mixture of “guidance” and “policy positions” include:

- (a) EPB 05 – “Guidance for development inland drainage proposals in the Wheatbelt”;
- (b) EBP 11 – “Consultation on Conditions Recommended by EPA”;
- (c) EPB 16 – “Minor or Preliminary work or investigation work”; and
- (d) EPB 17 – “Strategic or derived proposals”.

5.20 Of course, there is the further potential for overlap between different instruments within the supporting materials identified in the “Policy Structure infosheet”⁹, namely “technical reports”, “forms and templates” and “Factsheets”.¹⁰ The Review Team has not examined instruments within these categories in particular detail. The material included within these three categories will need to be carefully evaluated to determine whether the information contained in them would be better presented within any new framework that ought to be developed following this Review. The content of

⁹ Review Brief, Document 6, pages 2-3.

¹⁰ See footnote 5, above.

the “technical reports”, for example, may have overlapping scope or purposes to the EAGs and EPBs that purport to provide technical guidance to stakeholders in the EIA process. Similarly, “Factsheets” should not be used as the primary articulations of environmental or administrative positions, as appears to be the case with the “Policy Structure infosheet” document.

- 5.21 The difficulty in the categorisation of the various instruments, of course, arises in part from the lack of clarity as to the intended purpose of the nominal categories and the problems with structure identified in Chapter 4. It is also due to a failure to recognise the various genres of content that can be found in the policy instruments.

Genres of content

- 5.22 In order to consider how a new framework might be developed, it is instructive to consider the practical scope and effect of the content within existing instruments, apart from their nominal designations within the existing categories.
- 5.23 Without going into detail to discuss each of the individual documents listed in paragraph [5.16] above, it is possible to identify general classes or genres of content scattered throughout the instruments.
- 5.24 An analysis of the EAGs, in particular, reveals that the instruments within that category have different purposes and scopes. For example, documents such as EAG 3 and EAG 7 are included in the same category as those which ultimately establish the framework for environmental impact assessment, such as EAG 8 and EAG 9.
- 5.25 The summaries of EAG 3 and EAG 7 (discussed at [4.76] to [4.84] above) set out in EAG 15 provide a useful illustration of how different genres exist within one particular category of policy instruments (page 15):

“EAG 3 sets out a framework and guidance for assessing the cumulative loss of benthic primary producer habitat and could link to this draft [sic] EAG where deterioration in environmental quality is predicted to cause significant and permanent losses of benthic primary producer communities.

EAG 7 is an activity based guidance that sets out an approach for presenting and managing the predicted impact of suspended sediment from dredging operations on benthic habitats and communities (shading, abrasion, sedimentation and clogging of feeding mechanisms), and the uncertainty associated with these predicted impacts.”¹¹

5.26 That is, EAG 3 has as its focus the EPA’s scientific understanding and knowledge about a particular environmental factor, whereas EAG 7 provides information in relation to the impact of a particular activity and guidance as to known or established methods for predicting and monitoring those impacts.

5.27 In its analysis of the policy instruments, the Review Team has identified six main genres of content that may be found in the individual instruments. The six genres, discussed in more detail below, are:

- (a) content which establishes the procedural framework for assessment of proposals under the *EP Act* (“Genre 1”);
- (b) content which set out the EPA’s scientific understanding and knowledge in relation to environmental factors (“Genre 2”);
- (c) content which provides information in relation to the impact of certain kinds of activities (“Genre 3”);
- (d) content describing particular technical issues in the assessment and monitoring of impacts on environmental factors (“Genre 4”);
- (e) content which provide guidance as to known or established methods for managing or mitigating particular impacts (“Genre 5”); and
- (f) content which seeks to set out policy positions that prescribe or predict outcomes in particular kinds of circumstances (“Genre 6”).

¹¹ EAG 15 – “Protecting the Quality of Western Australia’s Marine Environment”, page 15.

5.28 The individual instruments in the existing policy suite do not necessarily fit neatly within any one of the above genres. Indeed, a number of the instruments contain content that falls within two or more of the genres. This is why the analysis below shows examples of content, as opposed to individual policy instruments, that fall within the genres. This analysis is not intended to suggest those classes listed above should form a new list of instrument type that ought to be developed as part of the restructure of the policy suite. It is, rather, intended to provide greater clarity of thought around which genres are truly necessary, and to what extent, in order to properly support all aspects of environmental impact assessment. A better understanding of those genres should, in turn, guide the development of any restructuring process.

5.29 With that caveat we turn to the various genres in order to:

- (a) identify more precisely the nature of the genre, with examples; and
- (b) provide some observations in relation to the relative importance and significance of the genre to the EPA's environmental impact assessment function.

Genre 1 - The procedural framework for assessment of proposals

5.30 The content of Genre 1 is, most obviously, that which is concerned with the process for submitting and assessing proposals under Part IV of the *EP Act*. This material includes the formal requirements of a proposal or referral to the EPA, the identification of timelines for various stages in the EIA process and the administrative steps that must be taken by way of consultation.

5.31 The primary location in which this genre of content is (or ought) to be found is the Administrative Procedures, issued under s 122 of the *EP Act*, which provides that the EPA may “draw up administrative procedures... in particular for the purpose of establishing the principles and practices of environmental impact assessment”.

5.32 The *Administrative Procedures 2012* do, indeed, provide much of the needed content in this area, including processes for the differing levels of assessment carried out by the EPA.

5.33 Content of this genre is, however, not confined to the *Administrative Procedures 2012*. Procedural aspects of the EIA process are scattered through a number of different policy instruments, including:

- (a) EAG 01 – “Defining the Key Characteristics of a Proposal”;
- (b) EAG 02 – “Changes to Proposals after Assessment - Section s45C of the *EP Act*”;
- (c) EAG 06 – “Timelines for environmental impact assessment of proposals”;
- (d) EAG 10 – “Scoping a proposal”;
- (e) EAG 11 – “Recommending Conditions”;
- (f) EAG 14 – “Assessment on Proponent Information (Category A)”;
- (g) EAG 16 – “Referral of a Proposal Under s38 of the *EP Act*”;
- (h) EAG 17 – “Preparation of Management Plans Under Part IV of the *EP Act*”;
- (i) EBP 11 – “Consultation on Conditions Recommended by EPA”;
- (j) EPB 16 – “Minor or preliminary works and investigation work”; and
- (k) EPB 17 – “Strategic and derived proposals”.

5.34 As can be seen, the content of Genre 1 is not confined to one nominal type of policy instrument but can be found across the various types of instrument in the policy suite.

- 5.35 The interrelationship between the Administrative Procedures and other “process” content is also unclear and, at times, problematic.
- 5.36 For example, the *Administrative Procedures 2012*, at clause 5, provides as one of the principles for proponents that they will:
- “use best practicable measures and genuine evaluation of options or alternatives in locating, planning and designing their proposal”.¹²
- 5.37 A footnote to this clause then provides that “Best practicable measures is defined in EPA Guidance Statement No. 55 available on the EPA website”.
- 5.38 This creates a strange anomaly. The *Administrative Procedures 2012* are, in essence, a statutory instrument, published in the Government Gazette and intended, subject to any inconsistency with regulations,¹³ to have general application. They are, as they should be, expressed in imperative terms. Logically, the *Administrative Procedures 2012* should have precedence over guidance statements and other “non-statutory” policies.
- 5.39 And yet, by incorporating, by reference to a specific guidance statement (GS 55), a definition found in such a policy instrument, the *Administrative Procedures 2012* appear to have elevated the guidance statement to a higher status. This in turn leads to difficult issues in relation to the potential for amending or altering these documents. For example, given that GS 55 appears to be specifically incorporated into the *Administrative Procedures 2012*, (and given that Guidance Statements are no longer in use) is it necessary to amend the *Administrative Procedures 2012* in order to bring about changes to the meaning of “best practicable measures” by way of introduction of a new EAG?¹⁴

¹² *Administrative Procedures 2012*, clause 5(3).

¹³ *EP Act*, s 122(2).

¹⁴ A separate problem arises from the reference in clause 13 of the *Administrative Procedures 2012* to the now withdrawn Environmental Assessment Guideline on Environmental Offsets. As will be discussed in Chapter 6, the reference to guidelines in the Administrative Procedures should be avoided.

- 5.40 As to the relative importance and significance of this genre to the EPA's environmental impact assessment function, the Review Team concludes that material of this nature is essential for the EPA to be able to carry out its environmental impact assessment function and to maintain public confidence in the EIA process. The fact that so much of the EIA process is now (and ought appropriately be) public, regardless of the level of assessment¹⁵, means that maintenance of public confidence in the EIA process is essential.
- 5.41 It is in the nature of environmental impact assessment that the outcome of the EPA's assessment and the recommendations it makes in particular cases cannot be predicted with a high level of certainty; the very nature of the task is such that a recommendation to the satisfaction of the proponent (or other stakeholder) cannot be guaranteed.
- 5.42 What can be achieved, however, is certainty of process. That an assessment can, and should, be carried out in accordance with a transparent and clear process was a common theme that emerged in the stakeholder submissions.
- 5.43 A useful summary of those themes can be found in principles for approvals reform developed by the CME in 2011, set out in its submission as follows:¹⁶

“1. Accountability and Transparency

- Policies, procedures and guidelines used by approval agencies to inform decisions are readily available to proponents, and clearly identify the proponent's obligations for the assessment of proposed developments.
- Applicants are able to independently identify the progress of their particular application within the approvals process.

¹⁵ That is, the EPA may cause any information, subject to confidentiality considerations, to be available for public review (*EP Act*, s 40(4)). In that regard, the *Administrative Procedures 2012*, at clauses 10.1.2(3) and 10.1.4(3), make specific provision for public comment in relation to both API category A and API category B in addition to PER.

¹⁶ CME Submission, page 4.

2. Procedural Fairness

- Fair and reasonable opportunities for stakeholder input into the formulation of policies, procedures and guidelines used by approval agencies.
- Decision making is transparent and unbiased, and stakeholders treated fairly and equitably.
- Stakeholders have a fair and reasonable opportunity to make and respond to submissions.
- Appeals are assessed independently in a fair and equitable manner following the principles of natural justice.

3. Timeliness and Resourcing

- Increased use of regulatory timelines and the development of appropriate escalation procedures.
- Improved use of parallel processing of applications in multiple approval processes to ensure timeliness of decision making.
- Removal of duplication in the assessment requirements or condition setting across approval agencies.”

5.44 It is notable that these principles are solely confined to certainty of process, rather than certainty of outcome.

5.45 In a very real sense, material in Genre 1 is not “policy” properly so-called at all. Rather, it concerns the *mechanics* of how the EPA carries out its EIA function and, so far as possible it should be strictly adhered to. In that sense, to use the language of administrative law, the EPA should not simply **take into account** the procedures for carrying out its environmental impact assessment function; it should **follow** them (whether or not they are regarded as mandatory considerations in an administrative law sense) in order to ensure compliance with the statutory procedures in Part IV of the *EP Act*.

5.46 It follows from this observation that, in designing material that establishes the mechanics of the practical aspects of the EIA process, the emphasis should be on clarity and simplicity. Instruments of this nature should be drafted in imperative terms, articulating particular processes to be followed, with reference to exceptional circumstances where necessary. This content should have a minimum of verbiage and “aspirational” language.

- 5.47 Another point to make about this genre is that its drivers for change do not include advances in scientific understanding, or technological progress. That is, there should be no reason why changes in scientific understanding, or technological progress should require amendment to process documents. Rather those documents should be drafted with a level of generality that can be applied to any particular environmental factor or type of development.
- 5.48 Given these features, content in Genre 1 should be contained in a minimum number of, preferably centralised, documents.
- 5.49 The drivers for change in relation to Genre 1 will, rather, be administrative efficiency and the extent to which the processes produce timely, transparent and fair outcomes.

Genre 2 - The EPA's scientific understanding and knowledge in relation to environmental factors

- 5.50 Content of this genre consists of statements by the EPA of what it considers to be the current scientific consensus in relation to certain environmental factors. Genre 2 is concerned essentially with ***facts***, while it is true that those facts may be a matter of dispute within the scientific community or the community generally, they are nevertheless matters which can be expressed as factual conclusions. This is so even where, as is so often the case, those facts concern events in the future which are attended by uncertainty.
- 5.51 Content within Genre 2 may be of a general or specific nature.
- 5.52 At its most general, for example, is the identification by the EPA of different environmental factors themselves, as is done in EAG 8 – “Principles, Factors and Objectives”.
- 5.53 More specifically, the content of Genre 2 may set out the EPA's understanding of a particular environmental factor, its current “state” and how the factor is affected by natural and human activity.

5.54 Take, for example, these passage from EAG 5 – “Protecting Marine Turtles from Light Impacts”:

“Marine turtles are listed as threatened fauna deserving of special protection worldwide. They live for many decades and can take 20 to 30 years or more to reach breeding age (e.g. Chaloupka et al, 2001). Important populations of these animals live offshore and breed on the beaches of northern Western Australia. Six of the seven species of marine turtles in the world occur in Western Australian waters. These are the green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*), loggerhead (*Caretta caretta*), flatback (*Natator depressus*), leatherback (*Dermochelys coriacea*) and olive ridley (*Lepidochelys olivacea*) turtle. Marine turtles have existed for some 110 million years but all species are now declining globally as a result of human activity (Lutcavage et al, 1996).”¹⁷

Turtle Nesting

To nest successfully, marine turtles require sandy beaches with access to the ocean. Different species prefer different combinations of sand depth, sand composition, shore approach and offshore habitat, but sandy beaches beyond the reach of high tides are universally required for successful nesting. Examples of important nesting sites include Cape Domett, the Maret Islands, the Lacepede Islands, Mundabullangana on the Pilbara mainland coast, Barrow Island, the Montebello Islands, the islands of the Dampier Archipelago and Dirk Hartog Island in Shark Bay. Lower density nesting occurs along undeveloped sections of the Gascoyne coast, North West Cape and adjacent islands, along the Onslow coast and offshore islands, along Eighty Mile Beach and at suitably sandy locations throughout the Kimberley and its offshore islands. Nests are also known from areas close to development sits on Barrow, Thevenard and Varanus Islands, at Pretty Pool and Cemetery Beach in Port Hedland and at Cape Lambert.

...

Nesting in Western Australia occurs predominantly from August to March, with a peak from September to February, depending on the species. Incubation takes 6 to 8 weeks. Hatchlings usually emerge at night. Some species emerge in Western Australia year round, although more generally from November to May, with a peak from November to February (Table 1). One exception is the flatback turtle population in the far north of the state at Cape Domett which has a nesting peak in winter. This population is thought to be genetically linked to the turtles that nest in the Northern Territory but distinct from the summer breeding population off the Northwest Shelf (DEC, pers. Comm.).”¹⁸

¹⁷ EAG 5, page 1-2.

¹⁸ EAG 5, page 7.

- 5.55 As noted above, these passages set out matters of **fact**, including facts that are the result of particular scientific studies. These facts are not, strictly speaking, expressions of opinion or “policy”. The statements contained in them either are correct, or they are not.
- 5.56 For example, to refer to the particular content above, the statement that “nesting in Western Australia occurs predominantly from August to March” is not a matter upon which the EPA has formed a “policy”: either that is true, or it is not.
- 5.57 There are many examples of such factual content within Environmental Assessment Guidelines: see for example EAG 3 – “Protection of Benthic Primary Producer Habitat”, Appendix 3 at pages 35-39; EAG 12 – “Consideration of Subterranean Fauna an Environment Impact Assessment in Western Australia”, at pages 3-4.
- 5.58 Nevertheless, content of Genre 2 can also be found in Environmental Protection Bulletins. EPB 18 – “Sea Level Rise”, for example, includes:
- “Sea levels have varied considerably over the geological history of the Earth. During the last interglacial period (125,000 years ago) global average sea levels were four to six metres higher than they are now. Sea levels stabilised at current levels around 2000 to 3000 years ago until the beginning of the 19th century. Over the 20th century, global mean sea levels rose around 0.17m (IPCC, 2007).
- Research indicates that a key driver of seal level rise is global climate change. Should global warming continue its current trajectory, sea levels are expected to continue to rise, caused by thermal expansion of the world’s oceans and the melting of polar ice sheets. Added to these broad-scale changes are the effects of short term fluctuations and regional variations which occur as a result of tides, storm surge events, the Leeuwin and other ocean currents and the El Nino – Southern Oscillation (IPCC, 2007 & CSIRO, 2009).”¹⁹
- 5.59 Likewise this genre of content can be found in Guidance Statements (see GS 06 – “Rehabilitation of Terrestrial Ecosystems” at page 6, paragraph 2.1) and

¹⁹ EPB 18, page 1.

in Position Statements (see PS 4 – “Environmental Protection of Wetlands” at pages 4-5).

