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**The Western Australian Environmental Protection Authority (EPA)  
: Its Structure, Functions and Performance 1971-1996**

Vincent Cusack  
*Edith Cowan University*

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**The Western Australian Environmental Protection Authority (EPA):  
Its Structure, Functions and Performance 1971-1996.**

by

**Vincent Cusack**

*A thesis submitted in partial fulfilment of the requirements for the  
award of*

*Bachelor of Arts (Honours) (Politics and Government)*

*Faculty of Community Services, Education and Social Science*

*Edith Cowan University (October, 1999).*

## USE OF THESIS

The Use of Thesis statement is not included in this version of the thesis.

## ABSTRACT

This study examines the effectiveness of the Western Australian Environmental Protection Authority (EPA), from its inception in 1971 to 1996. While environmental concerns have risen considerably in recent times, environmental awareness can be traced back to early historical beginnings. Yet, despite this initial awareness it took some time before environmental problems permeated the public consciousness, to occupy the political agenda. However, in the early 1970s, governments throughout the First World responded to research and heightened awareness of environmental concerns, with specific legislation to protect the environment. A common feature of the legislation, was the provision for a main administrative body with designated powers and responsibilities to assist in environmental management. Hence, this study undertakes a review of the environmental protection legislation in Western Australia, with specific concentration upon the EPA. This is done by evaluating the original *Environmental Protection Act 1971* (EP Act), and its successor the 1986 EP Act. In addition, the significance of two sets of amendments to the main legislation, in 1980 and 1993, have been explored. This study found that the 1986 EP Act was the strongest environmental legislation enacted in Western Australia. It increased the power and influence of the EPA, which enhanced its ability to provide adequate environmental advice to government. However, the power and influence of the EPA appear to have been, restricted by the 1993 amendments. Moreover, a common trend emerged over the period studied, which indicated an ideological difference between the two major political parties concerning environmental legislation and the strength and independence of the EPA. Finally, the need for governments to adopt a long-term approach to environmental management is recommended.

## DECLARATION

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any institution of higher education; and to the best of my knowledge and belief it does not contain any material previously written by another person except where due reference is made in the text.

Signature



Date 29-10-99

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## **ABBREVIATIONS**

<b>AAPC</b>	<b>Australian Association of Planning Consultants</b>
<b>the Authority</b>	<b>Environmental Protection Authority</b>
<b>CEO</b>	<b>Chief Executive Officer</b>
<b>CTRC</b>	<b>Conservation Through Reserves Committee</b>
<b>DCE</b>	<b>Department of Conservation and Environment</b>
<b>DEP</b>	<b>Department of Environmental Protection</b>
<b>EIA</b>	<b>Environmental Impact Assessment</b>
<b>EIS</b>	<b>Environmental Impact Statement</b>
<b>EPA</b>	<b>Environmental Protection Authority</b>
<b>EP Act</b>	<b>Environmental Protection Act</b>
<b>EPP</b>	<b>Environmental Protection Policy</b>
<b>ERMP</b>	<b>Environmental Review and Management Programme</b>
<b>MLA</b>	<b>Member of Legislative Assembly</b>
<b>SIU</b>	<b>Social Impact Unit</b>
<b>WAPD</b>	<b>Western Australia Parliamentary Debates</b>



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## Chapter One

### An Historical Background to the rise of Environmentalism.

Environmentalism is considered by many as a relatively recent addition to modern political thought. Indeed, this thesis will focus upon a modern institution namely the Western Australian Environmental Protection Authority (EPA), which was established in 1971. The growth of environmental problems in recent times has intensified the challenge for proponents to provide long term solutions. As a result contemporary environmental groups often fail to acknowledge the efforts made by previous generations to address similar problems (Papadakis, 1993, p. 45). While it is true that the extent of environmental issues has risen considerably in the past few decades, environmental concerns have a much longer history. In Greece for example the first signs of widespread misuse of the environment emerged around 650 BC as population rose and settlements expanded. Concerns with land degradation from overgrazing and removal of trees, were expressed by ancient Greek writers such as Xenophon and Aristotle, and even more graphically by Plato in *Critias* (Ponting, 1991, p. 76). Similar problems of soil erosion were identified in Italy a few centuries later as population pressure increased the demand for land and timber. Moreover, continuous examples of environmental destruction were documented at various stages throughout history. However, despite these early warnings there was little evidence of universal public concern until well after the industrial revolution.

Environmental concerns increased following widespread social and economic change brought by the industrial revolution in Europe and America. The most profound change was a dramatic expansion in the production of goods. Consequently, labour was

concentrated in urban areas placing even greater demands on resources especially timber and later charcoal (Ponting, 1991, p. 277). At first, environmental awareness was confined to the countries that experienced the most rapid form of industrialisation. Hence, to a large extent the environmental movement was a reaction to the threats posed to nature from the process of industrialisation (Heywood, 1992, p. 243). "Among the most notable early groups concerned with environmental protection were the Society for the Protection of Nature formed in 1854 in France, the Commons Open Spaces and Footpaths Preservation Society founded in 1865 in Britain, and the Sierra Club established in 1892 in the United States of America" (Papadakis, 1993, p. 46). While these groups had some success influencing legislation most notably for the setting aside of national parks, it was some time before the environment became a major issue on the political agenda.

The prevailing view among political thinkers before the 1960s was that nature could be used purely as an "economic resource" to meet human demands, without much thought to the limits of natural resources. This view stemmed from the anthropocentric mechanistic version of reality formulated by Rene Descartes (Dobson, 1995, p. 40). Under this doctrine the natural world is theorised as a machine with no intrinsic value. This encouraged a human relationship of domination and control of nature (Merchant, 1993, p. 276). While the major political ideologies diverged on many issues the belief in anthropocentrism was central to all. As a result, the holders of the main political ideologies were dedicated to the same goal of greater material affluence, for the benefit of humans (Heywood, 1992, p. 245). The main contention, however, was how this could be accomplished. Hence, to a large extent political debate was reduced to and revolved around the best means of achieving the goal of economic growth.

The pursuit of economic growth was central to shaping the ideas, beliefs and values of humans over a number of decades and became the dominant social paradigm. This has been referred to as the “exclusionist paradigm” because it excludes human beings from the laws of nature (Porter and Brown, 1991, p. 27). The exclusionist paradigm is based on the assumptions of neoclassical economics and the belief in the unfettered free market. According to this view, humans have the capacity to use technology to compensate for scarce resources with greater efficiency and innovation. The most frequently used example to highlight this claim was in the area of food production. Crop sizes have significantly increased with the use of insecticides and chemical fertilisers. Moreover, food life was extended with the use of processing, canning, freeze-drying, additives and in some cases genetic engineering (Heywood, 1992, p. 253). Since proponents of this view were primarily concerned with material wealth, and nature was not considered a constraining factor, the exclusionist paradigm did not consider the environment relevant to economic growth (Porter and Brown, 1991, p. 27).

However, the dominant exclusionist paradigm came under challenge from the 1960s onwards. A series of events including the extent of destruction caused by nuclear weapons in World War Two, and the potential for even more devastation during the cold war period, raised a great deal of concern. Environmental awareness was heightened with the release in 1962 of *Silent Spring* by Rachel Carson. The book was aimed at a wider public audience and designed to shock people into action against the dangers of chemical pesticides (Mc Cormick, 1995, p. 67). The strategy worked, and the public came to realise for the first time that technology could not only improve production and market forces, but also could inflict unlimited environmental damage. In addition the work of Paul Ehrlich *The Population Bomb* (1968) and Garrett Hardin

*Tragedy of the Commons* (1968) raised the spectre of the debate by linking environmental concerns to overpopulation (Vincent, 1992, p. 211). The issue of exponential population growth was first raised by Thomas Malthus in 1798. However, his assertions were dismissed because he failed to anticipate the capacity for technology to enhance food production. This apparent win for technology over nature may help explain the complacency of political leaders in addressing environmental issues.

Nevertheless, the environmental argument was extended by the Club of Rome *Limits to Growth Thesis* in 1974. The researchers combined five trends of global environmental concerns in their study, namely accelerating industrialisation, rapid population growth, widespread malnutrition, depletion of non-renewable resources and a deteriorating environment (Dobson, 1995, p.73). While there were limitations to the study, the main principles and conclusions were adopted by and advanced the cause of environmentalists throughout the world. The primary conclusion drawn from the report was that technology merely shifted the problem around and could result in larger environmental problems such as pollution. Hence, the opposing view to the exclusionist paradigm was that technology may extend the period of industrial and population growth, but cannot alter the fact that the earth's carrying capacity is finite (Dobson, 1995, p. 75). The *Limits to Growth Thesis* was followed by a constant stream of environmental literature throughout the 1970s that enhanced ecological awareness on a global scale.