- 5.60 As to the relative importance of Genre 2 to the EPA’s environmental impact assessment function, as has been noted above, the articulation of environmental factors and the understanding of their significance is a foundational aspect of good environment impact assessment. The identification of such factors is able to guide both a proponent and the EPA’s consideration of the matters that must be the subject of the EPA’s report under s 44(2)(a) of the *EP Act*. By identifying, in a general way, the range of potential environmental factors, both proponents and the EPA are able to address the impacts on those factors in a systematic way.
- 5.61 The identification of key environmental factors, in the manner currently set out in EAG 8, can be expected to be a relatively stable set of considerations. That is, while new factors might emerge as relevant to environmental impact assessments as a result of changing science (the emergence of climate change over time may be an example), it could be expected that the general factors requiring consideration (such as flora and vegetation, amenity, marine fauna etcetera) will remain constant over the short to medium turn.
- 5.62 In light of the relative stability of the identification of “key environmental factors”, and their close connection with the statutory functions set out in s 44 of the *EP Act*, in designing a policy framework, those matters should have an elevated level of importance.
- 5.63 At the more specific level, content of this kind is similarly important for providing a consistent context in which proponents are to address key environmental factors of a proposal, and in which the EPA is able to reach conclusions as part of its environmental impact assessments. In particular, statements in relation to the broad environmental issues facing particular species (for example, turtles) or geographic features (for example, coastal processes) are important for enabling the cumulative impact of proposals to

be better understood. Without research and a common understanding as to the broader context within which to assess a particular proposal, the EIA process risks becoming a piecemeal exercise and defeating the overall objectives of the *EP Act*.

5.64 Nevertheless, while factual content of this kind is important, there are limitations on the extent to which it should form part of the EPA's suite of policy instruments.

5.65 Firstly, there may be built-in to the factual content itself a degree of uncertainty and disagreement at a scientific level. While it may be appropriate, on occasion, for the EPA to resolve some particular factual or scientific issue for the purposes of its assessment of proposals, there will nevertheless be other cases where the EPA should remain open-minded as to the particular scientific facts.

5.66 This notion of uncertainty is, of course, built into the principles expressed in s 4A of the *EP Act*, including by the precautionary principle articulated in Principle 1 of s 4A.

5.67 More importantly, it must be recognised that specific content of Genre 2 is inherently subject to change and evolution. Such change may occur as the result of both developments in the scientific understanding of particular facts over time (that is, knowledge is improved) and as a result of changes, over time, in the facts themselves (that is, the facts change).

5.68 Accordingly, policy content of this kind must always remain, in a sense, provisional – and subject to changes in scientific knowledge and changes to the environment itself – and subservient to the broader considerations of the *EP Act* itself.

5.69 Finally, it must be recognised that the production of content of this genre by the EPA is by no means confined to the EIA process itself. On the contrary, there are a wide variety of forms of information that the EPA may prepare,

as to the state of the environment or some environmental feature, which is quite separate from, and unrelated to, its functions under Part IV of the *EP Act*.

5.70 Consider, for example, the functions of the EPA in s 16(e) to (k) of the *EP Act*:

- “(e) to advise the Minister on environmental matters generally and on any matter which he may refer to it for advice, including the environmental protection aspects of any proposal or scheme, and on the evaluation of information relating thereto; and
- (f) to prepare, and seek approval for, environmental protection policies; and
- (g) to promote environmental awareness within the community and to encourage understanding by the community of the environment; and
- (h) to receive representations on environmental matters from members of the public; and
- (i) to provide advice on environmental matters to members of the public; and
- (j) to publish reports on environmental matters generally; and
- (k) to publish for the benefit of planners, builders, engineers or other persons guidelines to assist them in undertaking their activities in such a manner as to minimise the effect on the environment of those activities or the results thereof”.

5.71 All of these functions may result in the EPA’s publication of reports, information, advice and guidance in relation to environmental matters, wholly outside the context of its environmental impact assessment function.

5.72 Any reform of the EPA’s policy suite should specifically make clear when an instrument is intended for use as part of the environmental impact assessment process, and when it is not.

Genre 3 – Information in relation to the impact of certain kinds of activities

5.73 This genre of content is closely related to the preceding genre. Rather than focusing on the environmental factor itself, however, Genre 3 approaches environmental impacts from the perspective of a particular human activity. The identification of the activities generally take the form, in this genre, of activities likely to be the subject of proposals (such as dredging, fracking or industrial land uses) and so, in this sense, are proposal specific.

5.74 As a consequence, there are many examples of this genre in policy instruments which deal with, and identify as their scope, a particular kind of proposal. A good example of this is EAG 7 – “Environmental Assessment Guideline for Dredging Proposals”, discussed in Chapter 4, which includes descriptions of the environmental impact of dredging activities. For example:

“2.2.1 Dredge-generated sediments and their effects

Dredging and spoil disposal introduces sediment to the water column to varying degrees from three principal sources:

1. from the mechanical interaction of the dredging equipment with the seabed substrates;
2. from overflow associated with loading of dredging material and land reclamation; and
3. from the disposal of dredge spoil.

The mechanical interaction of dredging equipment with the seabed causes sediment particles, in a range of particle sizes, to be introduced to the surrounding water column at the dredge site (e.g. loss from the cutting head of a cutter suction dredge or spillage from grab/bucket dredges). Limited under-keel clearance and turbulence from propellers can also disturb and lift sediments in the water column.

Hydraulic dredges produce slurries that comprise a fine sediment-water mixture and dredged solids. When the fine sediment-water mixture is allowed to escape during loading at dredging site or from land reclamation area, it can introduce significant loads of fine sediment to the water column. This sediment-laden discharge is the second principal source of sediment introduced to the water column by dredging and is commonly referred to as *overflow* or *spill* when discharged from vessels or *return water* when discharged from reclamation areas.

Some sediment is also introduced to the water column during disposal of dredged material at sea, although the proportion of fines retained in spoil is relatively low when overflow practices are used during loading. Accordingly, in many cases only a relatively modest proportion of all fine sediments produced by dredging is introduced to the water column during dumping at sea. Exceptions to this will arise when overflow at the dredge site is eliminated or highly controlled to manage release of contaminants or when dredging up-current of particularly important areas.

The characteristics of sediment introduced to the water column by dredging can be very different to the characteristics of nature substrates at a dredge site. The characteristics of sediment generated and released by dredging is influenced by a range of factors including the geotechnical characteristics of the substrates to be dredged, the type of dredge and its mode of operation, and the nature of the

interaction between the dredge and its mode of operation, and the nature of the interaction between the dredge and seabed substrate.”²⁰

- 5.75 As noted in Chapter 4, while EAG 7 might be thought to deal with guidance on the full range of environmental considerations relevant to marine dredging, it is in fact limited to the impacts of dredging on benthic communities or habitats. Further such content is found in EAG 15, “Protecting the Quality of Western Australia’s Marine Environment” and EPB 14, “Guidance for the assessment of benthic primary producer habitat loss in and around Port Hedland”.
- 5.76 As with other genres, the activity specific content of Genre 3 is found in policy instruments across the policy suite, including in Environmental Protection Bulletins (EPB 22 – “Hydraulic Fracturing for Onshore Natural Gas from Shale and Tight Rocks”) and Guidance Statements (GS 03 – “Separation Distance between Industrial and Sensitive Land Uses”).
- 5.77 As with Genre 2, this kind of content is also useful in providing a consistent context in which proponents are to address key environmental factors of a proposal, and in which the EPA is able to reach conclusions as part of its environmental impact assessments. To that extent, content of this genre should find expression somewhere in the suite of policy instruments.
- 5.78 Nevertheless, in the view of the Review Team, it is unnecessarily confusing that the policy suite should have different instruments and different content addressing the same issue from a different perspective: one, from the perspective of a particular environmental factor and, the other, from the perspective of a particular kind of activity. That duplication appears particularly unfortunate where, as in the case of EAG 3 and EAG 7 the ultimate scope of the instruments appears identical.

²⁰ EAG 7, pages 5-6.

- 5.79 That duplication is one of the causes of the difficulty of placing the existing policy instruments into a coherent policy framework. A choice needs to be made between the framework being “environmental factor focused” or “activity focused”.
- 5.80 Similarly, it would appear unnecessarily prescriptive to be identifying, in relation to particular kinds of proposals, what environmental factors should be considered as part of the assessment of the proposal. No doubt proponents should be obtaining expert advice as to all of the environmental factors relevant to a proposal.
- 5.81 Equally, the range of environmental factors to be considered in a particular proposal ought to be specific to *that* proposal (for example, this proposed dredging) and not to proposals of that general description (that is, dredging generally). That is the very exercise that is required by the Environmental Scoping Document required by the *Administrative Guidelines 2012* as part of a Public Environmental Review.²¹
- 5.82 It is preferable, in the view of the Review Team, that any reform of the EPA’s policy suite for environmental impact assessment to include the kinds of content included in this genre as part of the content as to the environmental factors themselves.
- 5.83 As with the last genre, it is also open to the EPA, and part of its functions, to prepare reports, information, advice and guidance in relation to environmental matters attaching to particular activities, outside of the context of its environmental impact assessment function.

Genre 4 - Technical issues in the assessment and monitoring of impacts on environmental factors

- 5.84 This genre of content is highly specific to environmental impact assessment. It includes content which identifies a preferred or required method for the

²¹ See *Administrative Procedures 2012*, Clause 10.2.3.

analysis of environmental factors in an area the subject of proposal and the prediction of the impact of the proposal upon those environmental factors.

5.85 The content therefore consists of a particular scientific methodology for measuring or describing these features and predictions.

5.86 As in the case of other genres, content in Genre 4 can be of a general or specific nature.

5.87 For example, content within Genre 4 may provide general guidance for determining and describing impacts. For example, EAG 3 – “Protection of Benthic Primary Produces Habitats” sets out an evaluation scheme for the acquisition of information required in relation to the determination of the extent of benthic primary producer habitats and the description of the pre-existing and current percentages of the habitat.²² Similarly EAG 12 – “Consideration of Subterranean Fauna – An Environmental Impact Assessment in WA” sets out levels of survey and general descriptions of appropriate survey design.²³

5.88 By contrast, some content within Genre 4 has a high degree of specificity. See for example, draft GS 54A – “Sampling Methods and Survey Considerations for Subterranean Fauna in Western Australia”. This instrument includes details as to haul nets and pumping methods to be used and for timeframes for particular subterranean fauna studies, such as those reflected in Table 3.2 of that instrument:

²² See EAG 3, pages 11 to 13.

²³ See EAG 12, pages 5 to 13.

	Colonization of bores/traps	Sampling rounds	Identification, analysis and reporting
Stygofauna	Ideally allow 6 mo. for bore to colonize	Ideally sample in 2 different seasons (see section 3.11). 2 nd round of sampling should be > 3 mo. after 1 st to maximize chances of collecting most fauna.	Takes weeks to many months per round depending on number of samples and availability of expertise (see section 3.9). It is possible that analysis will show that additional sampling or taxonomic study is needed
Troglofauna	May trap immediately. Traps remain in place ≥ 6 weeks	Ideally 2 sampling rounds in different seasons (see section 3.11)	Similar timelines to stygofauna but the likelihood additional sampling will be required is high and adequate survey may take several years

5.89 The content within Genre 4 is also scattered throughout the policy suite, including in

- (a) Environmental Assessment Guidelines (see EAG 12 – “Consideration of Subterranean Fauna and Environmental Impact Assessment in Western Australia”);
- (b) Environmental Protection Bulletins (see EPB 14 – “Guidance for the Assessment of Ethnic Primary Producer Habitat lost in or around Port Hedland”);
- (c) Guidance Statements (see GS 20 – “Sampling of short range endemic invertebrate fauna for environmental impact assessment in Western Australia”); and
- (d) Position Statements (see PS 03 – “Terrestrial Biological Surveys as an Element of Biodiversity Protection”).

5.90 In terms of the significance of Genre 4, technical requirements for reporting purposes raise similar considerations to the process requirements in Genre 1. This is for a number of reasons.

5.91 First, these technical requirements are specific to the environmental impact assessment function. That is, technical guidance or requirements of this nature are specifically designed to serve the EIA process and result in consistency

and, so far as possible, uniformity, in the manner in which scientific data is presented to the EPA. Consistency in the presentation of such scientific data enables, to use the language of EPB 14 “a clear and common starting point for the evaluation” of proposals.

5.92 These are not matters that have any particular relevance to the other reporting or publication functions of the EPA outside of the context of its environmental impact assessment function

5.93 Secondly, being material that involves technical matters, the content here is directed in large measure toward the scientific advisors engaged by proponents to conduct scientific surveys and analysis. Consistency in approach, in this area, therefore contributes to the improvement in expertise and standards within the community of consultants generally.

5.94 Thirdly, unlike the factual matters in Genres 2 and 3, while there must be a clear scientific basis for the technical content in this genre, it does nevertheless involve an element of policy selection by the EPA. That is, there may be a variety of methodologies for conducting particular surveys or reporting particular data, each of which is scientifically valid. In prescribing particular technical requirements, the EPA may genuinely “choose” to select that methodology which best suites the statutory function of environmental impact assessments. For this reason, as with Genre 1, the EPA should not simply *take into account* the technical requirements identified as part of its environmental impact assessment function; it should *apply* them. This of course requires that the OEPA has sufficient expertise to be able to understand and interpret the material provided in accordance with those requirements.

5.95 For these reasons, while sampling methods and tools of scientific analysis can certainly be expected to improve and change over time, it is to be expected that in the short to medium term, technical requirements such as these should remain relatively fixed.

Genre 5 - Guidance as to methods to manage or mitigate particular impacts

5.96 Genre 5 is a relatively uncommon genre which provide guidance as to the particular ways in which environmental impacts may be avoided or mitigated. It is, in essence, a “solution” genre which can be found in the context of policy instruments with an environmental factor focus and with an activity focus.

5.97 EAG 5 – “Protecting Marine Turtles from Light Impacts”, for example has a detailed description of methods and solutions for avoiding light impacts on marine turtles. The methodology provides quite detailed steps to be taken both before and after construction of particular developments.

5.98 Other material within this genre is at a more general level. See for example EAG 7 – “Marine Dredging Proposals” which provides:

“While best practice tends to be highly site and project specific, some examples considered to represent best practice in the context of dredging proposals include:

- up-front design to minimise the need for dredging, considering the environmental setting and operational safety requirements;
- dredge area design that aims to minimise direct and indirect impacts on key benthic habitats (e.g. design and locate marine infrastructure to avoid or reduce impacts on coral or algal reefs, seagrass habitat or mangroves);
- using site-specific geotechnical data and understanding of dredge equipment-substrate interactions to help select *fit for purpose* dredging equipment and operating modes to minimise the environmental impacts;
- using this knowledge of geotechnical conditions, and dredge equipment-substrate interactions to establish the likely physical characteristics and generation rates of fines produced by dredging at the site;
- using validated hydrodynamic and sediment transport models to assess the dynamics and likely fate of sediment plumes;
- the use of silt curtains where they are operable and likely to be effective in controlling turbidity release and dispersion;
- contracting dredges equipped with sediment management devices where these are found to minimise sediment generation and dispersion;

- a commitment to manage dredging in ways that minimise the release of sediments into the water column as much as practicable, particularly in situations where dredging-related sediments have the potential to impact sediment-sensitive benthic communities. Methodologies such as planned commencement of overflow, piping dredge spoil direct to disposal sites or to transfer vessels stationed sufficient distances from sensitive receptors to eliminate or minimise risk pathways to those receptors may need to be considered; and
- the application of near real-time data collection and interpretation methods (particularly for turbidity) to support environmental management of dredging. This should be determined on a hierarchical basis grading from small maintenance dredging campaigns in low sensitivity environments where real-time monitoring is not warranted through to major capital dredging projects where substantial commitments to monitoring and adaptive management, including the use of telemetered turbidity meters, are required. In addition to the scale and environmental settings of proposals, in all cases the degree of uncertainty in impact prediction will be considered when determining the appropriate level of near real-time data collection and interpretation required to manage project implementation.”²⁴

5.99 A final example which fits somewhat within this genre is the identification of separate distances between industrial and sensitive land uses, such as those found in Appendix 1 to GS 3 – “Separation Distances between Industrial and Sensitive Land Uses”.

5.100 While content within this genre may well be very useful for industry generally, and is indeed specifically recognised as a function of the EPA in s 16(k) of the *EP Act*, it is debatable whether it is content which should form part of the policy framework for Environmental Impact Assessments.

5.101 This is for a number of reasons.

5.102 First, it is not clear precisely what role the content of this genre is intended to play in the environmental impact assessment process. For example, in the case of the particular measures identified in EAG 5, concerning lighting solutions, it is not clear whether the EAG is identifying potential solutions for the benefit of the proponent or, alternatively, identifying a solution that

²⁴ EAG 7, page 27.

the EPA expects and requires to be included as part of a proposal. Depending upon which of these approaches were intended, the EPA's assessment of a particular proposal may be very different.