This awareness led to a growing realisation that the exponential population growth combined with demands for a higher standard of living in the First World placed enormous pressure on the environment. Consequently, environmental concern became

more acute and radical, because of the fear that the unfettered exploitation of nature could threaten the future existence of humans, and the planet itself (Heywood, 1992, p. 244). This resulted in a proliferation of environmental groups around the world challenging the existing ideologies and demanding government action. In the United States for example, a change in priority saw the creation of new organisations such as the Environmental Defence Fund, and Friends of the Earth (Mc Cormick, 1995, p. 171). Friends of the Earth was established by David Brower in 1969 following a split with the earlier formed Sierra Club. His philosophy was more radical than the previous interest groups, but was widely adopted by the larger more pro-active groups such as Greenpeace, which was formed in Canada in 1972. One of the strategies central to the new environmental lobby groups was a vigorous campaigning effort designed to draw maximum public attention to the environmental cause. While these groups varied in size and influence throughout the First World, they all adopted similar intensive lobbying tactics.

In Australia, the response to environmental awareness corresponded with events in America, Canada and various other First World countries. As a result, a number of voluntary environmental and conservation groups were established in Australia during the 1960s. In 1965 the first national organisation the Australian Conservation Foundation was formed (Papadakis, 1993, p. 105). Among the numerous voluntary conservation groups established around the same time were the National Trust of Australia (NSW), the Civic Trust of South Australia and the Conservation Council of Victoria. In Western Australia the Nature Conservation Council of WA was formed in 1967, and is still actively campaigning on a wide range of environmental issues (Churchward, 1991, p. 33). Surprisingly, support for environmental groups did not

transfer into the creation of specific "Green" political parties, until the early 1990s in Australia. This contrasted with trends in other parts of the world such as Western Europe. For example, the first national green party in Europe was established in Britain in 1973 with limited electoral success, although the electoral system in Britain does not favour smaller parties (Mc Cormick, 1995, p. 208). On the other hand, the German green party was not formed until 1979, but achieved notable electoral success in 1983 having secured 27 seats in the Bundestag.

### **Governmental Statutory Response to Environmental Concerns.**

One possible explanation for the overall lack of green political party success was the ability of the major parties to incorporate and respond to rising environmental awareness during the 1970s (Mc Cormick, 1995, p. 155). As a result, governments throughout the First World developed similar policies to address environmental concerns. The preferred option in providing environmental protection was by public consultation backed up with strong statutory powers (Grinlinton, 1990, p. 74). The common law was deemed insufficiently suited to cope with the growing number of environmental issues, as it mainly provides protection for private individual rights, rather than matters of universal public concern (Bates, 1995, p. 8). Hence, there was an increase in legislation throughout the First World, designed specifically to manage environmental issues. However, once committed to legislation, governments had to balance the conflicting demands between environmental protection and economic development in a diminishing policy space (Kellow and Niemeyer, 1999, p. 206).

Despite the vast difference between First World countries, the structure of the legislation was remarkably similar, with the creation of at least one administrative body



and the specification of its powers, functions and responsibilities (Hollick, 1985, p. 116). Hence, the first Department of the Environment was created in Britain in 1970, although it was given limited powers and responsibilities. In America the National Environmental Policy Act was enacted on 1 January 1970, which allowed for the creation of the Environmental Protection Agency later that year (Mc Cormick, 1995, p. 167). Similarly, Japan responded to public pressure for pollution control measures by establishing a national Environment Agency in July 1971 (O'Brien, 1978, p. 41). In Australia a Federal Office for the Environment was set up by Prime Minister John Gorton in 1971, but it received insufficient resources and was therefore inadequate. Moreover, under a Federal system of governance in Australia, historically, the responsibility for environmental protection lay with State governments (Bates, 1995, p. 76). Consequently, in New South Wales a State Pollution Control Commission was created in 1971, and in Victoria a Ministry for Conservation was formed in 1973 (Papadakis, 1993, p. 107).

In Western Australia, the first legislation to protect the environment the Physical Environmental Protection Act was introduced into Parliament by the Liberal-Country Party Government. Although it received Royal assent on November 30, 1970 it was never proclaimed and remained inoperative. One explanation given for the delay, was that the person chosen to head the environmental body, Dr Brian O' Brien, was not ready to take up his position (WAPD, Thursday 7 October 1971, p. 1948). Subsequently, the Brand Government was defeated at the election in 1971, and the new Labor Government decided to bring in tougher legislation with stronger "teeth" (O' Brien, 1978, p. 43). The main administrative body the Environmental Protection Authority (EPA) was formed as part of the *Environmental Protection Act 1971*, which became

operative by proclamation in the Government Gazette on December 17, 1971. The three inaugural members of the EPA were Dr Brian O' Brien, a Professor of Physics and Space Science, who was appointed chairman, eminent barrister Philip Adams was appointed deputy chairman and Professor of Zoology Bert Main (O' Brien, 1991, p. 5).

The EPA was given responsibility for coordinating all activities necessary to protect, restore or improve the environment in Western Australia (WAPD, 23 September 1971, p. 1738). The EPA however, noted in its first report that it would have to develop principles on a case by case basis, as it could not look to preceding environmental bodies for guidance. It intended to achieve this, mindful of the need to balance planning for the future, with the practical and economic requirements of the present generation (EPA Annual Report, 1972, p. 5). The EPA expressed its profound belief in the importance of public awareness and participation in environmental management. It looked to the experience overseas that detailed the enormous expense required to rectify environmental degradation. Hence, the Authority developed a number of principles with the three main ones being,

- i) An attempt to strike a balance between conservation and development.
- ii) The importance of informed public participation in environmental management, and
- iii) Environmental correction is much more expensive than environmental protection.

The EPA performs a number of functions in pursuing environmental protection. However, its three main principles are central to all of its deliberations, with its major role being to give independent advice to Government. This ensures, environmental

issues, are taken into account by the Minister, when considering approval for major development proposals.

### **Significance of the Study.**

The objective of the *Environmental Protection Act* 1971, and its 1986 successor was clearly to protect the environment. This was apparent from the preliminary statements to both Acts, and more explicitly stated under s15 of the 1986 EP Act, which reads

“ it is the objective of the Authority to use its best endeavours-

(a) to protect the environment; and

(b) to prevent control and abate pollution”.

The effectiveness of any environmental legislation however, depends on a number of factors including the quality of drafting of the Act, the powers given to the administrative body and the degree of direct and indirect political control (Hollick, 1985, p. 116). While the EPA is solely an advisory body its value resides in its complete independence from government guaranteed by the Act, which clearly states that the Authority cannot be directed by the Minister. Hence, for the Authority to remain effective and credible it must be able to provide free independent fearless advice on matters concerning the environment. This of course requires the allocation of sufficient resources necessary to carry out its functions and responsibilities. This degree of autonomy is balanced by the Minister not having to accept the Authority's advice, with the final decision taken by the elected Government of the day (Johnson, 1988, p. 142).

The EPA is an independent statutory authority and therefore relies on the Act to determine the range and depth of its activities to provide adequate environmental protection (Conacher, 1980, p. 53). Changes to the Environmental Protection Act can

alter the structure and function of the EPA. Hence the significance of amendments to the Act, is that changes can impact on the EPA's powers and responsibilities. A number of additional political factors can also impact on the activities of the EPA. These include the composition of the Authority, which the Government can attempt to influence by selecting or restricting members of various persuasion (Hollick, 1985, p. 122). The EPA's funding is provided entirely by government, which can have a direct impact on the ability of the Authority to adequately perform its duties.

The significance of this study is that it examines the main environmental legislation that the EPA derives its powers and responsibilities from. It explores the main achievements of the EPA from its inception in 1971 until 1996, the year of the State election. The study examines the likely political motives underpinning legislative changes to the environmental protection Act, and seeks to establish ideological trends guiding the two main parties. The independence of the EPA is considered with an emphasis on the relationship between the Department and the Authority, and the degree of direct and indirect, Ministerial control. However, it should be noted that the study does not incorporate the controversy surrounding the Regional Forest Agreement (RFA). This agreement, between the Commonwealth and the Western Australian Government was signed in May 1999, but was later modified by the State Government after considerable public pressure.

#### **Problem Under Investigation.**

This thesis focuses on the Western Australian Environmental Protection Authority (EPA) which was given broad statutory powers to protect and enhance the environment (EPA Annual Report, 1972, p. 9). Its main role however, is to provide expert advice and

recommendations to government on environmental issues. While the EPA acts purely in an advisory capacity, its advice is made public which ensures openness and accountability (Main, 1991, p. 23). This makes it more difficult for the Government to ignore EPA recommendations, as it would have to make public its reasons for doing so. Therefore, a strong Authority can have a significant influence on government decision making concerning environmental issues. This study undertakes an evaluation of the *Environmental Protection Act 1971*, the 1980 amendments, the new 1986 Act, and the 1993 amendments. It seeks to determine

- i) whether the legislative changes have significantly altered the structure and function of the EPA, and
- ii) whether these changes have advanced or impaired the EPA's capacity to provide adequate environmental advice.

Hence, the task for this research is to establish if the legislative changes have strengthened or weakened the Act and subsequently the EPA. At the beginning of this chapter the significant rise of environmentalism was canvassed. Chapter two will focus upon the original *Environmental Protection Act 1971*, as well as the rationale for the important 1980 amendments to the same Act. Chapter three undertakes an evaluation of the new 1986 EP Act, and highlights some of the improvements and the enhanced role for the EPA. Chapter four explores the justification behind the 1993 amendments, and the impact of the changes on the EPA. Finally, the main conclusions are presented in chapter five, with an overall discussion, and implications of the findings from this study.