- 5.103 Secondly, by identifying particular solutions for the prevention or mitigation of environmental impacts within the environmental impact assessment policies, the policy instruments could have the effect of inhibiting innovation on the part of the proponents in exploring new solutions to potential environmental impacts. If a particular solution, for example, is regarded by proponents as an easier route to approval (that is, a positive recommendation under s 44) the proponent may be inclined not consider other alternatives.
- 5.104 Of course, some of the content within this genre does suggest a high degree of latitude in using design and site specific data proposing particular solutions. Those examples, however, are expressed so generally that they prove little practical guidance.²⁵
- 5.105 Where content of this genre is more specific, such as in the case of GS 3 – “Separation Distances between Industrial and Sensitive Land Uses”, it also runs the risk of being inconsistent with other legislative or administrative requirements. Stakeholders, for example, submitted that the Department of Environmental Regulation (“DER”) had recently circulated a draft guidance statement containing its own recommended separation distances for prescribed premises and their emissions from sensitive land uses. It was noted during stakeholder consultation that the DER draft guidance was inconsistent with GS 3.

²⁵ The “best practices” identified in the extract from EAG7 above are, perhaps, an example of such content. It is difficult to see, for example, what assistance can be derived from a suggestion that there be “dredge area design that aims to minimise direct and indirect impacts on key benthic habitats”.

5.106 Material of this kind, the Review Team concludes, is better included in material separate from the EIA process, such as in material published under s 16(k) of the *EP Act*.

Genre 6 - Policy positions that prescribe or predict outcomes in particular kinds of circumstances

5.107 This genre is, in many ways, the most problematic of the different genres of content that appears in the policy instruments prepared by the EPA. Content within Genre 6, in essence, contains predictions or presumptions as to the conclusion that the EPA will reach in relation to proposals having particular kinds of characteristics or effects.

5.108 It should be emphasised that the predictions or presumptions contained within this genre are concerned with substantive outcomes and, in particular, the critical outcome under s 44(2) of the *EP Act*, that is, whether to recommend that a proposal be implemented or not implemented. It is a prediction or presumption as to how the EPA will act, and what it will do, in dealing with future environmental impact assessments.

5.109 This should clearly be distinguished from statements as to how the EPA will act in relation to procedural issues. Those statements, which are dealt with in Genre 1, concern the *mechanics* of how the EPA carried out its EIA function and, as noted above, so far as possible should be strictly adhered to.

5.110 Genre 6 is qualitatively different. It involves the EPA making a generally applicable statement as to whether it will recommend that proposals be implemented when they meet certain criteria. Generally the form of such content, is in essence “Where a proposal has x effect, in y circumstances, then the EPA will recommend that it not be implemented” or, “Where a proposal has x effect, in y circumstances, then the EPA will recommend that it be implemented”.

5.111 It is, of course, content of this genre with which the Court is concerned in the *Roe 8 Case*. To take one of the policy instruments in that case, PS 9,²⁶ the policy had this effect:

- (a) If the environmental assets affected by the proposal come within the ‘critical’ category; and
- (b) if the impact of the proposal upon those assets will be significant after all steps at on-site mitigation have been taken,

then
- (c) the EPA will proceed on the basis that there is a presumption against recommending approval of the proposal, and the use of environmental offsets will not be considered.

5.112 There are, throughout the policy instruments, both a “soft” and a “hard” form of Genre 6.

5.113 The “soft” form of Genre 6 can be seen in content in which the EPA describes a process of reasoning that it will adopt in relation to particular proposals, identifying the order in which it will address certain matters. Examples of the soft form of Genre 6 are the policy positions in EAG 3 and EAG 7 set out in paragraph [4.80] in the previous chapter. That and other such policies effectively contain an articulation, in the specific context of the environmental factor, the mitigation hierarchy contained in the *Administrative Procedures 2012*: avoidance, minimisation, rectification and reduction.

5.114 Another example of the soft form of Genre 6 is in EAG 13 – “Consideration of environmental impacts from noise”, which provides:

“The following scenarios inform how impacts from noise may be considered during the assessment process:

...

²⁶ *Roe 8 Case*, per Martin CJ at [58].

2. If the proposal cannot demonstrate that it meets assigned levels in the noise regulations or the criteria in SPP 5.4 then Amenity and/or Human Health will likely be considered a key environmental factor, and conditions recommended to ameliorate the impacts of noise and meet the EPA's objectives.
3. If the proposal cannot, after all best endeavours, demonstrate compliance with assigned levels in the noise regulations and the EPA consider it appropriate, the EPA may recommend in its report that the Minister grant exemption from compliance with the noise regulations under a regulation 17 application – refer to section 4.6 for details.
...
6. If the impacts from noise emissions cannot meet the EPA's objectives, or the proposal cannot be reasonably modified to meet those objectives, the EPA may find the proposal environmentally unacceptable and recommend that it is not implemented.”²⁷

5.115 These examples of are of a “soft” form as they are not overly prescriptive as to the outcome in a particular case. They are, rather, expressed in general terms as to what the EPA “may” do or “will base” its assessment on when considering a proposal.

5.116 “Hard” forms of Genre 6, by contrast articulate particular outcomes that will ensue where particular circumstances exist. The three policy instruments the subject of the Roe 8 Case, were all examples of “hard” policy. While those policies (by definition) admitted exceptions, they nevertheless created presumed outcomes when their conditions were met.

5.117 Another example of the hard form of Genre 6 can be seen in GS 28 – “Protection of Lake Clifton Catchment”. That Guidance Statement sets out detailed management criteria in relation to rural residential developments in the Lake Clifton catchment, including building envelopes and setbacks, lot sizes and maximum domestic water allocations. GS 28 goes on to provide:

²⁷ EAG 13, pages 5-6. Similar passages can be found in other, older, Guidance Statements such as GS 01 - “Protection of Tropical Arid Zone Mangroves along Pilbara Coastline” and GS 33 – “Environmental Guidance for Planning and Development”.

“Where it is not possible to modify the proposal to meet these criteria, then it is likely that the EPA would recommend to the Minister for the Environment that the proposal be refused environmental approval.”²⁸

5.118 The above discussion commenced with the observation that Genre 6 is, in many ways, the most problematic of the different genres that appear in the policy instruments prepared by the EPA.

5.119 It is problematic for a number of reasons.

5.120 First, from a purely practical perspective, it is the kind of policy that could most potentially lead to legal challenges to decisions made under the *EP Act*. Policies of this nature lead to a natural and justifiable expectation that they will be followed, and in the absence of express reference to them, it may be difficult for the EPA to establish, if decisions are challenged, that they have been properly taken into account.

5.121 Insofar as such policies are mandatory considerations which the EPA is bound to take into account, the creation of such policies is a self-imposed fetter on the exercise of the EPA’s functions. While this may not be a “fetter” in the strict sense of the administrative law prohibition on unlawful fetters of discretion,²⁹ it nevertheless creates an administrative burden on the EPA to, in every case, acknowledge the existence of the policy and explain why it was, or was not, following it in the particular case.

5.122 In addition, as noted in paragraphs [4.77] to [4.84] above, the wording of such policies can be inconsistent with one another, open to interpretation and give rise to an overly legalistic approach to environmental impact assessments. Those matters tend to divert the EPA from its primary statutory function.

²⁸ GS 28, page 5 (clause 5.5).

²⁹ See paragraphs [1.30] to [1.31] in Chapter 1.

5.123 Secondly, insofar as the “soft” form of Genre 6 is concerned, policy of this kind runs the real risk of simply multiplying more words without any discernible benefit to the decision making process. Many of the “soft” form policy statements that appear throughout the policy suite consist of little more than a restatement of the requirements of the *EP Act*. A common refrain in Environmental Protection Bulletins, for example is:

“The EPA uses environmental factors and associated environmental objectives, as set out in the EPA’s Environmental Assessment Guideline No. 8 (EAG 8 – *Environmental factors and objectives*), as the basis for assessing whether expected impacts on the environment are acceptable.

In determining whether a proposal is likely to have a significant impact on the environment, the EPA will apply the significance test outlined in the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2012*. If the proposal is assessed, the Significance Framework in Environmental Assessment Guideline No. 9 will be applied to make decisions throughout the environmental impact assessment process. It should be noted that this test and framework include consideration of the extent to which other decision-making processes can regulate a proposal to meet the EPA’s environmental objectives.”³⁰

5.124 Content such as this is, at best, repetitious and, at worst, meaningless, as it does not add anything of substance to the already established statutory and policy framework.

5.125 Soft content of this kind reaches the height of absurdity in statements such as the following, which appears in PS 4 – “Environmental Protection of Wetlands”:

“In using this Position Statement and in assessing the environmental acceptability of development proposals, the EPA will employ the Precautionary Principle, as listed in section 4A of the *Environmental Protection Act 1986*.”³¹

³⁰ See EPB 22 – “Hydraulic fracturing for onshore natural gas from shale and tight rock”, page 3; EPB 24 – “Greenhouse gas emissions and consideration of projected climate change impacts in the EIA process”, page 2; cf. EPB 21 – “Guidance for wind farm developments”, page 3.

³¹ PS 4, page 9.

- 5.126 Nothing could, with respect, be quite so meaningless or unnecessary than a policy by a statutory authority that it will observe the requirements of the statute that created it.
- 5.127 Secondly, insofar as the “hard” form of Genre 6 is concerned, there needs to be great care, if such policy is to be used, that it does not subvert, or run counter, to the objects and requirements of the *EP Act* itself.
- 5.128 As explained in Chapter 3, the EPA’s environmental impact assessment functions differs in significant respects from many typical statutory discretions. Unlike those statutory discretions, where “hard” policy is permissible, even to be encouraged, whether the EPA recommends that a proposal be, or not be, implemented is not, ultimately, a matter of a discretionary choice between alternatives. Rather it is the expression of the EPA’s considered opinion as to whether the proposal is appropriate to be implemented, having regard to the objective of the *EP Act* to “protect the environment of the State”, and the objectives of the EPA.
- 5.129 That considered opinion must be formed in the context of the particular environmental factors in relation to the proposal being assessed. While a sound understanding of the factual and scientific issues, in their broad context, and a rigorous process, ought to lead to consistent decision making, there is no *a priori* reason why the EPA should predict, in advance, how it will determine proposals of a particular kind.
- 5.130 Similarly, as in the case of Genre 5, there is a risk that an overreliance on presumptive policies as to what recommendations will be made in what circumstances will stifle innovation in relation to the way in which environmental factors are addressed and in which the environment as a whole is protected and conserved.

- 5.131 For these reasons, the Review Team is of the view that content within Genre 6, while necessary in certain circumstances,³² should be used sparingly as part of the suite of policy instruments.
- 5.132 In light of the principles identified in this, and the previous Chapter, we now turn to specific recommendations for the reform of the EPA's policy framework and content.

³² Somewhat ironically, given the result in the *Roe & Case*, one of the areas in which such policy may well be necessary is in relation to environmental offsets, the subject of Chapter 7.

CHAPTER VI - POLICY FRAMEWORK AND CONTENT RECOMMENDATIONS

Introduction

- 6.1 As follows from the previous two Chapters, the short answer to the question posed in the Terms of Reference as to “whether the current framework for, and intended purposes of, policies, guidelines and procedures is appropriate” is, of course, “No”. The current policy framework is inadequate to provide the necessary guidance for all users of the documents and this situation adversely affects both the use and the development of policy instruments generally: [4.5].
- 6.2 The previous chapters have identified various principles that ought to guide the creation of both a new policy framework and the content of the documents therein.
- 6.3 This chapter sets out more detailed recommendations as to how those principles might best be incorporated into a new policy framework in relation to environmental impact assessment.
- 6.4 Before doing so, those principles are briefly summarized.

Key Principles – Adherence to the objectives and principles of the *EP Act*

- 6.5 The key recommendation as to the restructure of the EPA’s environmental impact assessment policy suite is that the objectives and principles of the *EP Act* should be the fundamental basis upon which the EPA’s environmental impact assessment policy framework should be built: [3.20].
- 6.6 Those principles are as follows.
- 6.7 First, the performance of functions must be consistent with the objective of the *EP Act* as a whole, which is to “protect the environment of the State”, having regard to the principles set out in s 4A. All of the EPA’s activities and work, including its policies and guidelines, ought to be referable to these objectives and principles: [3.86].

- 6.8 Secondly, in conducting environmental impact assessments, the EPA is not a “decision-maker” in the strict sense. The EPA’s role in conducting environmental impact assessments and reporting to the Minister is entirely advisory: [3.87].
- 6.9 Thirdly, while the conduct of environmental impact assessments are matters in relation to which the expertise of the EPA must be applied and opinions may differ, whether the EPA recommends that a proposal be, or not be, implemented is not, ultimately, a matter of discretion. Rather it is the expression of the EPA’s considered opinion as to whether the proposal is appropriate to be implemented, having regard to the objective of the *EP Act*, being to “protect the environment of the State”, and the objectives of the EPA: [3.88].
- 6.10 Fourthly, the assessment by the EPA, as to whether to recommend a particular proposal be implemented, must be determined in accordance with the objective facts and the environmental factors identified in the course of its assessment of the “environmental acceptability” of the proposal: [3.89].
- 6.11 Fifthly, the EPA’s function does not include weighing the competing social, commercial or economic benefits of a proposal against the environmental impacts of the proposal. Rather, the recommendation to be made by the EPA in any given case is to be made on the basis of the environmental factors alone (including the “economic and social surroundings” directly related to the area of the proposal): [3.90].
- 6.12 Sixthly, the scheme of the *EP Act* as a whole clearly recognises that, in a particular case, environmental impacts may be outweighed by the social or economic benefits to be gained by the implementation of a proposal. The weighing of those competing factors, however, is a matter to be carried out by the Minister or the Governor in Council: [3.91].
- 6.13 Seventhly, the structure of Part IV of the *EP Act* makes clear that the Minister may allow the implementation of a proposal, notwithstanding that the EPA

has recommended that it not be implemented. Conversely the Minister may determine that a proposal may not be implemented, notwithstanding a recommendation by the EPA that the proposal may be implemented. In so determining the Minister may have regard to both to environmental and non-environmental factors: [3.92].

Principles in relation to Policy Framework and Content

6.14 The following findings in relation to the current framework of the policy suite were set out in Chapter 4:

- (a) there are too many policy instruments: [4.87(a)];
- (b) there is no clear hierarchy, or logical numerical order to the instruments: [4.87(b)];
- (c) within the nominal framework that currently exists, are several “types” of instruments that have different purposes, objectives, and outcomes: [4.87(c)];
- (d) there are overlapping purposes and forms of content within the documents, notwithstanding their nominal designations: [4.4];
- (e) the problems with the structure of the policy suite arise from a lack of a clear guiding framework and proper hierarchy of instruments: [4.54]; and
- (f) past attempts to rationalise the policy instruments and to develop a “policy framework” have not dealt with the problem root and branch, but have rather tried to make the changes incrementally by building upon existing structures and existing policy instruments. If success is to be achieved in creating a coherent policy framework, a more radical approach is needed: [4.88] to [4.89].

6.15 The following findings in relation to the current forms or genres of content in the current policy suite were set out in Chapter 5:

- (a) within the nominal policy types there are different “genres” or forms of content interspersed across the whole of the policy suite: [5.5] to [5.6];
- (b) any reform of the EPA’s policy suite must be conscious of the genre of the content being included in particular policy instruments and the particular function or purpose of that content: [5.8];
- (c) content that establishes the procedural framework for assessment of proposals under the *EP Act* (that is, process content) is essential for the EPA to be able to carry out its environmental impact assessment function and to maintain public confidence in the EIA process: [5.40];
- (d) in designing process content, the emphasis should be on clarity and simplicity. Instruments of this nature should be drafted in imperative terms, articulating particular processes to be followed, with reference to exceptional circumstances where necessary. This content should have a minimum of verbiage and “aspirational” language: [5.46];
- (e) process content should be contained in a minimum number of, preferably centralised, documents: [5.48];
- (f) factual content that articulates environmental factors and an understanding of their significance is a foundational aspect of good environment impact assessment. The identification of such factors is able to guide both a proponent and the EPA’s consideration of the matters that must be the subject of the EPA’s report under s 44(2)(a) of the *EP Act*: [5.60];
- (g) identification of key environmental factors, in the manner currently set out in EAG 8, can be expected to be a relatively stable set of considerations: [5.61];
- (h) factual content at a more specific level, is similarly important for providing a consistent context in which proponents are to address key environmental factors of a proposal: [5.63];

- (i) however, policy content that sets out factual context must always remain, in a sense, provisional – and subject to changes in scientific knowledge and changes to the environment itself – and therefore subservient to the broader considerations of the *EP Act* itself: [5.68];
- (j) content that provides information in relation to the impact of certain kinds of activities should be included as part of content in relation to environmental factors: [5.82];
- (k) content which identifies a preferred or required method for the analysis of environmental factors in an area the subject of proposal and the prediction of the impact of the proposal upon those environmental factors should remain relatively fixed in the short to medium term: [5.95];
- (l) content that provides guidance as to the particular ways in which environmental impacts may be avoided or mitigated is better included in material separate from the environmental impact assessment process, such as in material published under s 16(k) of the *EP Act*: [5.106]; and
- (m) content that contains predictions or presumptions as to the conclusion that the EPA will reach in relation to proposals having particular kinds of characteristics or effects should be used sparingly as part of the suite of policy instruments: [5.131].

6.16 From these findings the following principles for reform of the policy framework and content emerge.

6.17 First, there should be a simplified policy framework that is arranged in a hierarchical manner, with the objectives and principles of the *EP Act* at its apex.