## Chapter Two

### The *Environmental Protection Act 1971*: Its strengths and weaknesses.

The Tonkin Labor Government pursued a raft of progressive legislation following a return to power on 3 May 1971, after 20 years of conservative rule (Kellow and Niemeyer, 1999, p. 211). This included the introduction of the *Environmental Protection Act 1971* (EP Act), which was enacted in response to increasing environmental awareness in Western Australia. The purpose of the legislation was to create an administrative body with the required powers and authority to protect the environment (WAPD, 23 September 1971, 1737). As a result, the Environmental Protection Authority (EPA) was formed as the main administrative body, and given widespread powers to protect and enhance the environment. These ranged from “the specification of standards and criteria to the publication of model by-laws for adoption by local authorities” (WAPD, 23 September 1971, p. 1738). The intention of the Act as stated in the preliminary statement was “for the prevention and control of environmental pollution and for the protection and enhancement of the environment”(EP Act, 1971). The definition of “environment” contained in the Act related to “the physical factors prevailing in that State...” Hence, the Act was restricted by its narrow definition of the environment to mean a purely ‘physical environment’, rather than a broader definition that included the relationship between humans and their surroundings (Conacher, 1980, p. 52).

The broad objectives of the legislation were set out by Premier Tonkin during his second reading speech (WAPD, 23 September 1971, p. 1737), and were restated in the EPA’s first Annual Report (1972, p. 8) as follows;

- Enable positive action to be taken to control environmental degradation.
- Establish environmental protection policies that will set acceptable standards now and for the future.
- Invoke public opinion where necessary, and
- Provide avenues of appeal in appropriate cases.

However, there were a number of deficiencies in the 1971 Act that reduced the power and influence of the EPA. The most obvious were the ambiguity surrounding the requirements for environmental protection policies (EPPs), and the inadequate definition of pollution contained in the Act. Consequently, the EPA's role was restricted to providing independent advice to the Minister (Main, 1988, p. 135). Indeed, Hollick (1985, p. 116) has argued that there are many reasons why the practical implementation of environmental management may vary significantly from the intent of the legislation. These include weaknesses in drafting the Act, the powers given to the administrative body, the interpretation of its role and responsibility, and the degree of direct and indirect political control. While providing innovative legislation for its time the 1971 EP Act was weakened by a combination of these influences.

### **Structure of the Environmental Protection Bodies.**

In addition to the EPA, the legislation provided for a fourteen member Environmental Protection Council to assist and provide specialist advice to the Authority. In order to delineate between roles the Authority was the executive body while the Council was an advisory body. However, the Council was not intended to be subservient to the Authority and could submit its recommendations directly to the Minister (WAPD, 23 September 1971, p. 1738). An Environmental Appeal Board was established to hear appeals against a proposed policy prior to its proclamation. Finally, the Department of

Environmental Protection was set up within the Public Service, under the direction of the EPA (WAPD, 23 September 1971, p. 1739). The role of the Department was to provide research, investigative and administrative support to the Authority. It acted as a first point of contact for general inquiries and could resolve problems not requiring executive consideration (EPA Annual Report, 1972, p. 11). Under the 1971 EP Act, the Chairman of the EPA was also the Director of the Department. This was to become the most contentious part of the legislation with the major parties taking ideologically opposed positions on the issue of the respective heads of the Department and the EPA.

The Coalition Opposition, while supporting the need for environmental legislation, expressed concern with the cumbersome organisational aspects of the Bill and questioned the need for all the environmental bodies. It preferred a more educational approach to environmental protection and opposed an all powerful Authority that could delay government policy and subsequently industrial development (WAPD, 7 October 1971, p. 1984). On the other hand, the Labor Government specifically designed the legislation to balance the powers and independence of the EPA, with the responsibility of government. This was achieved by retaining Cabinet's constitutional obligations, with the Authority fulfilling the role of environmental watchdog (WAPD, 23 September 1971, p. 1739). Hence the elected government of the day had the benefit of independent advice, but ultimately made the final decision on environmental issues. These decisions can be made more difficult with the publication of the Authority's findings. However the 1971 EP Act, failed to specifically require the Authority to publish its recommendations although it could, if it so chose. This was a significant weakness in the legislation, which reduced the power of the EPA (Conacher, 1980, p. 54). Consequently, the extent of the Authority's influence in environmental management



under the original legislation largely depended on the commitment of the Government to accept and implementing its advice.

The commitment of the Tonkin Labor Government to its own legislation and the new environmental body was tested early with two controversial projects. Parliament had passed an Agreement Act for setting up the Pacminex alumina refinery in the Upper Swan region, subject to an EPA environmental report. The EPA recommended against proposals for the refinery because of concerns over air pollution, and the danger of impurities leaking into the underground water system (O' Brien, 1978, p. 44). The Government accepted the EPA's advice and arrangements had to be made for a new site. This was an important landmark decision by the EPA, as the Gnangara Mound has subsequently been relied upon to supply part of Perth's domestic water. However, many within industry and government bureaucracies were taken completely by surprise, and had to come to terms with a new environmental body that Premier Tonkin promised would have "teeth" (WAPD, 23 September 1971, p. 1739). Moreover, the Government's decision to accept the EPA recommendation caused disquiet within its own ranks, as the refinery would have contributed 190 million dollars to the economy. In particular, it denied the new, Minister for Development and Decentralisation, Herbert Graham an early industrial development trophy (*The West Australian*, 20 October, 1972, p. 20).

Another controversial issue that arose early in the life of the EPA was the so called Fitzgerald River Reserve. This was a C class Reserve in the South West where a mining company wanted to explore for coal. Conservationists, however, vehemently opposed the granting of exploration licences in the belief that extensive open-cut mining would be permitted if the proposition proved viable. To resolve the issue, the EPA went

against standard procedure and recommended that public money be spent on drilling, to determine the viability of mining coal reserves (O'Brien, 1991, p. 9). The Government accepted the recommendation and the resulting coal deposit was much lower than expected. The consequence of this decision was the loss of investment interest by the mining company. Moreover, the Government later accepted an EPA recommendation that the reserve be upgraded to a Class A national park, which required an Act of Parliament to sanction future mining in that area of the South West (EPA Annual Report, 1973, p. 31). Despite widespread criticism, the EPA showed within months the beneficial impact of its recommendations upon future generations.

These achievements were backed up with the Authority's profound belief in the importance of public awareness and participation in environmental management. This ensured openness and accountability, which led to increased public knowledge on environmental issues (Main, 1991, p. 23). The role of the public is an integral part of environmental protection in Western Australia and was clearly set out in the 1971 EP Act. As a result, the EPA established a Committee for Understanding the Environment, made up from a group of private citizens to ensure public participation. One of its most notable initiatives was the setting up of a library in the Department of Environmental Protection. This provided access to the public and an important avenue for those requiring specific research material (EPA Annual Report, 1973, p. 10). Hence one of the EPA's main early achievements was its continuous contribution to greater public awareness in environmental management.

Another significant achievement by the EPA was its contribution to the preservation of large areas of reserves in Western Australia. The EPA at its very first meeting set up the

Conservation Through Reserves Committee (CTRC) whose task was to determine what areas of the State, should be set aside for National Parks and Nature Reserves. It divided the State into 12 parts or systems where it could concentrate on land utilisation within that area (O' Brien, 1991, p. 9). The important work of the CTRC can be examined in detail through its publications in the Red and Green Books, but can also be enjoyed by current and future generations in a whole range of leisure activities, and aesthetic qualities that could easily have been lost through development (Mulcahy, 1991, p. 67). This was a considerable study that extended over ten years, and the EPA decided from the outset to access the most difficult and contentious area surrounding Perth and Bunbury, known as Systems 6 last. The Authority reported in 1977 that significant progress was occurring with the Coalition Government having accepted 275 recommendations by the CTRC, for ten of the twelve systems (EPA Annual Report, 1976-77, p. 13). There were delays however, in implementing some of the Red Book recommendations because of disputes involving mining boundaries. However, the most comprehensive land-use study ever undertaken in Western Australia was completed in 1983, with the final CTRC recommendation endorsed by the Labor Government in 1984.

#### **Deficiencies in the *Environmental Protection Act 1971*.**

Notwithstanding these early achievements there were a number of reasons why the Authority's powers and influence had been restricted. This was evident for example in the area of formulating environmental protection policies (EPPs) for the State, which according to Premier Tonkin (WAPD, 23 September 1971, p. 1738) was one of the most important functions of the EPA. However despite the intention of the legislation no EPPs were prepared by the EPA under the 1971 EP Act. This enterprise did not

commence until it was replaced with the *Environmental Protection Act 1986* (Cox, 1994, p. 307). This was partly due to a weakness in drafting which stipulated under Section 35 and 36 that all policy proposals must be advertised in three issues of a daily newspaper and the Government Gazette. This was interpreted to mean that the entire policy proposal must be published. Surprisingly, this view was never challenged by the Authority (Hollick, 1985, p. 118, 120). Consequently, the EPA missed an opportunity to establish a more direct role for itself in environmental management by not initiating draft EPPs in the early years. Further deficiencies in the 1971 Act can be highlighted with the legislation failing to provide the Authority with the necessary powers to address a significant environmental issue such as salinity.