6.18 Secondly, within the hierarchy of policy instruments, the instruments at each level of the hierarchy should expressly “link back” to the instrument above it in the hierarchy.

- 6.19 Thirdly, content which establishes the procedures and processes for assessment of proposals under the *EP Act* (that is, process content), which should remain relatively fixed and stable, ought to be separated entirely from substantive content dealing with environmental factors. That second type of content should be a separate hierarchy.
- 6.20 Fourthly, policy instruments should so far as possible, be rationalised into single documents so as to reduce the number of policy instruments in the framework.
- 6.21 Fifthly, the framework should better reflect and be sensitive to the various genres of content described above and the considerations relating to them.
- 6.22 Finally, rather than try to make the changes incrementally by building upon existing structures and existing policy instruments, if a coherent policy framework is to be achieved it must be established, as it were, from the ground up. No longer should the EPA continue, in its reform of policies, to put new wine into old wineskins.¹
- 6.23 Before turning to a recommended model for such a policy framework, it is useful to provide two examples of these a number of these principles having been implemented in other contexts.

Example One – Hierarchical Structure

- 6.24 A useful example of a policy structure used by a government entity is the one used by the National Offshore Petroleum Safety and Environmental Management Authority (“NOPSEMA”). NOPSEMA is the Commonwealth statutory authority continued in existence under the *Offshore Petroleum and Green House Gas Storage Act 2006* (Cth), and generally responsible for occupational

¹ Matthew, IX: xvii.

health and safety matters in connection with offshore petroleum operations or offshore greenhouse gas storage operations in Commonwealth waters.

6.25 In the course of its submissions to the Review, APPEA made reference to the clear hierarchical nature of the forms of policy and guidance instruments maintained by NOPSEMA.

6.26 APPEA provided the Review Team (with NOPSEMA's consent) the following table setting out the hierarchy of policy instruments maintained by NOPSEMA:

Form of Usage	Description	Document Code
Policy	Outlines the objectives and <u>provides guiding principles</u> on how NOPSEMA administers the requirements of the legislation or process. Should consist of policy statements only.	PL
Guidelines	Provide specific detail on the approach, expectations or criteria NOPSEMA uses in <u>applying statutory discretion</u> . In general an operator not complying with a guideline should provide good justification for not doing so.	GL
Guidance Note	<p>Informs operators of NOPSEMA's <u>interpretation of regulatory requirements</u>; however this advice is not authoritative. Operators may offer an equally valid interpretation and provide a plan based on their interpretation of the regulations (but must still show that it meets the regulations).</p> <p>Guidance notes:</p> <ul style="list-style-type: none"> • enable NOPSEMA to present its interpretation of regulations • recognise that guidance is not authoritative, but presents a reasonable interpretation • provide operators with a consistent basis for meeting regulatory requirements • useful 'go-by' for assessors to assist in consistency of assessments (noting that they would not be directly used for assessments). 	GN
Information Paper	<p>Provides information, background and practices to <u>foster good/better practice within industry</u>. The advice shall be broadly consistent with the OPGGS Act and associated regulations, the concepts of an objective based regime and government policy.</p> <p>Information papers:</p> <ul style="list-style-type: none"> • enable NOPSEMA to deliver the broader advice components under the Act and Statement of 	

Form of Usage	Description	Document Code
	<p>Intent, in a manner that protects our independence and ensures we secure compliance with the law</p> <ul style="list-style-type: none"> • provide a vehicle to encourage good/better practice in an open and transparent manner. 	

6.27 The table itself does not reflect the entirety of the regulatory hierarchy, given that, sitting above the instruments identified in the table are subject to the *Offshore Petroleum and Green House Gas Storage Act 2006* (Cth) and the regulations made under it.

6.28 Nevertheless, the descriptions of the various instruments does provide admirable, and concise, clarity, as to the relationship between the instruments identified and the statutory or regulatory functions to which they relate. A similar consistency and clarity can be found in the instruments themselves, each of which explicitly relate back the content contained therein to the higher instruments to which they relate.

6.29 This is not to suggest that the structure employed by NOPSEMA can be duplicated by the EPA. On the contrary, NOPSEMA operates in a quite different administrative environment, managing particular issues for one particular industry within a particular legislative framework. Rather, it is presented as an illustration of how various types of policy instruments can be presented within a framework that establishes principles, objectives, guidance for proponents and information.

6.30 The NOPSEMA structure also illustrates why it is necessary for a coherent policy framework to be established from scratch and in accordance with first principles.

Example Two – Consolidation and Rationalisation

6.31 A successful example of consolidation and rationalisation of guidance documents, very familiar to the Review Team is the *Consolidated Practice Directions* of the Supreme Court of Western Australia (“*Consolidated Practice*

Directions”). Practice directions, in the context of court practice, are notices to the public and legal practitioners providing guidance to assist those people who access the court to comply with the procedural requirements of the Court. The procedural requirements themselves are generally to be found in *Rules of the Supreme Court 1971* (WA), statutory instruments issued by the Court having effect as subsidiary legislation.

- 6.32 Prior to 2009, the Supreme Court had adopted a practice of issuing Practice Directions, Notices to Practitioners and other documents on an ad hoc basis, when the need arose for such guidance. Those documents were generally designated with a number for the year issued (for example, No. 1 of 1991, No. 2 of 1991, etcetera). Over time, however, as individual practice directions or notices were withdrawn or replaced, the collection of documents as a whole ceased to have any coherent pattern.
- 6.33 What remained was a dizzying collection of disparate documents, difficult to navigate and with content that was all too easy to overlook.
- 6.34 The *Consolidated Practice Directions* were issued on 22 January 2009 and immediately replaced all former Practice Directions and Notices. In their place, the *Consolidated Practice Directions*, as the title suggests, included all relevant guidance in relation to compliance with the Court’s procedures in a single document. That single document includes a numbered scheme of directions arranged in accordance with subject matter.
- 6.35 Significantly, when changes to practice arise, and new directions are required or amendments made to existing directions, those changes are made to the document as a whole by issuing replacement pages. In this way, the *Consolidated Practice Directions* always remain a single document available on the Court’s website. With each update, the document also includes a table of amendments identifying the pages replaced by each amendment.

- 6.36 The *Consolidated Practice Directions* are a good illustration of a simple but effective change of practice in relation to the publication of guidelines that has much to recommend it.
- 6.37 We now turn to a suggested structure for future reform of the EPA's policy framework.

Suggested Framework – Separate Hierarchies

- 6.38 The first recommendation, for creating a coherent policy framework is that the framework should be broken into three wholly separate categories. The proposed categories are:
- (a) a framework for the process and procedures of environmental impact assessments;
 - (b) a framework dealing with the substantive aspects of environmental impact assessments; and
 - (c) policies, advice and other documents not included within the environmental impact assessment function.
- 6.39 Traditionally, all three of these categories have been mixed into a single framework and, as has been discussed, are scattered across the range of policy instruments issued by the EPA.
- 6.40 The rationale for separating the categories is to more clearly enable the categories to reflect their purposes and objectives, and the differing considerations that go into preparing their content.
- 6.41 For example, material in the first category, being concerned with process and procedure, should remain relatively fixed and should, so far as possible be strictly adhered to, for the reasons discussed in Chapter 5.
- 6.42 In addition, material in this framework should be applicable to *all* environmental impact assessments carried out under Part IV of the *EP Act*. The process and procedures should, rather, be generic and able to be applied

to any particular proposal or consideration of environmental factors. This material should be separated from the scientific and technical material that will be relevant to those particular matters.

- 6.43 The second category concerns those scientific and technical matters, including the material that may be properly described as “policy”. Material in this category should be specifically directed towards guidance and consistency in EIA referral and assessments.

- 6.44 Finally, as has also been discussed in previous chapters, there are a wide variety of forms of information that the EPA prepares, as to the state of environment or some environmental matter, which is quite separate from, and unrelated to, its functions under Part IV of the *EP Act* (see [5.69] to [5.71], [5.83], and [5.106]).

- 6.45 The EPA should continue to prepare and issue that material and, indeed, its separation from the environmental impact assessment material made clearer.

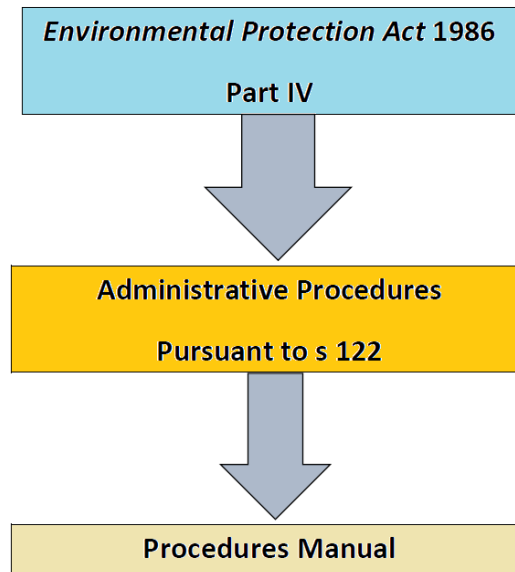
- 6.46 While material of this kind does not fall within the Terms of Reference, it is clear that, in discharging its statutory functions, the EPA should continue to produce wide variety of information and guidance that is envisaged by the *EP Act*. Indeed, it is imperative that such material be produced, quite apart from guidance in the environmental impact assessment process. The EPA, for example, is entrusted with the function of providing advice to the public and industry generally in relation to environmental matters and its overarching responsibility for the protection of the environment might be lost, or overshadowed, by too narrow focus on environmental impact assessments.

- 6.47 Documents within this category, accordingly, need not be (and should not be) tied to or make reference to the environmental impact process. On the contrary, documents dealing with the substantive content of environmental impact assessments should clearly state that to be the case and be treated accordingly.

- 6.48 Indeed it is this final non-EIA category of policy which, most appropriately, finds expression in environmental protection policies under Part III of the *EP Act* (discussed in detail at [3.72] to [3.76]).
- 6.49 As was observed in Chapter 3, it appears that the use of environmental protection policies has fallen into desuetude. This may, in part be seen to be as a result of the cumbersome process required for the promulgation of those policies. It may also, however, be the result of such policies being too closely regarded as related to the environmental impact assessment function under Part IV of the *EP Act*.
- 6.50 Turning then to the two proposed frameworks for the EPA's environmental impact assessment material.

Framework 1 – Process and Procedures

- 6.51 The EPA's policy suite in relation to environmental impact assessment process and procedure can, and should, be radically simplified. The review team recommends that the EPA consider a simple two-level hierarchy of documents falling within this category.
- 6.52 Under this structure, the essential steps and information in relation to process and procedure would be contained in the Administrative Procedures made pursuant to s 122 of the *EP Act*, accompanied and supported by a Procedures Manual. The Procedures Manual would include all relevant guidance to the public, proponents and practitioners in relation to the environmental impact assessment process set out in the Administrative Procedures.
- 6.53 The proposed structure may be represented diagrammatically as follows:



- 6.54 As the diagram suggests, the overriding consideration in relation to the EIA process must be the requirements of Part IV of the *EP Act* themselves. Many of those procedural requirements can be found, for example, in s 30, s 38A, s 39A and, most importantly, s 40 of the *EP Act*. Those provisions provide the essential framework for the EIA process.
- 6.55 The Administrative Procedures passed or created under s 122 of the *EP Act*, being the next level in the hierarchy should therefore follow closely the scheme set out in Part IV of the *EP Act*, linking their provisions to that scheme. Those Procedures should set out the essential matters of procedure to be followed as part of an environmental impact assessment.
- 6.56 In many respects the *Administrative Procedures 2012* already do this, at critical points, by linking the content of those procedures to the critical statutory provisions in Part IV of the *EP Act*. In that regard, the *Administrative Procedures 2012* are generally adequate for their purpose. However, updates to the policy framework since that instrument was published and the changes proposed here are such that it will be necessary to issue a new instrument.

- 6.57 The next level, the Procedures Manual, should include *all* relevant guidance in relation to the entire process set out in the Administrative Procedures. As with the relationship between the Administrative Procedures and the *EP Act*, the Procedures Manual would provide the relevant guidance as to compliance following the same scheme as the Administrative Procedures. Each part of the Procedures Manual would make clear to which part of the Administrative Procedures that part of the Procedures Manual relates. At its most basic level, for example, the Procedures Manual would follow the same order and numbering as the Administrative Procedures.
- 6.58 The Procedures Manual would, accordingly, contain all of the kinds of “process content” found throughout the current suite of policy instruments that falls into Genre 1 discussed in Chapter 5. Conversely, it should contain none of the content in Genres 2 to 5.
- 6.59 At a very general level, for example, the Procedures Manual would contain the kind of content found in the following policy instruments:

Environmental Assessment Guidelines (EAG):
EAG 01 - Defining the Key Characteristics of a Proposal
EAG 02 - Changes to Proposals after Assessment - Section s45C of the <i>EP Act</i>
EAG 06 - Timelines for environmental impact assessment of proposals
EAG 09 - Application of a significance framework in the environmental impact assessment process
EAG 10 - Scoping a proposal
EAG 11 - Recommending Conditions
EAG 14 - Assessment on Proponent Information (Category A);
EAG 16 - Referral of a Proposal Under s38 of the <i>EP Act</i>
EAG 17 - Preparation of Management Plans Under Part IV of the <i>EP Act</i> 1986

Environmental Protection Bulletins (EPB):
EPB 01 - Environmental Offsets
EPB 16 - Minor or Preliminary work or investigation work
EPB 17 - Strategic or derived proposals

- 6.60 No longer, however, would there be any designation of different policy instruments. All the relevant content would be contained in the one document.

6.61 Of course, much of the content in existing instruments would need revision in order to maintain consistency of language and avoid repetition.

6.62 In this context, the Review Team notes that the OEPA had already commenced a review of the *Administrative Procedures 2012* in mid-2015, but that that work on potential changes was put on hold pending this Review.² In that regard, the Review Team was provided with an internal OEPA working document developed as part of this process, entitled “Review of EIA Administrative Procedures – 2015/16” (“Working Document”).

6.63 A number of observations may usefully be made in relation to the Working Document in the context of the recommendations made above.

6.64 First, the Working Document commences with the following observations:

“As well as guiding the EPA in its assessments, the Admin Procedures provide an important guide to proponents and environmental consultants in going through the EIA process. The administrative procedures are used as a key part of training courses run for environmental consultants and environmental personnel in companies. There seems to be a reasonable acceptance that the administrative procedures provide a sound basis for this.

Notwithstanding this the EPA/OEPA see considerable opportunity to rationalise the Administrative procedures and remove unnecessary information.”

6.65 As to those assessments the Review Team generally agrees, both as to the acceptance of the *Administrative Procedures 2012* and the potential for some simplification of the language. There is, at times, in the *Administrative Procedures 2012* unnecessary verbiage. Clause 8.1, by way of example, is unnecessarily prolix and could be significantly simplified.

6.66 The Working Document also discusses the extent to which practices should be set out in the Administrative Procedures as distinct from policy instruments (such as EAGs) poses the question generally, “to what extent

² Review Brief, page 8.

there should be a clear linkage between the clauses in the Administrative Procedures and the [EP Act]?”

- 6.67 It will be apparent from the recommendations set out here that there *should* be clear linkage between the clauses in the Administrative Procedures and the *EP Act*, just as there should be clear linkage between sections of the Procedures Manual and the clauses in the Administrative Procedures.
- 6.68 The Working Document also poses for consideration the prospect that certain parts of the *Administrative Procedures 2012* be deleted on the basis that they merely replicate the provisions of the *EP Act*,³ or because they deal with matters that are contained in Environmental Protection Bulletins.⁴
- 6.69 It will be apparent that neither of these proposals would be appropriate. Rather, the Administrative Procedures should follow the scheme laid down by the *EP Act* in its entirety, even if it is only to put aspects of the process in context and similarly, the subsidiary document (that is, the Procedures Manual) should not be raising new issues, in addition to the processes set out in the Administrative Procedures. Rather, the Procedures Manual should be providing guidance in relation to, and by reference to, those Administrative Procedures.
- 6.70 As a final matter, in preparing the Administrative Procedures and the Procedures Manual, the type of confusion identified in paragraph [5.35] to [5.39] above should be avoided. That is, while the relationship between the *EP Act*, the *Administrative Procedures* and the Procedures Manual should be made clear, in their actual content the instruments lower in the hierarchy should reference and link back to the documents higher in the hierarchy; and not *vice versa*.

³ Such is the case in relation to Clause 12, regarding public inquiries.

⁴ Such is the case in relation to Clause 13, regarding offsets.

6.71 Turning then to the second proposed framework: substantive aspects of environmental impact assessments.

Framework 2 – Substantive aspects of EIA

6.72 Providing a framework for the substantive aspects of environmental impact assessment, that is, content providing substantive guidance as to the environmental issues likely to arise in environmental impact assessments, is clearly more difficult, given the wide variety of proposals, environmental factors and issues that may be dealt with in that process. Any framework will inevitably be faced with anomalies.

6.73 Nevertheless, choices need to be made as to the best structure to be adopted to suit the needs of the process. One critical choice, posed above,⁵ that must be confronted is whether the framework should be “environmental factor focused” or “activity focused”.

6.74 For the reasons generally discussed in Chapter 5, the Review Team strongly recommends that a new framework be “factor focused”. The articulation of environmental factors and the understanding of their significance is a foundational aspect of good environment impact assessment and is best able to guide both proponents and the EPA. By identifying, in a general way, the range of potential environmental factors, both proponents and the EPA are able to address the impacts on those factors in a systematic way.

6.75 Environmental factors are also, of course, the very thing that must be the subject of the EPA’s report under s 44(2)(a) of the *EP Act*. This aspect of the policy suite is “policy” properly so-called. Namely, it is material intended to provide clarity as to the factors and issues that will be taken into consideration as part of the EPA’s exercise of its environmental impact assessment function, in deciding upon whether or not to recommend a proposal be implemented.

⁵ Chapter 5, [5.79].

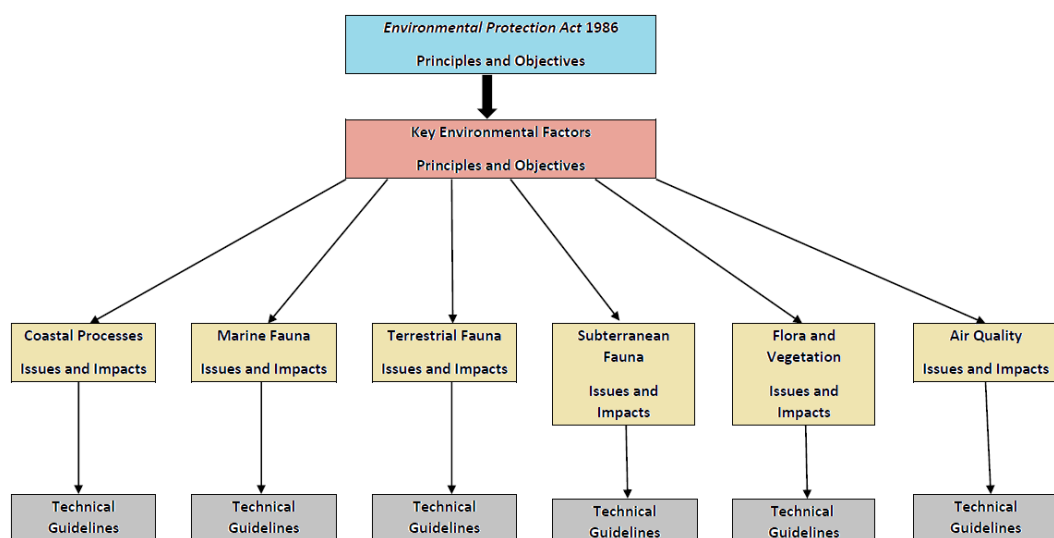
6.76 The Review Team therefore recommends a hierarchical structure for substantial aspects of environmental impact assessment whereby the identification of environmental factors and the objectives in relation to those factors is elevated to a preeminent level, with relatively fixed and stable content.

6.77 Specific content in relation to in relation to scientific understanding about particular environmental factors, being inherently subject to change and advancement, while important, would be referable to, and as a matter of priority, subservient to this first level.

6.78 As will be apparent from the discussion in Chapter 5, these two levels principally envisage content within Genre 2 (the general and specific forms respectively).

6.79 Below that level in the hierarchy would be technical guidance or requirements in relation to the method for the survey or analysis of particular environmental factors and the prediction of the impact of the proposal upon those environmental factors.

6.80 A somewhat simplified diagram of this proposed structure is as follows:



6.81 The structure depicted is simplified in two ways:

- (a) first, it does not depict each of the environmental factors that would be included within the second-tier instrument that sets out the key environmental facts, principles and objectives;⁶ and
- (b) secondly, there may well be, within the structure, more than one instrument that falls within the lower branches of the hierarchy. For example, separate instruments might deal with different flora and vegetation, or technical guides applicable to that factor.

6.82 Subject to that qualification, the hierarchy, as depicted in the diagram has a number of important features.

6.83 First, as with the procedures framework, the overriding consideration in this framework must be the principles and objectives of the *EP Act* themselves. These are, most obviously, the objective and principles set out in s 4A and the objective of the EPA set out in s 15 of the *EP Act*. More specifically, they should reflect the principles reflected in paragraphs [6.7] to [6.13] above.

6.84 Secondly, the next instrument in the hierarchy should be a single document which identifies the key environmental factors relevant to environmental impact assessment analysis, with objectives in relation to each factor which explicitly links to the principles and objectives of the *EP Act*. That is, for example, the document should identify, with greater specificity, how each of the key environmental factors may be expressed in the terms of the five principles identified in s 4A of the *EP Act*.

⁶ EAG 8, for example, includes 17 “factors”, although it is highly debatable whether some of those matters listed in EAG 8 (such as “offsets” and “rehabilitation and commissioning”) are truly “factors” in the sense that it is understood in the literature, namely “broad components of the environment such as flora, fauna, water quality or air quality that may be impacted by a proposal”: see Dahlitz & Morrison-Saunders (2014): Assessing the utility of environmental factors and objectives in environmental impact assessment practice: Western Australian insights, *Impact Assessment and Project Appraisal*, page 1.

- 6.85 This overarching document could be titled, for example, “Environmental Impact Assessment: Key Factors, Principles and Objectives Policy”.
- 6.86 Another important element in this preeminent level of the hierarchy, is a clear articulation of the interrelationship between the different environmental factors and the need for environmental impact assessment to take a holistic approach to environmental impacts. The need for a holistic approach to EIA was emphasised by both stakeholder consultations and in the academic literature.⁷
- 6.87 As stated elsewhere above, this instrument can be expected to be a relatively stable set of considerations and objectives. It should therefore be drafted with that level of consistency in mind.
- 6.88 In terms of existing policy instruments, EAG 8, of course, contains the content that best approximates what should be included in this preeminent instrument in the structure. Increased attention to the each of the key environmental factors could be expressed in the terms of the five principles identified in s 4A of the *EP Act* and the interrelationship between those factors.
- 6.89 Thirdly, the next level in the hierarchy, are the documents related to particular aspects of the environmental factors that might be impacted by proposals. Those documents, described in the diagram above as “Issues and Impacts”, would focus more on the general environmental issues facing aspects of the particular factor; that is, setting out the EPA’s understanding of a particular environmental factor, its current “state” and how the factor is affected by natural and human activity.

⁷ See Morrison-Saunders & Bailey (2000): Transparency in environmental impact assessment decision making: recent developments in Western Australian, *Impact Assessment and Project Appraisal*, 18(4): 260-270 at page 270; Dahlitz & Morrison-Saunders (2014): Assessing the utility of environmental factors and objectives in environmental impact assessment practice: Western Australian insights, *Impact Assessment and Project Appraisal*, page 4.

- 6.90 The instruments in this level should be arranged numerically within the category of the particular factor, so that its placement within the hierarchy is clear. More importantly, the content of the instruments should explicitly link back to the principles and objectives identified for that factor in the overarching policy (as suggested, the “Environmental Impact Assessment: Key Factors, Principles and Objectives Policy”).
- 6.91 For example, the overarching policy might (as EAG 8 does) identify “Marine Fauna” as one of the key environmental factors. That document would therefore set out the principles and objectives for that factor generally, expressed in the terms of the five principles identified in s 4A of the *EP Act*.
- 6.92 An instrument at the next level of the hierarchy, dealing with a specific aspect of that factor, for example, “Issues and Impacts in relation to Marine Turtles” would explicitly link back to the general the principles and objectives set out in the overarching document in relation to “Marine Fauna”.
- 6.93 In this way the relationship between the two levels of documents is maintained and kept clear. So too is the hierarchy maintained such that the “Issues and Impacts” document (containing, as it inevitably will, scientific information that is subject to change) remains referable to and, as a matter of priority, subservient to the higher level principles and objectives. It is those principles and objectives which, ultimately, the EPA is bound to consider in discharging its statutory function.
- 6.94 Content within these documents would therefore generally contain content within Genres 2 and 3 discussed in Chapter 5, to a lesser extent Genre 6. It is to be emphasised, however, that, because the new framework would be “factor focused”, content within Genre 3, insofar as it is contained in the environmental impact assessment policy framework, would be found in instruments relating to the particular environmental factor. There would not be, within this framework, any policy instruments dealing with particular activities.

- 6.95 Again, to take an example from the existing policy suite, the content found in EAG 7 – “Environmental Assessment Guideline for Dredging Proposals” that discusses the effects of dredging on benthic primary producer habitats, should be contained within an “Issues and Impacts” document related to benthic primary producer habitats within, for example, the “Marine Environment” factor (however it may be described) arm of the hierarchy.
- 6.96 There would, accordingly, be no solely “activity focused” instruments, such as EAG 7, within the framework for the substantive aspects of environmental impact assessments.
- 6.97 Again, this is not to suggest that the EPA should not prepare reports, information, advice and guidance in relation to environmental matters attaching to particular activities. It should. Such reports are a very important part of its broader statutory functions in providing guidance to government, industry and the public. Nevertheless, such material (and related material falling within Genre 5), which synthesises issues relating to various environmental factors, are better prepared outside of the context of its environmental impact assessment function. That is, such documents should form part of the third broad category referred to in paragraph [6.38(c)] above.
- 6.98 Finally, documents of this kind might contain content within Genre 6; that is, predictions or presumptions as to the conclusion that the EPA may reach in relation to assessment of proposals having particular kinds of characteristics or effects. For the reasons discussed above, however, such material should be included sparingly.
- 6.99 Again, at a very general level, “Issues and Impacts” instruments would be expected to contain much of the content found in the following instruments within the existing policy suite:

Environmental Assessment Guidelines (EAG):
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EAG 03 - Protection Of Benthic Primary Producer Habitat in Western Australia’s Marine Environment

EAG 05 - Protecting Marine Turtles from Light Impacts

Environmental Assessment Guidelines (EAG):
EAG 13 - Environmental Impacts from Noise
Environmental Protection Bulletins (EPB):
EPB 05 - Guidance for Development Inland Drainage in the Wheatbelt
EPB 06 - The Natural Values of the Whicher Scarp
EPB 10 - Geraldton Regional Flora and Vegetation Survey
EBP 11 - Consultation on Conditions Recommended by EPA
EPB 12 - Swan Bioplan - Peel Regionally Significant Natural Areas
EPB 13 - Guidance for use of Albany Regional Vegetation Survey
EPB 18 - Sea level rise
EPB 24 - Greenhouse Gas Emissions and Consideration of Projected Climate Change Impacts in the EIA Process
Environmental Protection Policies (EPP):
EPP - Western Swamp Tortoise Habitat
Guidance Statements (GS):
GS 01 - Protection of Tropical Arid Zone Mangroves along Pilbara Coastline
GS 06 - Rehabilitation of Terrestrial Ecosystems
GS 07 - Protection of the Western Swamp Tortoise Habitat Upper Swan Bullsbrook
GS 28 - Protection of Lake Clifton Catchment
GS 41 - Assessment of Aboriginal Heritage
GS 49 - Assessment of Development Proposals in Shark Bay World Heritage Property
Position Statements (PS):
PS 02 - Environmental Protection of Native Vegetation in WA
PS 04 - Environmental Protection of Wetlands

6.100 The final level in the hierarchy for the framework for the substantive aspects of environmental impact assessment is the technical guidance or requirements in relation to the method for the survey or analysis of particular environmental factors and the prediction of the impact of the proposal upon those environmental factors.

6.101 This is, essentially, the content contained within Genre 4. While these technical requirements are related to process (being prescriptions for how information should be presented as part of proposals) the Review Team considers that they are best included within this framework.

6.102 This is for the following reasons.

- 6.103 First, these technical requirements are closely connected to environmental factors and, indeed, to particular issues or impacts within those factors. Accordingly, they fit more readily into a framework for the assessment of those factors.
- 6.104 Secondly, and more importantly, by being included within this point in the hierarchy, the technical requirements can be expressly linked back to the issues and impacts facing a particular environmental factor and ultimately the principles and objectives at the apex of the framework. In determining those technical requirements, therefore, the EPA should determine which information (methods of survey, etcetera) best meets the needs for assessing the impacts of a proposal on the particular environmental factor. The instruments containing technical requirements should therefore be expressly linked to the particular instruments above them in the hierarchy.
- 6.105 These instrument would be expected to contain much of the content found in the following instruments within the existing policy suite:

Environmental Assessment Guidelines (EAG):
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EAG 12 - Consideration of Subterranean Fauna in EIA WA EAG 13 - Environmental Impacts from Noise EAG 15 - Protection the Quality of Western Australia's Marine Environment
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Guidance Statements (GS):

GS 03 - Separation Distance between Industrial and Sensitive Land Uses GS 10 - Natural Areas within System 6 Region and Swan Coastal Plain portion of System 1 region GS 20 - Sampling of Short Range Endemic Invertebrate Fauna GS 51 - Terrestrial Flora & Vegetation Surveys for EIA WA GS 54a - Sampling Methods and Survey Considerations for Subterranean Fauna in WA GS 56 - Terrestrial Fauna Surveys for EIA in WA
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Position Statements (PS):

PS 03 - Terrestrial Biological Surveys as an Element of Biodiversity Protection

Miscellaneous - Other Policies and Guidance:
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Technical Guide on Terrestrial Vertebrate Fauna Surveys for Environmental Impact Assessment

Conclusions in relation to proposed structures

- 6.106 The structures proposed above for the process and procedures of EIA and the substantive aspects of EIA, respectively, are intended as a broad framework to guide reform of the EPA's policies and guidelines in relation to environmental impact assessment. They are not intended to be a rigid or prescriptive formula. It is entirely foreseeable that aspects of the framework would need to be varied.
- 6.107 Nevertheless, an overriding consideration is that the structure of the policies and guidelines should be carefully planned and settled before it is populated with particular instruments.
- 6.108 Similarly, that reform process should be directed towards creating a new policy framework in its entirety. That may mean for example, that the existing policy suite is employed during what may be a lengthy development process for the new policy framework. It may also mean that immediate or urgent changes that are necessary would need to be made to the existing policies while the broader policy development is underway. Nevertheless, it is better for those things to occur (that is, the current policy suite continue to be used, and managed, in the short to medium term) and to get the new framework and content *right*, rather than creating yet another hybrid of old and new policy documents.
- 6.109 Additional comments in relation to policy development generally are set out in Chapter 8 below.
- 6.110 Before addressing those matters, it is necessary to say something specific in relation to policy concerning environmental offsets.

CHAPTER VII – ENVIRONMENTAL OFFSETS

Introduction

- 7.1 As noted in Chapter 1, the principal issue the *Roe 8 Case* was the failure of the EPA, in assessing the Proposal in that case, to take into account three statements of policy in relation to “environmental offsets” (see [1.17]). The failure to consider these “offsets” policies was determinative of the proceedings before Martin CJ, and remains an issue before the Court of Appeal.
- 7.2 Other aspects of the challenge raised in the *Roe 8 Case* included whether, as a matter of law, the consideration of offsets required the EPA to approach its assessment of the proposal in a particular way; namely, whether the EPA was required to ask itself whether an offsets package was capable of rendering the proposal environmentally acceptable *before* addressing the adequacy of the offsets package which should be provided by the proponent.”¹ This aspect of the challenge was rejected by Martin CJ but has again been raised in the Court of Appeal. As with the other aspects of the appeal, the Review Team expresses no views in relation to the success or otherwise of the appeal.
- 7.3 Nevertheless, given the centrality of the “offsets” policies to the *Roe 8 Case*, which gave rise to the Review, it would be passing strange were they not specifically addressed in this report. In addition, as will be discussed below, there are aspects of the nature of environmental offsets that are unusual in the environmental impact assessment context, which suggest that they are an appropriate area for specific policy.
- 7.4 As with the other aspects of the Terms of Reference, it does not form part of the Review to review the merits of the EPA’s environmental policy position in relation to environmental offsets, but rather whether to consider whether

¹ *Roe 8 Case*, per Martin CJ at [106(a)].

the policy documents are expressed in a way that is conducive to good decision-making.

- 7.5 This chapter begins with a review of the nature of environmental offsets and the current policies applicable to them.
- 7.6 The chapter then provides an analysis of ways in which environmental offsets might conceptually fit within the environmental impact assessment process in Part IV of the *EP Act*.
- 7.7 The chapter concludes with some observations and recommendations in relation to the EPA's offset policies.

The nature of environmental offsets

- 7.8 “Environmental offsets” have been defined in a number of ways. A useful working definition, taken from the “WA Environmental Offsets Guidelines” is:

“Environmental offsets are actions that provide environmental benefits which counterbalance the significant residual environmental impacts or risks of a project or activity. Unlike mitigation actions which occur on-site as part of the project and reduce the direct impact of that project, offsets are undertaken outside of the project area and counterbalance significant residual impacts.”²

- 7.9 In order to properly understand environmental offsets, it must be made clear that they are not concerned with avoiding or minimising the environmental impacts or harm that will result from a particular activity. The concept of offsets takes, as its premise, that there will be environmental impacts or harm that result from the particular proposed activity.
- 7.10 These points were made in the policy instruments the subject of the *Roe 8 Case*. Position Statement 9 – “Environmental Offsets” (which it should be noted is no longer in effect), for example, stated:

² WA Environmental Offsets Guidelines, page 3.