In 1973 the EPA raised concerns about the possibility of increased salinity, from the clearing of vegetation in agricultural and mining regions (EPA Annual Report, 1973-74, p. 16). Salinity is caused by removing deep-rooted perennial, native vegetation which draws on underground water supplies, keeping levels down and preventing salt from rising to the surface. In 1974 the Wellington Dam reservoir in the South West was becoming salty, and the EPA was asked by the relevant water authorities to impose land clearing bans in the major catchments and surrounding areas. However, "the Authority had no power to act because salinity caused by clearing land did not fall under the definition of pollution", contained in the Act (Main, 1991, p. 21). Instead the EPA recommended that Parliament consider legislation to control land clearing (EPA Annual Report, 1974-75, p. 15). Despite some restrictions placed on land clearing for water catchments, successive governments failed to grasp the extent of the salinity problem throughout the State and did not respond with adequate legislation. The extent of the problem was highlighted in the 1998 State of the Environment Report, which placed

salinity among Western Australia's most significant environmental issue requiring enormous expense to resolve. Yet despite EPA concerns in 1973, and subsequently, land clearing continued on a massive scale until the early 1990s. The emergence of the salinity problem illustrated the lack of EPA power and influence on such an important environmental issue in Western Australia.

The 1971 EP Act provided the EPA with power to recommend restriction or cessation of activities causing pollution, with resulting penalties for convictions. However, the EPA were again restricted by a major flaw in the Act which failed specifically to express pollution as an offence (Hollick, 1985, p. 117). This deficiency in the legislation may have contributed to the EPA's reluctance to pursue prosecutions. Moreover, the Act provided the administrative body with discretionary powers rather than specific duties. This allowed the EPA to ignore certain aspects of the Act and shape the legislation to suit its particular brand of philosophy (Hollick, 1985, p. 119). For example the EPA acknowledged it could not look to guiding precedents, and from the outset made a conscious decision to adopt a collaborative informative approach rather than a regulatory approach to pollution control (EPA Annual Report, 1972, p. 9). Hence a weakness in drafting combined with the Authority's interpretation of the legislation has significantly reduced the power and influence of the EPA.

### **An Evolving Approach to Environmental Impact Procedures.**

While in some cases the EPA chose to ignore or interpret the legislation in a narrow sense, in others it had been forced to apply a much broader interpretation to give it a greater influence in environmental management. This was evident with the evolving approach to environmental impact assessment (EIA) procedures, which were adopted

much later in Western Australia than in the other States. This delay was largely influenced by the philosophy of the EPA, under the direction of its Chairman Dr Brian O' Brien (Fowler, 1982, p. 65). In the early years the EPA opposed the need for a highly formalised requirement for each development proposal and preferred an *ad hoc* approach. For example, in 1973 the EPA warned against elevating environmental impact statements (EIS) as a cure for all environmental problems, and suggested they were just another tool in the complex area of environmental management (EPA Annual Report, 1973, p. 5; O' Brien, 1976, p. 265).

However, political pressure was mounting on the State Government, with the possibility of mandatory requirements of EIS for projects involving Commonwealth funds and constitutional powers. This resulted in an agreement in 1977 between the Federal and Western Australian State Government, for joint arrangements on environmental impact assessment (Conacher, 1980, p. 51; EPA, Annual Report, 1976-77, p. 19). This evolution of events required the Authority to change its attitude on impact assessment, yet there was no specific reference to EIA in the 1971 EP Act. Hence the EPA in this instance had to apply a wider interpretation of the legislation to include environmental assessment procedures. This was achieved by using Section 57 (1) of the Act, which stated

Where it comes to the notice of a Minister of the Crown that a proposed development, project, industry, or other thing, may have a detrimental effect on the environment he shall so advise the Authority and shall thereafter in relation to that matter furnish to the Authority and to the Council all such aid, information and facilities as are practicable and the Authority shall

report to the Minister on the matter when and as often as the Minister requires.

In practice the EPA gained acceptance for EIA by insisting that it could not advise the Minister without more detailed information on the development proposal, but this was achieved without specific statutory backing. Moreover, the earlier preference for an *ad hoc* approach to environmental impact assessment led to a unique set of circumstances in Western Australia.

Western Australia did not adopt the same EIA procedures as the other States but chose a system similar to the Commonwealth approach to EIS. The highest level of assessment was referred to as an environmental review and management programme (ERMP) which was undertaken by the developer and submitted to the EPA for assessment (DCE, 1978, p. 3). The EPA experienced its first change in membership in 1977, with the retirement of Brian O' Brien after serving seven years as chairman. He was replaced by Colin Porter who was appointed chairman of the EPA. Porter was a hydraulics research engineer, who gained international recognition for cleaning up the Thames and restoring the Salmon fish stock after 120 years of uncontrolled pollution (Harris, 1986, p. 9). As chairman of the EPA, Porter inherited the responsibility for implementing the new EIA requirements for development proposals, and was faced with the added burden of a worldwide recession. Consequently, pressure was applied from various quarters for the relaxation of environmental standards due to the economic downturn. At least in an official response, as indicated in the 1977-78 Annual Report, the EPA contended that over the long term, environmental protection is less costly to the public than environmental correction (EPA Annual Report, 1977-78, p. 5). Furthermore, the new

EIA requirements for development proposals were unlikely to reduce the conflict between developers and conservationists.

The conflict between development and conservation was highlighted with proposals for an expansion of bauxite mining in different parts of the State. As a result of the new EIA arrangements, Alcoa of Australia and Alwest Pty Ltd. were among the first companies required to meet the new assessment procedures. Alcoa submitted an ERMP for its Wagerup Alumina refinery in the Darling Range, which the EPA released in May 1978 for public review. According to the EPA Annual Report, (1978-79, p. 21) this was the most difficult and complex task before the EPA since its formation. The mining lease covered an area containing much of the Northern Jarrah Forest, which had high conservation value, and was important for water catchment. The EPA recommended that the alumina refinery could be allowed, subject to a list of specifications (EPA Annual Report, 1978-79 p. 21). This was accepted by the Government, and the company was required to submit a new ERMP that met the criteria, with the proposal finally gaining approval in October 1978.

However, Alwest were experiencing even greater difficulty producing a satisfactory ERMP for its Worsley Alumina refinery. It took three attempts before the Authority considered that the ERMP was suitable for public review. Following extensive discussions between the company and a number of government bodies, the EPA submitted its report and recommendations on the Worsley proposal to the Minister for Industrial Development in March 1979 (EPA Annual Report, 1978-79, p. 22). The proposal was unsatisfactory and the company was requested to submit another draft ERMP to the EPA in July 1979, which was still deficient in a number of areas. The final



ERMP was referred to the EPA in October 1979, and after consideration the Authority advised the Minister against approving the proposal on environmental grounds. However, in a press release on 28 November 1979, Premier Court stated, "that on the basis of the final ERMP both the Commonwealth and State environmental authorities had recommended that the project could proceed" (Arthur and Coyle, 1980, p. 1). Hence, in a reminder that the EPA had only an advisory role, the Coalition Government, led by Sir Charles Court decided that the proposal could proceed on the basis of assurances provided by the company.

The Coalition Government was faced with increasing political pressure following its decision to grant approval for the Worsley project. This pressure came from various conservation groups, the press, and the Labor opposition. The main area of contention was not so much that the Government granted approval, but that it gave the impression the project had the full backing of the EPA (Arthur and Coyle, 1980, p. 1). The Opposition Leader Ron Davies called the situation exceedingly grave and demanded a full disclosure of all documents between the Government and the EPA. An editorial in *The West Australian* on 19 January 1980 strongly criticised Premier Charles Court, for failing to make public the EPA's concerns over the Worsley project. It argued, that the recent events "makes a mockery of the principle of public review of environmentally sensitive projects, and leaves the Government open to accusations that it is selective in the information it is willing to release to the public" (*The West Australian*, 19 January 1980, p. 6). Moreover, the editorial stated that the public was entitled to an explanation, and that at least on the face of it, Premier Charles Court had made a misleading statement. Under intense scrutiny in Parliament the Government finally admitted that its authorisation for the Worsley alumina proposal, contrasted with the Authority's

recommendations, and gave no adequate explanation for its earlier announcement that the project enjoyed EPA approval (Watt, 1980, p. 443).

Subsequently, political pressure intensified when it became known that the Government intended to review the legislation governing the EPA. It was widely reported that the Government was unhappy with the direction of the EPA under the leadership of its Chairman Colin Porter (*The West Australian*, 21 October 1980, p. 3). This led to considerable speculation in the media about the proposed changes to the 1971 EP Act. In addition to proposals to remove the Chairman from the EPA it was reported that responsibility for ERMPs would be transferred to the Department of Resources Development. However, when the legislation came before Parliament it was less draconian than anticipated which led many to assume that the Government had responded to growing political pressure and changed its original intentions (Penrose, 1981, p. 93).