“Conservation of the environment is always desirable. However, in a growing society and economy this is not always achievable. Where environmental impacts must occur, environmental offsets represent the ‘last line of defence’ for the environment. They aim to ensure that any adverse impacts are counterbalanced by an environmental gain somewhere else, so there are no adverse environmental impacts as a result.”³

7.11 It will be apparent that there is a certain conceptual tension in statements such as this:

- (a) on one hand, there is an acknowledgement that adverse environmental impacts must occur; and
- (b) on the other hand, there is a conclusion that, following environmental offsets “there are no adverse environmental impacts as a result”.

7.12 The final sentence in the passage from PS 9 above does not strictly make logical (or at least grammatical) sense. There cannot strictly be “adverse impacts” and at the same time “no adverse environmental impacts” as a result. What the sentence presumably intends to say is that the aim of offsets is to ensure that the *particular* adverse environmental impacts are counterbalanced by an environmental gain somewhere else, so that, ultimately, there is no *net* adverse impact on the environment *as a whole*.

7.13 This is why environmental offsets are referred to as a “last line of defence” and are clearly distinguished from mitigation strategies and other forms of environmental protection. Environmental offsets are a result of the frank and realistic acceptance that in a growing society and economy, environmental factors may in certain circumstances be outweighed by social or economic factors. In doing so, of course, offsets policy conceptually looks to “the environment” as a whole.

³ PS 9, page 2.

7.14 Because offsets necessarily involve a recognition of *some* residual impact on the site of the particular proposal, they have been the subject of suspicion by some in the community. In PS 9, for example, the EPA observed:

“The EPA is also concerned about perceptions that negotiated offset and compensation packages are being used to make otherwise ‘unacceptable’ adverse environmental impacts ‘acceptable’ within government. It is aware that some environmental offsets, proposed in the guise of sustainability tools, are sometimes over-riding the protection and conservation of our State’s most valuable environmental assets. Over time, the cumulative effects of this type of decision-making would contribute to a gradual decline in both the quality and quantity of the State’s priority environmental assets. The EPA is of the view that this approach is neither sustainable nor focused on protecting the environment. It is also aware there may be equity issues that need to be addressed by government. The challenge now is to find the means of doing so effectively.”⁴

7.15 The sustainability referred to in this passage includes the fact that, in order to provide an offset in relation to some particular environmental impact, it is necessary to identify some other environmental asset to be improved or conserved. Attention needs to be given, then, to the identification of the asset preserved in the offset, and whether it truly is an offset.

7.16 Observations of this kind, for example, appear in Martin CJ’s judgment in the *Roe 8 Case*, where his Honour recognised:

“the general question of whether environmental offsets do in fact mitigate or ameliorate adverse environmental impact if the offset is nothing more than the acquisition and maintenance of other land in its current environmental condition. There is a cogent argument to the effect that unless there is a real or appreciable risk of the environmental degradation of that other land, the mere act of acquisition and maintenance of that land does not mitigate or ‘offset’ the environmental degradation of other land in any material way.”⁵

7.17 There is also of course, an issue as to the continued availability of environmental assets to be employed as offsets. As recognised by the EPA in

⁴ PS 9, page 1.

⁵ *Roe 8 Case*, per Martin CJ at [46]. It should be noted that, given the clear conceptual distinction, in the context of environmental impact assessment, between mitigation and offset, his Honour has used the words “mitigate” and “ameliorate” in a more generic sense.

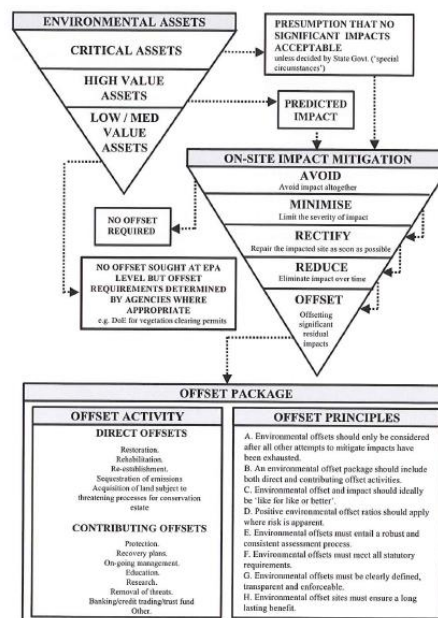
PS 9, environmental impacts could not be endlessly offset by other assets, in a kind of Ponzi scheme, in which the other assets would eventually be exhausted. As has been recognised, in past and current policies, it is necessary that offsets be managed in a coherent and sustainable way.

Past and Current Offsets Policy

7.18 The policies the subject of the *Roe & Case*, which are detailed in Chapter 1,⁶ were a form of “hard” policy which, in certain circumstances, created a presumption against the appropriateness of offsets.⁷ Those circumstances generally concerned residual significant effects on “critical assets”, as defined.

7.19 Those policies also recognised that there may be circumstances in which, notwithstanding that the EPA did not consider offsets to be appropriate (and so advised in its report under s 44), the Minister may nevertheless conclude that a proposal should be implemented, subject to the provision of offsets.

7.20 Position Statement 9, for example, included the following decision-tree:⁸



⁶ See [1.17].

⁷ See also the discussion in Chapter 5, at [5.110] to [5.111].

⁸ PS 9, page 20.

- 7.21 Notably, the “presumption” in the top right-hand corner contained the qualification “unless decided by the State Govt. (‘special circumstances’)”. This was also reflected in the text of PS 9 which stated, in relation to that part of the decision-tree, that “where projects have been approved by the State Government ... approval should be conditional on” maximum on-site mitigation and acceptable offsets.
- 7.22 This part of PS 9 should not, in the view of the Review Team, be understood to have contemplated that the Minister might dictate the content of the EPA’s recommendation or that the EPA might accept such dictation (which as observed by Martin CJ in the *Roe 8 Case* would arguably be unlawful⁹).
- 7.23 On the contrary, that part of the policy should be understood to have recognised that regardless of the EPA’s recommendation, the Minister might approve a proposal, in his or her discretion, because the environmental factors were, in the Minister’s opinion, outweighed by social or economic factors. Such a result could, of course, be a perfectly legitimate course of action in a particular case and is contemplated by the scheme of Part IV as a whole.¹⁰ Indeed, this is the direct effect of *Coastal Waters Alliance*.¹¹
- 7.24 In such circumstances, it would be open to the EPA, under s 44(2a) of the *EP Act*, to advise the Minister that if, contrary to its recommendation, the Minister decides that a proposal may be implemented, that the Ministerial approval should be accompanied by certain conditions as to offsets. Indeed, not only would that be open to the EPA; in the view of the Review Team, it would be desirable for it to do so.

⁹ *Roe 8 Case*, per Martin CJ at [194].

¹⁰ See especially the discussion in Chapter 3 at [3.64] to [3.71].

¹¹ *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; Ex parte Coastal Waters Alliance* (1996) 90 LGERA 136.

- 7.25 As noted previously, the policies concerning offsets that were at issue in the *Roe 8 Case* have now been withdrawn.
- 7.26 The EPA has now, through the policy position articulated in EPB 1 – “Environmental Offsets” (revised August 2014), adopted the “WA Environmental Offsets Policy” (“the WA Offsets Policy”) and the “WA Environmental Offsets Guidelines” (“the WA Offsets Guidelines”).
- 7.27 WA Offsets Policy and the WA Offsets Guidelines are somewhat unusual in the suite of policy instruments reviewed as part of the Review, because they are not instruments prepared or issued by the EPA itself. Rather they are “whole of Government” instruments issued by the State Government.
- 7.28 In light of the statutory independence of the EPA from the Executive Government, the WA Offsets Policy and the WA Offsets Guidelines could not, automatically, apply, or be relevant, to the EPA’s environmental impact assessment function. They could only become relevant policies for the EPA insofar as they were adopted by the EPA.
- 7.29 That is what EPB 1 does.
- 7.30 EPB 1, in terms, “clarifies how the Environmental Protection Authority (EPA) will consider offsets through the environmental impact assessment (EIA) process” and provides:

“The EPA adopts the WA Environmental Offset Policy and WA Environmental Offset Guidelines for application through the environmental impact assessment process. The EPA believes that the Guidelines represent a contemporary and best practice approach to offsets in the Western Australian context. The EPA assesses each proposal on its merits and so there may be circumstances when the EPA may depart from the Guidelines. However, in these cases, the EPA will explain its position and rationale in its report to the Minister for Environment. The EPA’s position will be publicly available, open to appeal and the Minister for Environment will make the final determination.

The EPA strongly supports transparency and accountability in the offsets process. Where the EPA is of the view that a significant residual impact remains after avoidance, minimisation and rehabilitation efforts, the EPA will ensure that any offsets are recommended as conditions of approval in the EPA’s report to the Minister for Environment, as well as including details on

the rationale for the offset. The OEPA will ensure that all offsets that are required by the Minister are published on the WA Environmental Offsets Register.”¹²

7.31 It is appropriate then to set out the salient features of the WA Offsets Policy and WA Offsets Guidelines.

WA Offsets Policy and WA Offsets Guidelines

7.32 The WA Offsets Policy opens as follows:

“The Western Australian Government’s Environmental Offsets Policy seeks to protect and conserve environmental and biodiversity values for present and future generations. This policy ensures that economic and social development may occur while supporting long term environmental and conservation values.”¹³

7.33 The WA Offsets Guidelines outlines its purpose as follows:

“These guidelines complement the WA Environmental Offsets Policy 2011 (offsets policy) by clarifying the determination and application of environmental offsets in Western Australia. Application of these guidelines will ensure that decisions made on environmental offsets are consistent and accountable under the *Environmental Protection Act 1986* (the *EP Act*).

These guidelines expand on the offsets policy to ensure that the basis for decision-making on environmental offsets is understood by decision-makers, government officers, industry and the community and consistently applied by decision-makers.”¹⁴

7.34 Section 2 of the WA Offsets Guidelines refers to the legislative context of Part IV of the *EP Act* and notes:

“The EPA undertakes an assessment of the proposal and prepares a report to the Minister for Environment on the outcome of its assessment. The assessment report sets out the EPA’s recommendation as to whether or not the proposal should be implemented and, if so, any conditions and procedures

¹² EPB 1, page 1.

¹³ WA Offsets Policy, page 1.

¹⁴ WA Offsets Guidelines, page 3.

it should be subject to. These recommended conditions may include offsets if a significant residual impact remains after mitigation.”¹⁵

7.35 Following discussion regarding Part V of the *EP Act*, which is not relevant for the purposes of the Review, the WA Offsets Guidelines remark:

“Consistent with the EPA’s Principles of EIA for the Proponent in its Administrative Procedures, proponents are expected to demonstrate that the unavoidable impacts will meet the EPA objectives for environmental factors and therefore their proposal is environmentally acceptable. This would include considering any offsets following mitigation.”¹⁶

7.36 Section 3 of the WA Offsets Guidelines is concerned with the question “When are offsets required?”

7.37 In that regard the WA Offsets Guidelines provide a “significance” framework in relation to significant residual impacts, following all avoidance and mitigation strategies.

7.38 Importantly, the WA Offsets Guidelines recognise that “environmental offsets are not appropriate for all projects (principle 2) and are not appropriate in all circumstances”.¹⁷ The reference to “principle 2” in this section is Principle 2 of the WA Offsets Policy, which states:

“Environmental offsets are not appropriate in all circumstances. The applicability of offsets will be determined on a project-by-project basis. While environmental offsets may be appropriate for significant residual impacts, they will not be applied to minor environmental impacts.”¹⁸

¹⁵ WA Offsets Guidelines, page 4.

¹⁶ WA Offsets Guidelines, page 5.

¹⁷ WA Offsets Guidelines, page 8.

¹⁸ WA Offsets Policy, page 3.

7.39 Section 3 of the WA Offsets Guidelines sets out a significance framework for determining when offsets are appropriate, which includes four levels of significance:¹⁹

- (a) Unacceptable impacts;
- (b) Significant impact requiring an offset;
- (c) Potentially significant impact which may require an offset; and
- (d) Impacts which are not significant.

7.40 These levels are then reflected in tabular form in Figure 3 in the WA Offsets Guidelines, *albeit* with slightly different descriptions of the four levels:

Part IV Environmental Factors	Vegetation and flora							
	Subterranean fauna							
	Marine fauna							
	Benthic habitat and communities			Benthic habitat and communities				
	Terrestrial fauna							
Part V Clearing Principles	Clearing Principle (c) Rare flora	Clearing Principle (d) Threatened ecological communities	Clearing Principle (e) Remnant vegetation	Clearing Principle (f) Wetlands and waterways	Clearing Principle (h) Conservation areas	Clearing Principle (a) High biological diversity	Clearing Principle (b) Habitat for fauna	
Residual impact that is environmentally unacceptable and cannot be offset	Significant residual impacts that will require an offset - All significant residual impacts to species and ecosystems are protected by statute or where the cumulative impact is already at a critical level	e.g. impact to or removal of buffers or other areas necessary to maintain ecological processes and functions for species declared as rare flora under WC Act or listed as threatened under EPBC Act	e.g. impact to or removal of habitat necessary to maintain ecological communities declared as environmentally sensitive areas under EP Act or listed as threatened ecological communities under EPBC Act	e.g. impacts where the existing vegetation is highly cleared (such as vegetation complexes with <30% of its pre-clearing extent remaining in a bioregion (<10% in constrained areas on the Swan Coastal Plain))	e.g. impact to or removal of buffers necessary to maintain conservation significant wetlands (such as EPP wetlands, Ramsar wetlands, Conservation Category Wetlands)	e.g. impact to areas reserved under statute or managed for the purpose of conservation e.g. National Parks, Marine Parks, Bush Forever sites, conservation covenants	e.g. significant impact to areas recognised as having high biological value (e.g. nationally or internationally recognised biodiversity hotspots), or habitat supporting listed migratory species (such as JAMBA, CAMBA, ROKAMBA)	e.g. impact to or removal of habitat necessary to maintain species declared as specially protected under WC Act or listed as threatened species under EPBC Act
Significant residual impacts that may require an offset - Any significant residual impact to potentially threatened species and ecosystems, areas of high environmental value or where the cumulative impact may reach critical levels if not managed	e.g. impact likely to result in a species being listed as rare under WC Act or listed as threatened under EPBC Act	e.g. impact likely to result in an ecological community being declared as environmentally sensitive under EP Act or listed as threatened ecological community under EPBC Act	e.g. impacts in landscapes where the existing vegetation is required to maintain ecosystem services, impact causes a high degree of fragmentation	e.g. clearing of native vegetation that is watercourse or wetland dependent (such as damplains and floodplains)	e.g. impacts to ecological linkages between conservation areas, contributing to the maintenance or restorability of one or more key ecological processes required to sustain the conservation areas or expanding the functional size of an existing conservation area or partially compensating for less than ideal shape	e.g. impacts to communities or species that are representative of high biodiversity, have a higher diversity than other examples of an ecological community in a bioregion, or is in 'degraded' condition yet is in better condition than other vegetation of the same ecological community in the local area	e.g. impact likely to result in a species being listed as specially protected under WC Act or listed as threatened under EPBC Act or impact affects significant habitat for a species	
Residual impacts that are not significant	Assessment	Does this project meet the EPA's objective for this factor / is this project at variance with the Clearing Principles?				Part IV Guidance	Part V Guidance	

7.41 What will be immediately apparent from this table is that it includes no criteria, discussion or examples at the level in the table above relevant to the circumstances in which the residual impact is “environmentally unacceptable and cannot be offset”.

¹⁹ WA Offsets Guidelines, page 9.

- 7.42 Section 4 of the WA Offsets Guidelines then discusses the criteria for determining the appropriate types of offsets in relation to particular residual impacts.
- 7.43 The remaining sections of the WA Offsets Guidelines are essentially post-approval matters that fall beyond the scope of the environmental impact assessment process.

Environmental offsets in the context of environmental impact assessment

- 7.44 In light of the nature of environmental offsets and the WA Government policies set out above, it is worthwhile considering how, conceptually, environmental offsets fit within the context of environmental impact assessment.
- 7.45 The starting point is to ask: do the notion of environmental offsets fit within the process of environmental impact assessment under Part IV of the *EP Act* at all?
- 7.46 In that regard, a view was expressed in the course of stakeholder consultations that consideration of environmental offsets has (or ought to have) no part in the EPA's environmental impact assessment functions under Part IV of the *EP Act*. The explanation for that view was that, by definition, environmental offsets are concerned with circumstances in which there are significant residual impacts from a proposal that, although they cannot be avoided or mitigated, will be allowed to occur because of some overriding public interest (social or economic).
- 7.47 For that reason, so the argument goes, environmental offsets are outside the scope of environmental impact assessment because they are, ultimately, concerned with social and economic considerations; the very kind of considerations excluded from the EPA's consideration by *Coastal Waters Alliance*.