#### **The 1980 Amendments to the *Environmental Protection Act 1971*.**

The 1980 amendments, however, were still the most significant change to the 1971 EP Act since its formation, and resulted in the separation of the roles of Chairman of the Authority and Director of the Department. The changes were widely viewed as politically motivated and a clear attempt to weaken the Authority (Penrose, 1981, p. 93). Environmental groups were extremely critical of the changes with both the Australian and the Western Australian Conservation Council's, expressing alarm at the Government's attack on the independence of the EPA (*The West Australian*, 22 October 1980, p. 4). The Labor Opposition objected to the Bill on three main grounds, and claimed that the amendments weakened the EPA by "sacking the director of the

department from the chairmanship of both the EPA and the Environmental Protection Council" (WAPD, 20 November 1980, p. 3808). It objected to the restrictions placed on the EPA to publish its recommendations and the potential for greater interference by the Minister for Conservation and Environment in the EPA (WAPD, 20 November 1980, p. 3813). These views were backed up by one of Australia's most distinguished public servants, Dr 'Nugget' Coombs. He criticised the change to the structure of the EPA and said, "that the removal of Colin Porter as chairman of the EPA was a retrograde step and was virtually placing him under direct ministerial control" (Arthur, 1980, p. 2).

The Coalition Government, however, argued that the amendments would streamline and strengthen the EPA and would not require one person having to continually change roles. As Deputy Premier Ray O' Connor stated, "the WA Government wanted to make the EPA a more independent environmental watchdog" (*The West Australian*, 14 November 1980, p. 5). Under the original Act the Chairman would provide independent advice to the Government, and then the same person would take orders from the Minister while Director of the Department (WAPD, 13 November 1980, p. 3520). However, the Government's reasons for introducing the changes lacked conviction, which was highlighted by its failure to act on these concerns at an earlier date. This was demonstrated by Labor MLA for Rockingham, Mike Barnett during the second reading debate when he stated that "the EPA has worked well over the last nine years and this has been proved by the fact the Coalition Government has been in power for six of those nine years and has not seen fit to change the Act substantially" (WAPD, 20 November 1980, p. 3811). The Labor member for Morley, Arthur Tonkin, stated that the reason for the amendments was to remove Colin Porter from the EPA, "because Mr Porter had been a thorn in the side of this Government" (WAPD, 20 November 1980, p. 3819).

Hence the amendments were clearly designed to avoid Government embarrassment and further curtail the limited power and influence of the EPA.

### **Conclusion.**

The 1971 EP Act provided a starting point for environmental protection in Western Australia. It was inadequate in a number of areas and failed to give the EPA any real power. As a result the EPA could only make recommendations to government (Hollick, 1985, p.121; Main, 1988 p. 135). The lack of specific powers may have helped persuade the Authority members to pursue a more educative approach to environmental management. This approach played an important contribution in increasing public awareness and helped ensure environmental concerns were considered for new development proposals (Main, 1991, p. 22). There were a number of weaknesses with the drafting of the legislation that were inconsistent with its intentions, which further restricted the influence of the EPA. These included the areas dealing with the formulation of environmental protection policies, and pollution control. Clearly the influence of the EPA was enhanced with the acceptance of environmental assessment procedures, but this was achieved without adequate statutory backing. Of course the structure and function of the EPA was directly affected by the Coalition Government's amendments in 1980 (WAPD, 13 November 1980, p. 3519). The splitting of the Authority from the Department was clearly designed to reduce the influence of the EPA. At the same time the restriction on publishing the Authority's recommendations was an attempt to avoid government embarrassment when it made a decision contrary to EPA approval. This illustrated the lack of political commitment to environmental management, and the failure to provide effective legislation to strengthen the EPA in Western Australia.

## **Chapter Three**

### **An Evaluation of the *Environmental Protection Act 1986*.**

The environment was a significant issue on the political agenda throughout Australia in the early 1980s, and it involved mainly disputes over wilderness conservation and anti-logging campaigns. The 1982-83 campaign against the 'Gordon-below-Franklin' Hydro-Electric Commission scheme in Tasmania was the most prominent (Pakulski, Tranter and Crook, 1998). During the 1983 election campaign in Western Australia the Labor Party promised to improve the environmental impact assessment procedures, which were deficient in a number of areas. Part of its policy called for a system that included a cost-benefit analysis that took account of environmental as well as economic factors. At a public seminar held on environmental impact assessment and procedures (DCE, 1983, p. 7), Premier Burke outlined four areas of the Act under review, which were stated as follows;

- the composition and duties of the Environmental Protection Authority
- the procedures under which the EPA operates
- the role of public participation in environmental decision-making, and
- pollution control measures

In his opening address the Premier spoke about the evolution of environmental assessment procedures in Western Australia. He highlighted some of the uncertainties stemming from the absence of specific legislation in certain areas that needed to be addressed. These included requirements for reports to be published, and legitimate access for public involvement in the assessment process. Premier Burke indicated that his Government would consider statutory backing for environmental impact assessment

(EIA) procedures, to provide greater certainty for developers and the community (DCE, 1983, p. 8). There were wide ranging views canvassed at the public seminar with support for and against stronger measures, which indicated the difficulties the Government faced in achieving consensus for legislative change.

### **Criticisms of the EPA and Government inaction over legislative change.**

Upon gaining office the Labor Government were even more critical of the 1971 EP Act, with the new Environment Minister Ron Davies describing it as the "worst environmental legislation in Australia" (Barker, 1983, p. 9). He said that it was unenforceable in a number of areas and would not stand up to legal scrutiny. Consequently, the Burke Government announced soon after the election that it would review the *Environmental Protection Act* 1971, including the area dealing with environmental assessments. The conflict between conservation and development increased in the early to mid 1980s, with a series of campaigns against a number of America's Cup projects. The Scarborough Ratepayers Association criticised the EPA for its efforts in producing only a two-page report on the Austmark Observation City project. However, in the report the EPA stated that the objections raised, related more to the social rather than the natural environment (Treweek, 1984, p. 15).

Criticism of the EPA intensified, when a spokesperson for the Sorrento marina watchdog committee, questioned the value of an independent body that could not make its recommendations stick with Government. During the controversy over the Farrington road extension near North Lake, a resident's group claimed that their submission to the EPA was not even considered. Moreover, the Conservation Council was extremely critical of the EPA, when it reversed its decision that an environmental review and

management programme (ERMP) was required for the Burswood Island casino. It accused the government of overriding the public right to participate in environmental procedures in its eagerness to pursue development projects for the America's Cup (*The West Australian*, 5 March 1985, p. 58). While these criticisms were mainly directed towards the EPA they emphasised the deficiencies in the 1971 EP Act, and highlighted the Labor Government's inaction in implementing legislative change.

In 1985, administrative changes occurred within the EPA when its Chairman Professor Main, retired after fourteen years service. He was replaced by Barry Carbon who vowed to continue the Authority's role and objectives, by providing informed advice on the environment while attempting to strike a balance between conservation and development. Carbon, had been a senior executive with the mining company Alcoa and as a result, his appointment was strongly criticised by conservationists (*The West Australian*, 3 April 1985, p. 4). However, these concerns were eased by his commitment to improve environmental legislation in Western Australia.

The significance of legislative changes to the 1971 EP Act, on the role of the EPA were illustrated by the new EPA chairman, who emphasised the need to "cement the foundation" of the preceding work done by the former members before it eroded. As Carbon stated, "The EPA will be recommending to Government on legislative changes which will formalise some of the existing practice and procedures of environmental assessment" (EPA Annual Report, 1984-85, p. 4). This was an important undertaking that ensured continuity, by providing statutory backing to the existing functions performed by the EPA, some of which had been adopted informally but were necessary to meet increased demands.

Meanwhile, the Environment Minister Ron Davies was having difficulty preparing the new legislation, as there was opposition from all sides. Premier Burke felt change was needed and appointed Barry Hodge, who had to resolve an urgent issue before he was sworn in as Minister for the Environment. The amendments carried out in 1980 to split the Department from the Authority were causing problems. There were conflicting views between the Chairman Barry Carbon and the Director of the Department Colin Porter, who were competing for the same resources. According to Hodge (1991, p. 98) the two men were excellent, dedicated people, but the arrangement was simply not working. The personalities combined with deficient legislation about the arrangements for the two roles proved impracticable. Hence the new Minister in consultation with his Cabinet colleagues, decided to place Carbon as Director of the Department, as well as Chairman of the EPA.

This was a return to the existing arrangement of the combined role under the original 1971 EP Act. In an interview after his resignation in March 1986, Colin Porter admitted he was upset at the time of the changes in 1980, which in his view was an attempt to weaken the EPA. However, he questioned the magnitude of the task for one person to handle the dual roles, and stated that "the real trouble was that no government has decided what it wants the EPA to do" (Harris, 1986, p. 9). Porter said, that the Government must decide whether it wanted an independent body outside the public service, or a traditionally oriented organisation. Following the appointment of a new Minister and after a delay of three years, the Burke Labor Government finally gave priority to bringing about the necessary legislative changes to the 1971 EP Act.



### **The Introduction of the *Environmental Protection Act 1986*.**

The *Environmental Protection Act 1986* was introduced into Parliament, after extensive consultation with the EPA, conservation groups, developers and community members. It was proclaimed on 20 February 1987, and with the accompanying Repeal Act, replaced the 1971 EP Act and repealed the Clean Air Act 1964-1985, parts of the Noise Abatement Act 1972 and Part III A (Control of Pollution) of the Rights in Water and Irrigation Act 1914-1985 (EPA, 1987, p. 1). The Government sought to strengthen and modernise the new 1986 EP Act to bring it more into line with environmental demands, arising from population growth and development (WAPD, 24 July 1986, p. 2537). The Bill provided for an expansion of the EPA to five members, which extended its level of experience and expertise (EPA Annual Report, 1986-87, p. 7). The new Act increased the power and influence of the EPA with a broader definition of the environment to cover wider social aspects, including aesthetic, cultural, economic and social surroundings (Bache, Bailey and Evans, 1996, p. 487). However, these were qualified under Subsection 2, to the extent that they must directly affect or be directly affected by humanity's physical or biological surroundings.

In addition, the 1986 EP Act provided the EPA with three statutory measures which enhanced its ability to carry out its functions, and increased its power and influence in environmental management (Singleton, 1992, p. 35; Bailey and English, 1991, p. 191). These were an improvement in environmental protection policy (EPP) procedures contained in Pt III, the formalisation of EIA requirements in Pt IV, and pollution control measures in Pt V with enforcement provisions in Pt VI. The new Act provided for a more central role for the Minister of the Environment. The Minister now had the power

to set environmental conditions for all proposals, some of which were previously carried out by other Ministers (EPA Annual Reports, 1986-87, p. 7).

An important element of the 1986 Act that further enhanced the power and influence of the EPA was the primacy given to the EP Act over the majority of Western Australian statutes, Section (5). The independence of the EPA from Ministerial direction was guaranteed on all but a small number of procedural matters (EP Act 1986, Section 8). Moreover, the legislation clarified the structure of the EPA, with the Chairman of the Authority given the additional function of Chief Executive Officer of the Department. Hence, the capacity for the Authority to coordinate and carry out a wide range of functions was strengthened by merging the staff of the Department and Conservation and Environment into the EPA. This ensured the necessary resources were provided for the Authority to carry out its duties and implement its policies (WAPD, 24 July 1986, p. 2539; Bache, 1998, p. 160).

The Coalition Opposition questioned the need to rewrite the legislation, and maintained its resistance against the realignment of the Authority and the Department. There has been a consistent ideological difference between the two main parties, on the issue of the respective heads of the Department and the EPA. The Liberal Party expressed concern with the original 1971 EP Act, it introduced legislation in 1980 to separate the combined roles and it opposed this aspect of the 1986 EP Act (WAPD, 16 October 1986, p. 3182). However, there has been no evidence to support the ideological stance against the combined role. In fact Barry Blaikie, Liberal MLA for Vasse, continued to quote extensively from the tribute to Professor Main acknowledging his contribution and stating the high degree of public confidence in the EPA over the fourteen years (WAPD, 16 October 1986, p. 3182). While he may have been referring to the period

when Main was chairman, it should be noted that the combined roles were operative during the majority of the fourteen years, which does not necessarily support the argument against realignment of the EPA and the Department.

#### **Enhanced Statutory Functions.**

One major flaw in the 1971 EP Act was that it was vague and inadequate in the area of pollution control. While it allocated broad powers to the EPA to monitor waste discharge and carry out inspections, the act however failed to specify pollution as an offence (Hollick, 1985, p.117). Moreover, pollution control powers were contained throughout a number of Statutes, which increased complexity and made prosecutions extremely difficult. Hence pollution control was consolidated into the new 1986 EP Act and became the responsibility of the Authority, with regulation tasks delegated to appropriate management agencies, subject to specified conditions (WAPD, 24 July 1986, p. 2538). While the Act ensured the independence of the EPA and its Chairman from Ministerial direction, an exemption was granted under Section 8 (b) which stated "except when acting in his capacity as the Chief Executive Officer". This was particularly relevant for pollution control which involved coercive measures administered by the Chief Executive Officer, subject to direction by the Minister (EPA Annual Report, 1986-87, p. 7). Consequently, the Opposition expressed concern with the pollution control aspects of the Bill and argued "that this introduces a potential conflict between the EPA's advisory and policeman roles" (WAPD, 16 October 1986, p. 3177).

The intention of the 1986 EP Act was to encompass a broad range of activities that could harm the environment. Therefore, Section 3 defines pollution as direct or indirect alteration of the environment,

- (a) to its detriment or degradation;
- (b) to the detriment of any beneficial use; or
- (c) of a prescribed kind.

The definition while appearing broad was restricted somewhat as a result of an appeal action in the Supreme Court in 1991 (Browne-Cooper, 1997, p. 169). The case of *Palos Verdes Estates Pty Ltd v Carbon* involved a conviction against the company for unauthorised clearing of bushland. The Supreme Court upheld the appeal on the basis that section 49 (1) was ambiguous, and that the definition of pollution was so broad as to be unworkable. The leading judgement was delivered by Chief Justice David Malcolm, who deemed it necessary, to revert to the dictionary definition of "pollution", to make foul or unclean. Using this interpretation, Malcolm held that land clearing fell outside the definition of pollution (Readhead, 1991, p. 3). Despite immediate attempts to introduce an amendment to cover the concept of "unauthorised environmental degradation", the Bill was never proceeded with (Browne-Cooper, 1997, p. 169). Consequently, for pollution to cause an offence in Western Australia it must not only degrade the environment, but must also make the environment foul or unclean. As a result, the decision handed down by the Supreme Court, cast doubt on the scope of the pollution control powers, and illustrated the discrepancy between the apparent intent of the legislation and its interpretation.

The 1986 Act specifically addressed the ambiguities surrounding environmental protection policies (EPPs) in the 1971 EP Act by providing greater clarity. The

deficiencies in the 1971 Act prevented the Authority from preparing any EPPs during the entire period of the original legislation. Under the new 1986 EP Act the EPA was able to use EPPs to protect any portion of the environment or to prevent, control or abate pollution (EP Act 1986, s 26). EPPs were considered an appropriate tool to address the cumulative impacts of development, and were therefore more beneficial for particular environmental issues than EIA or pollution control measures (Cox, 1994, p. 307). The Act provided detailed criteria for the preparation of draft EPPs including publication and increased availability of draft documents, with greater opportunity for public involvement (s 26-31). Once an EPP has been approved by the Minister and has not been disallowed by Parliament it has the force of law as though it were part of the Act (EPA 1987, p. 3). Hence EPPs once implemented are among the most direct means of providing environmental protection.

The first EPP developed and implemented under the new Act, related to the control of sulphur dioxide emissions from the gold and nickel processing plants in Kalgoorlie (EPA Annual Report, 1987-88, p. 7). Moreover, there were seven EPPs established by the EPA between 1987 and 1993 (Cox, 1994, p. 307). This was an improvement from the original legislation, which increased the potential use of EPPs and provided the EPA with a more direct capacity to influence environmental protection in Western Australia. However, despite the improvement, conservation groups expressed concern with the limited number of EPPs developed by the EPA, since the proclamation of the new 1986 EP Act. Indeed Singleton (1992, p. 36) advocated two possible reasons for this, namely legal uncertainty of what constitutes a statutory EPP, and a greater emphasis by the EPA towards pollution control and EIA procedures.

### **New Requirements for Environmental Impact Assessment (EIA).**

The 1986 EP Act formalised the system of environmental assessment in Western Australia by providing statutory backing for EIA procedures. This was a clear objective of the legislation, which sought to consolidate the Authority's evolved practice on environmental assessment. The 1986 EP Act provided the EPA with specific powers to administer EIA, which were balanced against detailed accountability provisions (Bailey and English, 1991, p. 191). These powers include *inter alia*, a compulsory referral of all relevant proposals; decision making is suspended until the EIA process has been completed; and the advice provided to the Minister for the Environment by the EPA must be published. The accountability provisions include, a public right to appeal on the procedures applied; a public right to appeal against the advice given by the EPA to the Minister, prior to the decision being made; and public notification must occur at specified stages of the EIA process (Bailey and English, 1991, p. 191, 192).

Public involvement was enhanced under section 38, which states, "a proposal that appears likely, if implemented, to have a significant effect on the environment" may be referred to the EPA by a proponent or any other person for assessment (Bates, 1995, p. 168). In 1989, a Social Impact Unit (SIU) was created to address the social, economic and quality of life issues outside the EPA's legislative framework. This was a direct response to the increased number of issues raised by the public concerning proposals. The unit was part of the Department of State Development, but worked closely with the EPA to assess the social acceptability of development proposals (Bailey and English, 1991, p. 192).

However, the decision whether to assess a proposal and at what level is made by the Authority. The broad definitions of “proposal” and “environment” in the Act means that the level of assessment is largely determined by the Authority’s interpretation of “environmental significance” (Sippe, 1987, p. 4). As a result, there are a number of options for dealing with proposals and different levels of assessment. The EPA may

- decide the proposal does not require assessment.
- assess it “in house” and provide public advice (known as Informal Review with public advice);
- issue a Works Approval and/or Licence; or
- assess it “formally through a Consultative Environmental Review, Public Environmental Review, or at the highest level Environmental Review and Management Programme (ERMP) (Carew-Hopkins, 1997, p. 191). See (Bailey and English, 1991, for more detail on different levels of assessment and for an overview of EIA procedures in Western Australia).