7.48 It is this approach to the task of the EPA under Part IV of the *EP Act* that underpins the unsuccessful argument in the *Roe 8 Case*; namely, that the EPA was required to ask itself whether an offsets package was capable of rendering the proposal environmentally acceptable *before* addressing the adequacy of the offsets package which should be provided by the proponent.²⁰

7.49 While of course prescinding from any conclusion the Court of Appeal may reach in relation to this issue, the weight of the views expressed during the course of the Review by those regularly or professionally engaged in environmental impact assessment is that the consideration of offsets now forms an essential part of good environmental impact assessment.

7.50 Indeed, while the issue of offsets generally arises in circumstances in which social or economic benefits are considered to outweigh particular significant residual environmental impacts, there are nevertheless genuine environmental issues involved in whether offsets *can* be employed to counterbalance a particular environmental impact and as to the type of environmental offset which might be available and suitable.

7.51 There is, for example, a notion in relation to environmental offsets policy that environmental offsets should be “like for like”²¹ or “like for better”. PS 9, for example, included a detailed discussion of these principles:

- ‘Like for like’ ensures that the offset activity counterbalances the same type of impacted ecosystem or emission.
 - When relevant to ecosystems, ‘like for like’ applies to environmental values, vegetation, habitat, species, ecosystem, landscape, hydrology, and physical area. The principle aims to avoid comparable threatened ecosystems, flora and fauna species from being systematically degraded over time through individual and cumulative impacts.

²⁰ *Roe 8 Case*, per Martin CJ at [106(a)].

²¹ The WA Offsets Guidelines also refers to the “like-for-like” principle (see page 13), although it does not explicitly refer to a “like-for-better” principle (although see references to “better” conditions and areas in the consideration for identifying appropriate offset sites.

Ideally the receiving offset site should be located in the same local vicinity, so as to ensure the offset effect is expressed within the same area of impact. This ensures that offsets are not diluted or concentrated within a specific geographical area of bioregion.

- When relevant to emissions, ‘like for like’ applies to both the chemical and quantity of emissions. The chemical being offset should be the same as the chemical being emitted. For example, phosphate waste discharge should be offset with phosphate sequestration methods. It is worth noting that offsets should not extend to chemicals that are hazardous to the environment or human health (i.e. toxic or synthetic chemicals such as plastics, pesticides, heavy metals, etc.). With reference to quantity of emission, ‘like for like’ refers to sequestering the equivalent mass or volume of the chemical that is being discharged to the environment. The EP A acknowledges that ‘like to like’ and ‘like for like or better’ for greenhouse gases should be approached in most cases on a CO₂-equivalent basis if the greenhouse gas emitted is other than CO₂.
- ‘Like for like or better’ refers to not only achieving ‘like for like’ but aiming for improvements beyond what is required for ‘like for like’. This may refer to either an enhancement in either the quality or quantity aspects of the offset activity while still considering ‘like for like’ requirements.
 - Where relevant to ecosystems, to achieve ‘like for like or better’ an offset resource from a lower quality asset which is the subject of the impact may be substituted for a higher quality asset in order to obtain an improved environmental outcome.
 - Where relevant to emissions, ‘like for like or better’ may consist of a greater amount of pollutant being sequestered than what is required under ‘like for like’ and ‘offset ration’ requirements (see Principle D). ‘Like for like or better’ may also refer to achieving ecosystem improvements *at the same time* as achieving emission offsets. For example, re-establishment of a desirable ecosystem would meet offset requirements for both emissions *and* ecosystems. However, establishing a plantation or nutrient-stripping pond would meet only emission offset requirements.²²

7.52 The kinds of questions raised by these principles (for example, “Is a ‘like for like or better’ environmental outcome even possible?”), clearly raise issues concerning the scientific analysis and evaluation of environmental factors;

²² PS 9, page 10.

which are issues suited to and contemplated by the expertise and independence of the EPA. The same can be said of the objective rephrased above, that the aim of environmental offsets “is to ensure that the *particular* adverse environmental impacts are counterbalanced by an environmental gain somewhere else, so that there is no *net* adverse impact on the environment *as a whole*”.²³ The assessment as to whether there will be no net adverse impact on the environment *as a whole* is itself a question that calls for the independence and expertise of the EPA.

7.53 The EPA would therefore be abdicating its functions if it put out of its mind consideration of environmental offsets for the purposes of environmental impact assessment. Leaving the question of offsets entirely to the decision-makers to determine would not be conducive to long term environmental protection.

7.54 Nevertheless, it must be acknowledged that the consideration of environmental offsets does occur at the margins (or interface) of the distinction between the role of the EPA under Part IV of the *EP Act* and the role of the Minister. It is the Minister who, under the provisions of Part IV, is ultimately responsible for resolving conflicts between protection of the environment and competing considerations.²⁴ The role of the EPA, in synthesising all of the relevant information and environmental factors, including information in relation to offsets, is to provide its recommendations based on those *environmental* factors.

7.55 Clearly also there is room (indeed significant room) for differences of opinion in relation to whether offsets are appropriate or environmentally acceptable in a particular case. As acknowledged above, it is entirely possible that the EPA may consider a proposal environmentally unacceptable (and unable to

²³ See [7.12] above.

²⁴ *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; Ex parte Coastal Waters Alliance* (1996) 90 LGERA 136 per Rowland J at 151.

be offset) and so recommend in its report (under s 44) against a proposal being implemented, but for the Minister to reach a different conclusion and decide (under s 45) that the proposal *may* be implemented.

7.56 The EPA should be alive to this possibility in preparing its reports and recommendations under s 44 of the *EP Act*. The question of offsets may arise, even where the EPA concludes to recommend that a proposal may not be implemented. As noted above, in such a case it may be appropriate for the EPA, under s 44(2a) of the *EP Act*, to advise the Minister that if, contrary to its recommendation, the Minister decides that a proposal may be implemented that it should be accompanied by certain conditions as to offsets.

7.57 These considerations lead, in the Review Team's view, to certain recommendations in relation the EPA's offsets policy.

Recommendations in Relations to Offsets Policy

7.58 The *Administrative Procedures 2012*, in clause 13, already make provision for the consideration of offsets as part of the EIA process,²⁵ and provide:

“Where offsets are required for a proposal, they should be considered early in the assessment process to ensure transparency and accountability. Where a proponent refers a proposal and expects that the EPA will assess as an API level of assessment, the proponent should include the relevant information about offsets as part of their referral information (or API document). For a PER level of assessment, the proponent is to recognise the need to address offsets in the ESD. An outline of the significant residual environmental impacts and proposed offsets should be presented in the PER document for public review. The EPA encourages proponents to achieve an overall net benefit to the environment through the application of offsets.”

7.59 As will be apparent from the preceding discussion, the Review Team considers that material of this kind should remain in the revised *Administrative Procedures*.

²⁵ Clause 2 provides that “Environmental offset means an action or actions undertaken to counterbalance environmental impacts from implementation of a proposal. The action(s) are taken after all reasonable mitigation measures have been applied and a significant environmental risk or impact remains”.

- 7.60 Furthermore, the “Procedures Manual” recommended by this report should provide additional guidance of the kind found in EPB 1, in relation to the details about proposed offsets that should be provided by proponents.
- 7.61 Moreover, the requirement for *early* consideration and identification of proposed offsets, as reflected in the *Administrative Procedures 2012* and EPB 1, is not only desirable from an administrative point of view. In the view of the Review Team, it is essential that this information be provided in order for the EPA to be able to discharge its environmental impact assessment function and to assess and consider the particular environmental offsets included as part of a proposal.
- 7.62 In order to be able to consider the environmental issues that arise in relation to a proposed offset (for example, “Is a ‘like for like or better’ environmental outcome even possible?”, or “Will there be no net adverse impact on the environment *as a whole?*”) the EPA must (at least ordinarily) know precisely what environmental offsets are available. It is difficult to envisage circumstances in which those assessments can be made by reference to offsets in the abstract.
- 7.63 These factors suggest that it will generally be inappropriate, as a matter of good decision-making, to defer the identification of offsets until after the proposal has been assessed or approved. Rather, offsets should (at least ordinarily) be identified with specificity in the s 44 report and recommendations themselves. These matters should be emphasised in the procedures relating to offsets.
- 7.64 A second issue relates to where offsets should properly appear in the frameworks recommended in Chapter 6.
- 7.65 In this regard, the Review Team noted that, currently, EAG 8 – “Environmental principles, factors and objectives” refers to offsets as a specific *environmental factor* under the theme of “integrating factors”. Strictly speaking, however, offsets are *not* an environmental factor like the others in

the scheme of EAG 8. This reflected in the way in which the objectives are expressed for this “factor” as opposed to the others. The objectives for the other environmental factors are described in terms of “maintaining” certain states of affairs or, in the case of themes relating to “people”, to “ensuring” certain states of affairs. The objective for offsets, however, is quite different; namely:

“To counterbalance any significant residual environmental impacts or uncertainty through the application of offsets.”²⁶

7.66 In the Review Team’s view, environmental offsets should not be regarded as an environmental factor *at all*, for the purposes of the structure recommended in Chapter 6. Rather, offsets should be regarded as a management option for counterbalancing particular impacts on the environment, which must be focused on the particular factor to which the proposed offset relates.

7.67 For this reason, it is to be expected that the procedural aspects of environmental offsets, such as the material currently contained in the *Administrative Procedures 2012* and EPB 1, would remain in the revised Administrative Procedures and the Procedures Manual.

7.68 There is, however, also a need for the development of additional policy on offsets in relation to the substantive aspects of environmental impact assessment. This is particularly so given that, as discussed above, the consideration of environmental offsets occurs at the margins (or interface) of the distinction between the role of the EPA and the role of the Minister under Part IV of the *EP Act*.

7.69 In this regard, it is noteworthy that, while the WA Offsets Guidelines recognise that environmental offsets are not appropriate for all projects and are not appropriate in all circumstances,²⁷ the Guidelines are silent as to the

²⁶ EAG 8, page 6.

²⁷ WA Offsets Guidelines, page 8.

circumstances in which that may be the case. That is, the WA Offsets Guidelines includes no criteria, discussion or examples at the point in the table above relevant to the circumstances in which the residual impact is environmentally unacceptable and cannot be offset.²⁸

7.70 This is to be contrasted with the previous EPA policy instruments, discussed in the *Roe 8 Case*, which sought to articulate the circumstances in which environmental offsets would *not* be appropriate.

7.71 While the kind of open discretion set out in the WA Offsets Guidelines may be sufficient for the purposes of a whole of Government policy, in relation to the EPA's environmental impact assessment function, it is important that there be greater structure around the circumstances in which offsets may or may not be an environmentally appropriate response to residual significant environmental impacts. Criteria for assessment of that issue might appropriately be included in the second level of the recommended hierarchy addressing the substantive aspects of environmental impact assessment: namely, the "Issues and Impacts" instruments. In that way, the EPA can focus on the different kinds of offsets that may be appropriate in addressing the different environmental factors.

7.72 The Review Team does not suggest, in any way, what those criteria for assessment should be; merely that there *should* be such criteria.

7.73 By providing greater clarity about which offsets may or may not be an *environmentally* appropriate response to residual significant environmental impacts, the EPA will be able to ensure that it remains on the right side of the divide between the role of the EPA and the role of the Minister under Part IV of the *EP Act*.

²⁸ See [7.39] to [7.40] above.

CHAPTER VIII - POLICY DEVELOPMENT AND REVIEW

Introduction

- 8.1 The preceding chapters of this report have largely been concerned with addressing whether the EPA's current framework for policies, guidelines and procedures is appropriate, whether the content of those policies, guidelines and procedures is appropriate for their intended application, and whether they are written in a way that is likely to achieve their intended purpose. For the reasons we have discussed above, the Review Team has concluded that they are not, and has recommended new hierarchical frameworks for the EPA's policy.
- 8.2 The Terms of Reference also ask the Review Team to consider whether the EPA's processes for development of policies, guidelines, and procedures is sound.
- 8.3 The OEPA provided the Review Team with a significant amount of material by way of case studies of policy development and review. The material documenting the development of EAG 13 – "Consideration of the environmental impacts from noise" and the review of EAG 8 – "Environmental Factors and Objectives" was considered in the context of this particular Term of Reference.
- 8.4 However, given the above findings and recommendations concerning the need for wide-scale structural reform of the EPA's policy suite, this chapter provides only general comments as to policy development, without reference to specific examples in the case studies. Rather, we discuss below the general principles that should be addressed in the EPA's future approach to policy development and review.

Stakeholder feedback

- 8.5 Submissions from various stakeholders highlighted, among other things, the following issues in relation to the development and review of EPA policies:

- (a) Some of the documentation is considered to be outdated due to the length of time it has gone without review, and it is “generally a perception in the development industry that only a number of policies are strictly speaking ‘relevant’” (UDIA);
- (b) Documentation often remains in “draft” form for unreasonable periods of time, creating uncertainty for proponents and stakeholders (NELA);
- (c) Where policies are developed in response to an emerging environmental issue or type of development, particularly taking into account the precautionary principle, there needs to be “either a more frequent reconsideration of policy, or the flexibility to amend it” (ECA);¹
- (d) In some instances, policy instruments have been “revoked with little, if any, public notice or consultation and often for reasons that seem implausible” (EDO);² and
- (e) Policy instruments have been developed and issued without adequate stakeholder consultation (the example of EPB 23 was raised by both AMEC and CME).

8.6 The general issues identified above provide a useful framework for considering what processes and procedures might be adopted by the OEPA for the development and review of policies.

Policy development

8.7 Recognition of the need to consider and address the EPA’s practices for development of policies, guidelines and procedures is not new. The “scope”

¹ In this context, ECA also suggested that policy should be adaptive to situations beyond the particular emerging factor or issue.

² The Wilderness Society also remarked on this issue in the context of EPPs, which has been dealt with in Chapter 3.

of the 2012 Review identified the following actions that would be conducted under the heading “Policy development and review methodology”:

“Develop an organised/systematic approach to initiation of policy development including consideration of:

- EPA and Ministerial priorities
- emerging issues
- incoming and current roadblocks in assessments and compliance
- the need and/or problem we are trying to solve and what type of policy will fit the purpose
- the audience we are endeavouring to engage
- prioritisation of policy gaps to identify policies requiring development
- prioritisation of policies requiring review

Develop guidance for a consistent process for how EPA/OEPA develop policy including:

- how to identify the policy gap and its relationship to available resources and priorities;
- an annual policy gap analysis exercise aligned to EPA strategic planning;
- the correct type of policy that should be used to fit each purpose;
- key steps (particularly internal) to follow for the relevant policy type, however this will largely be driven by the purpose of the policy;
- different level of consultation/communication required for policies and which (if any) DMA’s require involvement – based on the purpose of the proposed policy
- systematic way of collecting feedback on drafts or finals requiring review
- a policy maintenance schedule”.³

8.8 The 2012 Review identified that one of the “deliverables” desired as an outcome from the project was a “Policy manual”.⁴ The Review Team requested a copy of the policy manual listed in the deliverables, and was advised that no such document was in fact created⁵.

³ 2012 Review, page 5.

⁴ 2012 Review, page 5.

⁵ See paragraph [4.43] above.

- 8.9 Nonetheless, the actions proposed and deliverables identified in the 2012 Review generally highlight sensible practical initiatives that would assist and guide policy development.⁶ What is missing, however, is a properly articulated framework within which to develop policy material. As discussed previously, a list of policy types does not a framework make.
- 8.10 The documents in the Review Brief entitled “EPA Policy development approvals process” and “EPA Policy development and approvals policy: Guiding Principles” (the “Guiding Principles”) have been described as the key documents that outline the OPEA’s policy development process. The latter states that “These guiding principles are to provide supporting information for the EPA policy development process.”
- 8.11 The underlying theme in the available material highlights that the EPA’s current approach to policy development is to do so on a case-by-case basis in accordance with priorities identified at the time. For instance, the Guiding Principles notes that “the nature of the issue will dictate the type of policy (e.g. EAG, EPB, etc)”.
- 8.12 A case-by-case approach naturally allows for flexibility, which is, in general, desirable. However, the current status of the policy suite demonstrates that without an appropriate and adequate framework, this approach to policy development has resulted in a morass that now must be addressed.

Priority issues

- 8.13 As it is inappropriate for the Review Team to comment on the subject matter of policy instruments, it is sufficient here to touch only briefly upon how the EPA should set priority issues for the development of policy. The need to develop a new policy, or to reconsider and review an existing one, ought at all

⁶ With the exception of adopting an approach to policy development which includes consideration of “Ministerial priorities”, as discussed below.

times be guided by the statutory functions of the EPA and the principles and objectives of the *EP Act*.

- 8.14 In that respect, considerations such as “Ministerial priorities”⁷ and “external drivers (e.g. Ministerial request)”⁸ must be treated with caution. As noted in Chapter 2, the legislative context of the *EP Act* requires the EPA to maintain its independence from the Minister (as is expressly required by s 8) and focus on the protection of the environment through the principles and objectives of the Act. The *EP Act* provides that the Minister may request advice (subsection 17(3)), but ultimately the Minister cannot direct the EPA or determine its agenda.