Hence the 1986 Act increased the extent of EPA influence in development proposals through EIA, but allowed for extensive flexibility in its administration. This in effect ensured development proposals could proceed provided proponents incorporated environmental impacts into their overall management plan.

The efforts of the EPA in evolving the earlier *ad hoc* approach combined with the new legislative arrangements has resulted in an assessment system that enhances environmental protection. Increased public awareness coupled with greater clarity in the 1986 Act has substantially increased proposals for EPA assessment. According to the EPA Annual Report (1986-87, p. 11) over 900 proposals were referred to the Authority for assessment during that year. The new arrangements for EIA encouraged proponents

to include long term environmental impacts during the planning stage, with a greater emphasis on anticipation (EPA Annual Report, 1987-88, p.1). However, this frustrated some developers who were critical of a powerful EPA, which in their view delayed development. For example, the Australian Association of Planning Consultants (AAPC) were extremely critical of the powers contained in the 1986 EP Act. The AAPC argued that the Act gave the EPA and the Minister for the Environment the power to halt developments even though they complied with town planning schemes (Waddacor, 1988, p. 11).

The Environment Minister Barry Hodge responded by highlighting the requirements for impact assessment under the previous 1971 EP Act, which also called upon the Minister to accept or reject EPA recommendations. As Hodge stated, "since the new Act's introduction 21 months ago, some 200 projects had undergone assessment. Of those only a handful had been rejected outright, including Bond Corporation's controversial Knightsbridge project in City Beach" (Waddacor, 1988, p. 26). This highlighted the significance given to environmental impacts during development proposals, rather than suggest the Act or the EPA may contain too much power. Moreover, despite criticisms that the new 1986 EP Act gave the EPA too much power and influence, it is the elected Government of the day that makes the final decision on all development proposals.

### **Conclusion.**

After considerable delay the Burke Government finally introduced the *Environmental Protection Act* 1986 into Parliament, which was proclaimed on 20 February 1987, and with the accompanying Repeal Act replaced the 1971 EP Act. It increased the powers of the EPA, with a broader definition of the environment to include social aspects, and



with the allocation of new pollution control measures. It provided for a more central role for the Minister of the Environment. The Minister was given power to set environmental conditions for all proposals, some of which were previously carried out by other Ministers (EPA Annual Report, 1986-87, p. 7). The new Act formalised the system of EIA, and provided greater clarity for the assessment procedures in Western Australia. This was a clear objective of the legislation, which sought to consolidate the Authority's evolved practice on environmental assessment.

There were criticisms however from developers and the AAPC, who objected to an enhanced role for the EPA in EIA, and the increased powers for the environment Minister. The 1986 EP Act addressed a number of deficiencies in the previous legislation, with for example providing greater clarity for EPPs, which were considered among the best means of addressing the cumulative impacts of development (Bailey and English, 1991, p. 198; Cox, 1994, p. 307). The new Act was cumbersome and ambiguous in areas and can be improved upon. This was evident in Pt V, with insufficient specification for pollution control measures as illustrated in the *Palos Verdes* case. However, the 1986 EP Act was a significant improvement on the previous legislation and despite its limitations retained a great deal of flexibility, which was perhaps its greatest strength. It has increased the capacity and influence of the EPA in environmental management in Western Australia, especially through the Authority's enhanced role in EIA procedures.

## **Chapter Four**

### **The significance of the 1993 Amendments to the *Environmental Protection Act* 1986.**

There were many criticisms from industry following the proclamation of the Environmental Protection Act 1986 (EP Act). The main areas of contention were the overriding powers of the Act, the enhanced role of EPA in environmental impact assessment (EIA) procedures, and pollution control powers. The EPA was criticised at various stages by powerful groups such as the Australian Association of Planning Consultants and the Chamber of Commerce and Industry (Nicholson, 26 August 1992, p. 11). However, the attack on the EPA from the Chamber of Mines and Energy in November 1991 was arguably the most forceful. It was contained in a document titled "Resource Development in Western Australia". The report was critical of the expanding role and powers of the EPA, which included involvement in planning issues and social impact assessment (Allen, 1991, p. 13). It was extremely critical of the central role of the EPA in environmental assessment and blamed the Authority for delaying development proposals.

The EPA Chairman Barry Carbon responded by saying that the Chamber of Mines had gone too far by fabricating total nonsense. He argued that the report effectively attacked the integrity of the EPA and its staff. Carbon replied to the "shameful lies" of development delays by citing 4,875 mining approvals granted in Western Australia during the 1991 financial year (Carbon, 1991, p. 3). At the time the report was released the EPA had eight mining projects out for review, seven of which were waiting for the proponent and only one was waiting on the EPA to complete. This did not support the

Chamber of Mines argument that the EPA was holding up development proposals. The report acknowledged the upcoming review of the EP Act and recommended that consideration should be given to "restoring to the political level, rather than... independent appointees, the task of effectively balancing environmental and development values" (Allen, 1991, p. 16). This statement was completely misleading, as under the Act the Government makes the final decision on all environmental issues. It is unlikely that the Chamber of Mines were unaware of the procedures contained in the Act. Therefore such a forthright attack on the EPA was more likely designed to send a clear message to the Government before its review of the EP Act.

Section 124 (1) of the 1986 EP Act required the Government, through the Minister for the Environment, to review the operation and effectiveness of the Act as soon as practicable after five years. It required the Minister to consider and have regard to the effectiveness of the operations of the EPA, and the need for the continuation of its functions. The same considerations applied to any group, committee, council or panel established by the Minister or the EPA under s25 (1). The Minister was also required to submit a report based on the review, before each House of Parliament as soon as practicable following completion, s124 (2). In line with these statutory obligations the Labor Minister for the Environment Bob Pearce announced on 1 April 1992, the establishment of an Independent Advisory Committee to oversee the review of the EP Act (Ramsey, 1992, p. 1). The Minister instructed the committee conducting the review to hold public seminars call for public submissions and consult widely with interested parties.

### **Independent Review of the Environmental Protection Act.**

There were over 140 submissions to the Independent Advisory Committee chaired by Dr John Ramsey, Head of Department of the Environment and Planning Tasmania, with the two other members being industrialist Harold Clough and environmentalist Neil Blake. The majority of submissions even those critical of the EPA, acknowledged that the Act was generally well structured and had been a model for environmental protection in other states (Nicholson, 26 August 1992, p. 11). Key submissions from industry, including the Chamber of Commerce and Industry and the Chamber of Mines and Energy, called for the roles of EPA chairman and chief executive officer (CEO) to be split. This was rejected by EPA chairman Barry Carbon who maintained that the combined role, enabled the chairman to directly control staff which is necessary for a truly independent EPA (Cake, 1992, p. 8). The Chamber of Mines and Energy restated its objections to the involvement of the EPA in "socio-political" issues. It emphasised the need to speed up the system of appeals and argued that the public nature of EPA recommendations placed significant leverage on the Minister (Mine Life, 1991, p. 15). However, the Minister for the environment, Bob Pearce stressed that the environmental protection laws were "not up for grabs", and that the review was likely to be directed towards improvement rather than a major change of principle or direction.

The report of the Independent Advisory Committee for the review of the EP Act was released for public comment in October 1992. It was an extensive report with 50 recommendations containing a number of subclauses. The committee found that the EPA was an extremely effective organisation with strong and capable leadership, and supported the continuation of its functions (Ramsey, 1992, p. vii). There were four main features of the 1986 EP Act that the committee considered central to the system of

environmental protection in WA. These were the primacy of the Act and its assessment process; the right of public participation; independent EPA advice on environmental issues; and final decisions on environmental issues taken by the Minister, the Government or Parliament. Hence the committee recommended that all of these procedures be retained (Ramsey, 1992, pp. 8-14). This in effect was a vote of confidence in the basic operation of the 1986 EP Act.

On the controversial issue of whether the position of chairman and CEO should be split, the committee examined both sides of the argument. It concluded, that there is a "perception in the minds of some", of too much influence and power residing in one person under the combined role. However, the committee found no evidence to suggest the combined role had resulted in undue influence or unreasonable exercise of power (Ramsey, 1992, p. 37). Moreover, the report illustrated the provisions in the Act that provided a check on the exercise of power. It noted that the Chairman of the EPA is only one of five members involved in EPA decisions. It stressed that the EPA is only an advisory body, with the Government making the final decision on all environmental matters including appeals (Ramsey, 1992, p. 38). The committee made some recommendations to address the "perception" of power and influence of the combined position. These included *inter alia* the removal of the CEO role in advising the Minister on appeals; giving the EPA no greater role in the appeal process than any other participant; and ensuring that all appeals are considered by the Minister with the benefit of advice from an independent Commissioner for the Environment (Ramsey, 1992, p. 39). Consequently, the committee recommended that the combined position of Chairman/CEO should be retained for at least 12 to 18 months, to examine the effectiveness of the proposed changes.