Consultation

- 8.15 The Guiding Principles provide that the “purpose and intended outcome from the policy will also dictate the level and type of public or stakeholder consultation conducted during the development process”. The document notes that there are various possible levels of stakeholder consultation and that the “Strategic Policy Branch (SPB) should be consulted on determining fit-for-purpose external consultation.”
- 8.16 The feedback from stakeholders set out above highlights the importance of consultation throughout the policy development process. The proper articulation of purpose, audience and scope for policy instruments within the new framework will ultimately provide guidance on the nature of the consultation that will be useful for the development of the various kinds of instruments.
- 8.17 The example of EPB 23 is perhaps a useful discussion point at this juncture. AMEC and CME have expressed concerns about the lack of consultation and difficulties with understanding the application of the instrument in a letter to

⁷ 2012 Review, page 5.

⁸ Guiding Principles, page 1.

the Chairman of the EPA dated 13 January 2016, a copy of which was provided to the Review Team. AMEC and CME consider that the purpose and scope of EPB 23 is unclear, as seen in their view that the application of the instrument “could result in future mining related projects being rejected without consideration of any other scientifically based factors” and the belief that the stated purpose of the instrument “widens the application of EPB No. 23 beyond communicating how the Landforms factor is considered by the EPA during the EIA process”.

- 8.18 The fundamental problem underpinning concerns that EPB 23 lacks clarity, however, is perhaps the policy framework, or lack thereof, in which the instrument sits, rather than any particular issues with consultation during the development of EPB 23.
- 8.19 Again, the solution to address concerns such as these is for the EPA to have a clear and defined framework that will ensure that purpose and scope of policy instruments are both effectively articulated and understood by stakeholders.
- 8.20 In circumstances where an instrument is to set out the substance of a policy position (as opposed to procedural guidance), consultation might include seeking feedback on content from a scientific perspective to ensure accuracy, but not necessarily proponents’ comments on how the instrument would affect their interests.
- 8.21 Policy instruments, like all aspects of the EPA’s activities, ought only to be concerned with the protection of the environment in accordance with the principles and objectives of the *EP Act*, not economic or other considerations. Proponent or practitioner feedback may, however, be useful for material that outlines procedural guidance to ensure that the requirements of the proposals are practically feasible.
- 8.22 Finally, the Review Team notes that different considerations may arise where the purpose for which an instrument or document is published by the EPA

does not relate to the environmental impact assessment process. As noted in the preceding chapters, the statutory functions of the EPA include more general promotion and provision of advice on environmental matters, outside and beyond the scope of Part IV of the *EP Act*.⁹ In those instances, it may not be necessary or appropriate to consult with persons with an interest in the environmental impact assessment process before making the publication. Consultation with other stakeholders may be appropriate in order to make the most of available scientific expertise and knowledge. However, these distinctions merely serve to highlight the necessity to clearly articulate and identify a framework within which instruments issued by the EPA are to be situated.

Practical considerations

8.23 In essence, the EPA needs a “policy on policies”. Returning to the 2012 Review, it would be fruitful to develop the “policy manual” that was anticipated as an outcome of that project to ensure there is adequate “guidance for a consistent process for how EPA/OEPA develop policy”.

8.24 Such a “policy manual” should set out the practical steps and considerations that would be involved in the policy development and review process. Preferably, it should be made publicly available. As mentioned several times in this report, “certainty of process” will ensure that there is confidence in the EPA’s ability to develop and review policies.

8.25 Again, the core priority in the development and review of the EPA’s environmental impact assessment policy suite is the principles and objectives of the *EP Act*.

8.26 In addition to the matters identified in the 2012 Review set out above, the following issues should be addressed in any “policy manual”:

⁹ See, for example, *EP Act*, s 16(b), (c), (e), (g), (h), (i), (j).

- (a) the status of “draft” material, including whether, and the circumstances in which, such material may be made publically available for consultation or other purposes;
- (b) timeframes for finalisation of material ought to be properly confirmed – even if the principle adopted is that timeframes should be set on a case-by-case basis as part of the development of individual instruments, public confidence will be increased if every venture to develop or review policies has clear and identified timeframes and deliverables;
- (c) the requirements for and extent of consultation for each type of policy instrument (based on the purpose and scope articulated in the policy hierarchy);
- (d) the process for reviewing instruments that have been published and adopted and, subsequently, what processes will be followed if instruments are proposed to be amended or withdrawn.

8.27 One additional practical issue which ought to be considered for inclusion in the policy manual is that of the period for which policy instruments will remain in effect. Several of the older Guidance Statements include “sunset clauses”.¹⁰ Given the age of these documents, the basis upon which those

¹⁰ See, for example:

- GS 01 – “Protection of Tropical Arid Zone Mangroves along Pilbara Coastline”, page 13 (5 years from publication in 2001);
- GS 03 – “Separation Distance between Industrial and Sensitive Land Uses”, page 10 (5 years from publication in 2005);
- GS 06 – “Rehabilitation of Terrestrial Ecosystems”, page 37 (5 years from publication in 2006);
- GS 07 – “Protection of the Western Swamp Tortoise Habitat Upper Swan Bullsbrook”, page 17 (5 years from publication in 2006);
- GS 10 – “Natural Areas within System 6 Region and Swan Coastal Plain portion of System 1 region”, page 23 (5 years from publication in 2006);
- GS 41 – “Assessment of Aboriginal Heritage”, page 7 (5 years from publication in 2004);
- GS 49 – “Assessment of Development Proposals in Shark Bay World Heritage Property”, page 9 (5 years from publication in 2000);
- GS 51 – “Terrestrial Flora & Vegetation Surveys for EIA WA”, page 21 (5 years from publication in 2004); and

instruments are still current is unclear. If it is the case that documents will have set terms of currency, then there must be proper processes in place to ensure that they are reviewed before they are due to expire, otherwise lacunae may be produced when they lapse.

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- GS 56 – “Terrestrial Fauna Surveys for EIA in WA”, page 20 (5 years from publication in 2004).

CHAPTER IX – PARTICULAR ASPECTS OF THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

Introduction

9.1 The third of the Terms of Reference is to consider:

“3. processes to ensure [environmental impact assessment] policies, guidelines and procedures are given due consideration during assessment and in the EPA’s reporting, and specifically:

- a. the form and structure of a workflow process for consideration and application of policies, guidelines and procedures which:
 - ensures compliance with the Act
 - ensures compliance with good administrative law and decision-making principles, and
 - produces a written report or recommendation which is legally robust and consistent.
- b. the content of the report and recommendations to the Minister following the assessment of a proposal.”

9.2 In large part, this term of reference has been addressed in the recommendations on policy framework and content in Chapter 6. Adopting a hierarchical policy framework that appropriately reflects the objectives and principles of the *EP Act* should, in and of itself, assist in ensuring that the EPA gives due regard to its policies and guidelines in the course of performing environmental impact assessments.

9.3 Further, the development of a comprehensive Procedures Manual that outlines the process and procedures of environmental impact assessments, which is separate from the substantive factor and objectives aspects of such assessments and other documents not relating to environmental impact assessment, will directly assist in forming and structuring a workflow. It may be expected that this will ensure that the policies, guidelines and procedures dealing with the substantive aspects of the assessment process are considered and given due regard by the EPA.

- 9.4 Most, if not all, of the stakeholders consulted emphasised that they were primarily concerned that there should be certainty in the *process* the EPA will undertake in assessing proposals, rather than they be able to predict with certainty what the EPA’s final recommendation would be. This preference for certainty of process over certainty of outcome is reflected in our recommendation that the EPA’s environmental impact assessment process and Procedures Manual should remain relatively fixed, and that it should, so far as possible, be strictly adhered to.¹
- 9.5 The Review Team, however, received a number of submissions from stakeholders raising particular concerns with the environmental impact assessment process which are deserving of separate attention. These are considered later in this chapter.

Due consideration

- 9.6 After the *Roe 8 Case*, the OEPA implemented procedural requirements to ensure that the EPA’s policy instruments were duly considered as part of the assessment process. The OEPA provided the Review Team with copies of internal templates and spreadsheets listing documents in the policy suite developed to be “checklists” to ensure compliance.
- 9.7 Proponent stakeholders expressed their surprise at receiving this material for the purpose of providing further information to the OEPA where they had proposals currently undergoing assessment. The Review Team supports NELA’s submission on this term of reference that:

“Proponents should be encouraged to assist the EPA in [ensuring the EPA takes into account its relevant policies and guidelines], by providing documentation that demonstrates that relevant policies have been appropriately considered as part of the approvals process. This would expedite the EPA’s assessment process by reducing the EPA’s workload, as well as minimise legal risk.

¹ See [5.40] to [5.47] above.

However, this exercise should be undertaken at a holistic level and should not become a line-by-line compliance approach to avoid administrative law challenges.”

- 9.8 The checklists, as they currently stand, are likely to end up being part of a “tick a box” exercise rather than meaningful engagement with the relevant policies and guidelines. The material also further reflects the problems identified with the policy framework. Simplification of the structure and number of policy and guideline documents will, in turn, simplify the identification of relevant policies and, it may be hoped, reduce or eliminate the need for such exercises.
- 9.9 As an aside, the Review Team notes that the recently developed procedural checklists were instructive in one key aspect of the Review. One of the checklists consisted of an Excel spreadsheet that included three separate worksheets, each categorising the policy instruments a different way:
- (a) The first listed the policy instruments by environmental factor, with a subcategory of “Site specific guidance”.
 - (b) The second listed them by stage of assessment: “referral”; “scoping”; “environmental review”; and “reporting”.
 - (c) The third sorted additional instruments by geographic area: Kimberley; Pilbara; Gascoyne, etc, with two further subcategories.
- 9.10 These checklists highlighted the sheer complexity of the current policy suite.
- 9.11 Further, it was in the course of cross-referencing these lists that the Review Team identified certain policy documents were missing from depictions of the policy suite on the EPA’s website and in other material such as the “Environmental Policy and Guidelines by Factor”² and “Environmental

² Review Brief, Document 7.

Policy by EIA process”³ matrices (as discussed in Chapter 4, particularly at [4.60]-[4.62]).

9.12 We now turn to the various specific issues raised by stakeholders as to procedural or “process” matters.

“Retrospective” change in policy or procedure

9.13 Several stakeholders, particularly those representing proponents, expressed concern with so-called “retrospective” change or introduction of new policy or guidelines while a proposal was under assessment. Proponents were particularly concerned with uncertainty and disruption caused by changes, or the potential for changes, to what they are required to address during the course of the assessment process. In particular, it was submitted that, where a Public Environmental Review level of assessment had been applied to a proposal, any changes to existing policy, or introduction of new policy, which occurred after the environmental scoping document⁴ had been prepared should be excluded from the EPA’s consideration.

9.14 Although the recommendations of this Review regarding the adoption of a policy framework for the processes applicable to the environmental impact assessment process reflect the same desire for certainty evident in the above submission, the suggestion that policy should in effect be frozen as at the date of an environmental scoping document reflects a misunderstanding of the nature of the EPA’s duty under s 44 when it assesses a proposal.

9.15 The EPA must consider and assess a proposal, and make a decision whether or not to recommend that it may be implemented (and, if so, subject to what conditions) having regard to the objectives and principles of the *EP Act*. That assessment cannot be fettered by policies which happened to be in existence

³ Review Brief, Document 8.

⁴ See *Administrative Procedures 2012*, Clause 10.2.3.

at the start of the process, but which have subsequently been superseded, lest the EPA fall into jurisdictional error.⁵

- 9.16 However, this misunderstanding is perhaps understandable given the lack of a coherent framework for the EPA's existing policy instruments. It reflects a failure to distinguish between policies and guidelines prescribing the process and procedure to be followed in the assessment process and those dealing with substantive aspects of environmental policy.
- 9.17 The adoption of the policy framework recommended in Chapter 6 should largely ameliorate proponents' concerns with lack of certainty in the environmental assessment process. In particular, the development of a separate Procedures Manual specifically stipulating the process and procedures applicable during the assessment process will, if it remains fixed and is strictly adhered to, significantly redress any concerns regarding unexpected changes to the process to be followed after an assessment has commenced.
- 9.18 On the other hand, in respect of any policy concerning substantive aspects of environmental impact assessment policy, it is incongruous with the EPA's duty to assess and report under s 44 of the *EP Act* to suggest that any change to a substantive environmental consideration reflected in an EPA policy (for example a development or change in scientific understanding) should not be considered and given due regard by the EPA in the course of assessing a proposal, even if it was not reflected in an environmental scoping document.
- 9.19 However, if, as recommended in Chapter 6, the EPA's policy suite for the substantive issues arising in the assessment process is reformulated to reflect a structured, hierarchical framework of documents addressing issues at differing levels of abstraction then, it would be hoped, the need to amend or introduce new policy documents will be significantly reduced. Proponents

⁵ *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

may thus have increased confidence that there should be markedly fewer, if not no, unexpected changes to the substantive issues they must address during the assessment process.

- 9.20 Further, adopting policies and procedures stipulating timeframes within which the assessment process will be conducted will also serve to reduce the likelihood that there will be unexpected changes in the substantive matters to be addressed during the assessment process, and in so doing also serve to increase proponents' confidence in the process.

Minutes of Meetings

- 9.21 The Review Team received a submission expressing concern with the adequacy and timeliness in the production of minutes of the EPA. Reference was made to Regulation 2B(2) of the *Environmental Protection Regulations 1987* (WA), which provides that minutes are to be available 6 months after the day on which the minute was made.
- 9.22 At the same time, s 100 of the *EP Act* requires that any appeal against the content of, or any recommendation in, a report prepared by the EPA under s 44 must be lodged within 14 days of the publication of the EPA's report. Further, any application to the Supreme Court for prerogative relief seeking judicial relief in respect of a report or recommendation of the EPA must be commenced within 6 months of the decision being made (or the applicant becoming aware of it).⁶ The availability of accurate minutes of meetings may be critical to the exercise of these rights of appeal and review.
- 9.23 The public provision of minutes of the EPA's deliberations in a timely fashion is also likely to increase public confidence in the EPA's environmental assessment process. It may be hoped that the adoption of a restructured policy framework and Procedures Manual would assist in simplifying that process and expedite the production of minutes. It is not apparent why Regulation

⁶ *Rules of the Supreme Court 1971* (WA), O 56 r 2(4).

2B(2) of the *Environmental Protection Regulations 1987* (WA) provides for the publication of minutes more than 6 months after they were made, in circumstances where the EPA performs statutory functions and duties which are subject, in the normal way, to scrutiny by judicial review. The Review Team recommends that consideration be given to amendment of Regulation 2B(2) to provide for earlier release of minutes of EPA deliberations.

“API Category B” level of assessment

9.24 Finally, several submissions were made behalf of proponents criticising the “API Category B” level of assessment for which clause 10.1.4 of the *Administrative Procedures 2012* provides.

9.25 In essence, some proponents were concerned that the EPA may be exceeding its power under the *EP Act* by seemingly rejecting, out of hand, proposals without due consideration.

9.26 Ultimately, as s 39(1)(b) of the *EP Act* provides, it is for the EPA to decide what level of assessment should apply to any proposal it decides to assess under Part IV. That provision grants to the EPA a wide discretion to determine the level of assessment for a particular proposal. We note that, pursuant to s 39A, it is for the EPA to decide whether or not to assess a proposal. If it decides not to, then, pursuant to s 39B(7), it may nevertheless give advice and make recommendations on the environmental aspects of the proposal to the proponent or any other relevant person or authority.⁷

9.27 If the EPA decides to assess a proposal, however, then it assumes a statutory duty to *actually assess* the proposal, and any decision not to recommend implementation of a proposal that did not follow from an assessment of the proposal may be vitiated by jurisdictional error. That is, it is clear that the EPA cannot merely dismiss a proposal out of hand – it must decide either to assess

⁷ See, also, *Administrative Procedures 2012*, clause 8.2.

or not to assess the proposal, and, if it decides to assess, then it must actually assess.

9.28 In that sense the EPA would be exceeding its power under the *EP Act* if it rejected out of hand, without due consideration, proposals it had decided to assess.

9.29 Nevertheless, it is not apparent that the procedure for “API Category B” in clause 10.1.4 of the *Administrative Procedures 2012* properly meets that description, or would fall foul of such jurisdictional error. In particular, clause 10.1.4 of the *Administrative Procedures 2012* starts with the premise:

“In some instances it is possible for the EPA *to make a judgement* that the proposal that the proposal is fundamentally and fatally flawed, based on the proponent’s referral information, specialist advice sought by the EPA, the EPA’s own knowledge and experience in dealing with similar environmental risks and impacts, and the application of the precautionary principle.”
[Emphasis added.]

9.30 That is, API Category B is premised on the EPA forming a judgment (thus assessing the proposal) to conclude that the proposal is fundamentally and fatally flawed. Thus, provided that the EPA actually considers, and therefore assesses, a proposal to reach such a conclusion, it is not immediately apparent that an assessment pursuant to the currently prescribed API Category B level of assessment must necessarily be vitiated by jurisdictional error.

9.31 For these reasons, the Review Team sees no legal reason why the API Category B level of assessment should be removed.