### **Labor Strategy Before Election?**

The Labor Government did not act on the recommendations made by the Ramsey advisory committee. Instead it referred the entire report to legal expert Professor Richard Harding, to review the legal implications of the proposed changes. Professor Harding was asked to advise the Government on "how best to implement the recommendations of the three-member Ramsey committee" (Nicholson, 27 April 1993, p. 8). Professor Harding completed his review and submitted his report to the Environment Minister Jim McGinty, who took it to a Cabinet meeting on 7 December 1992. However, the Labor Government delayed releasing the report before the State Election. A number of environmental groups including the Conservation Council criticised the Labor Government, for its politically motivated delaying tactics (*The Greener Times*, March 1993, p. 5). The Conservation Council claimed that some Ministers feared making the EPA stronger than it already was, and that the Government decided to wait until after the election before taking a tough stance on the EPA. On the other hand the Labor Government showed its intentions albeit on the eve of an election, by controversially reappointing Barry Carbon as EPA chairman and CEO for five years, starting from 1 January 1993 (Nicholson, 19 January 1993, p. 28).

Subsequently, the two main parties differed on the issue of the combined role of chairman/CEO and the powers of the EPA during the election campaign. The Coalition announced, it would take the decision demanded by industry groups during the review of the EP Act, and split the roles of EPA chairman and chief executive (Nicholson, 19 January 1993, p. 28). This was a complete turnaround from the earlier views expressed by Liberal MLA Kevin Minson. In February Minson dismissed concerns from conservationists that a Coalition Government would weaken the EPA. He said, "he

could see no reason to split the roles of chairman and chief executive". Minson also said that it was important to keep the EPA strong and independent and that its chairman should never be directed (Nicholson, 23 February 1993, p. 4). During the election campaign the Labor party vowed to strengthen the EPA by enacting the recommendations of the Independent Advisory Committee, if it were returned to office. The Labor party promised to make the appeals system more independent, and to remove the obligation on the EPA to seek the Minister's permission to prosecute for pollution offences (Nicholson, 19 January 1993, p. 28).

#### **Removal of Environmental Protection Authority Members.**

Upon gaining office in 1993, the Coalition Government, were confronted with a substantial State debt, that had its genesis in the WA Inc. excesses of the 1980s. As a result, one of Premier Richard Court's first initiatives was to set up an Independent Commission to Review Public Sector Finances (Black and Phillips, 1993, p. 421). The Commission was chaired by Les McCarrey, a former Under-Treasurer and Director-General of Economic Development. Other members of the Commission included managerial Directors, P. J. Leonhardt from Coopers and Lybrand, Charles MacKinnon of Lothbury Ltd. and Peter Unsworth of Unsworth Financial services. Volume One of the Report was released on 24 June 1993, and was extremely critical of an inefficient Public Service (Black and Phillips, 1993, p. 422). Moreover, from 1992, public concern with the environment was displaced throughout Australia by more pressing issues, such as unemployment and health. For example, the environment was notably absent as an issue in the 1993 Federal election. In addition membership of environmental groups reduced by almost 50 per cent between 1993 and 1996 (Pakulski, Tranter and Crook, 1998, p. 241).

Hence, another initiative from the Coalition Government in 1993, was the decision to close down the Social Impact Unit (SIU) as part of its policy to speed up development proposals (Wood and Bailey, 1994, p. 42). This was done despite the endorsement of the SIU, by the Independent Advisory Committee in 1992 (Ramsey, 1992, p. 74). Moreover, the Government upheld its controversial promise to separate the joint position of EPA chairman and chief executive of the Department. The decision to do so before Parliament resumed combined with the inappropriate method chosen, exacerbated the controversy and fuelled the impression that vindictiveness lay behind the move (Brown, Nicholson and Quekett, 1993, p. 11). The separation of the combined roles in effect removed Barry Carbon from his position after serving eight years. Initially a defiant Carbon vowed he would fight the Government and not let the EPA's strength and independence, be destroyed (Nicholson, 26 April 1993, p. 1). While explaining the Government's position, the Environment Minister Kevin Minson, said that he had obtained advice from the Crown Law Department, stating that the contracts of Carbon and three other EPA members were invalid. This version of events was disputed by the Labor Opposition environment spokesperson Jim McGinty.

The Opposition spokesperson said that if such advice were given the Crown Law Department would have contacted him as former Environment Minister. McGinty later released a confidential Cabinet minute, which he said proved Carbon and the three other EPA members were properly appointed (Nicholson and Quekett, 26 May 1993, p. 4). Minson was also severely criticised for his part in releasing inaccurate details of Carbon's salary package. Moreover, the Opposition questioned the degree of influence Tim Meagher, one of Minson's advisers had on the Government's decision. In 1989 for example, Carbon had been highly critical of Meagher's submission for a development



proposal near Bold Park for Bond Corporation. Meagher responded with a scathing attack on the EPA in 1991, accusing it of causing great uncertainty in land tenure and planning in Western Australia (Nicholson, 27 April 1993, p. 11). For his part Minson insisted throughout, that "he was just sorting out administrative confusion from the previous government, and had no intention of gutting the Authority" (Nicholson, 27 May 1993, p.11). However, the Coalition Government finally admitted that it did not have proof that the appointments were improperly made and validated the three EPA members contracts. Moreover, Carbon accepted an out of court settlement, which suggested, his contract was also valid (Nicholson, 27 October 1993, p. 23). In an ironic twist, Carbon's knowledge and integrity was recognised by the Federal Labor Government who selected him to lead the Commonwealth Environmental Protection Agency in October 1993 (Nicholson, 27 October 1993, p. 23).

Notwithstanding the furore surrounding the Coalition Government's mishandling of the situation and the personal anguish inflicted upon Barry Carbon, there were many who condemned the decision to split the EPA. Among the most notable and influential was Bert Main who had served on the EPA for fourteen years. He was Chairman of the EPA between 1982 and 1985, and therefore was directly involved in administering the EPA in conjunction with a separate Departmental Head (Nicholson and Quekett, 27 April 1993, p. 1). Main said that the splitting of the EPA, by Sir Charles Court's Government in 1980 was a failure. He said it was impossible to administer without clear lines of communication to one single authority for making decisions. He said "over time if you finish up with two different agendas, two different sets of goals and a chairman and a head of department that are not communicating, then the environment will suffer" (Nicholson and Quekett, 27 April 1993, p. 1).

This view was backed up by Professor Richard Harding, who confirmed he had advised the Lawrence Labor Government' not to split the combined roles. His report supported the findings of the three-member Ramsey committee, who found no evidence of abuse of power or influence under the combined role. Professor Harding said that the opposition to one person holding both roles came from the Western Australian mining lobby, but they were unable to identify a single case that acted to the detriment of a proponent. In his view "the objections seemed ideological rather than empirical" (Nicholson, 27 April 1993, p. 8). Despite compelling advice from a number of diverging sources the Coalition Government were committed to restructuring the EPA.

#### **Introduction of 1993 Amendments.**

The Coalition Government introduced the *Environmental Protection Amendment Act* 1993, into Parliament, which altered the structure and function of the EPA. The Environment Minister Kevin Minson reiterated his position by making it clear to the House, that neither he nor the Government had any intention of restricting the Authority's independence (WAPD, 5 August 1993, p. 1999). The Government claimed that the Bill would strengthen the Authority and make it more accountable. However, this was contested by a growing number of opponents who claimed that the measures were designed to weaken the independence of the Authority (Gardner, 1993, p. 40). The Bill contained three major changes to the EPA. It enabled the existing membership of the EPA to be dismissed and a new membership to be appointed; it allowed for the separation of the roles of Chairman of the Authority and CEO of the Department; and it required the deliberations of the Authority to be made public (WAPD, 5 August 1993, p. 1999).

The Labor Opposition continued its objections to what it described, as an attack on the independence of the EPA. The opposition spokesperson Jim McGinty condemned the Environment Minister for his earlier attempts to sack the EPA board. McGinty described the Minister's actions as "outrageous". He said that the Minister "failed in his attempts because of the public outcry and now he is seeking to do the same thing by introducing statutory measures" (WAPD, 8 September 1993, p. 3419). The Opposition claimed that the independence of the EPA would be eroded, by allowing the Minister through the department to direct and control resources into specific areas. This was formerly the prerogative of the Chairman of the EPA under the combined role, which helped ensure the Authority's independence. The Environment Minister Kevin Minson answered this criticism with the introduction of s17A which stated that "the Minister shall ensure that the Authority is provided with such services and facilities as are reasonably necessary to enable it to perform its functions" (*Environmental Protection Amendment Act 1993*, p. 806).

Additional areas of concern were the changes to the Authority's collective decision making, and the obligation to make public the minutes of meetings held by the EPA. These requirements were contained under clause 8 and 9, of the amendments which the Opposition claimed were further proof of a "fundamental attack on the independence of the EPA" (WAPD, 8 September 1993, p. 3421). One of the greatest strengths of the Authority's recommendations had been that they represented a unified if not unanimous decision, similar to the cabinet decisions of government. Opponents of the changes feared that extensive media coverage of a split decision would reduce the force of EPA recommendations (Gardner, 1993, p. 43). The Opposition argued that the amendments would place undue pressure on the individual part time members of the Authority,

potentially affecting the overall decision making capacity and independence of the EPA (WAPD, 8 September 1993, p. 3422). The failure of the Coalition Government to provide definitive reasons for splitting the EPA did nothing to alleviate the perception, that the changes were ideologically driven and would result in a weakened EPA. In practical terms the 1993 amendments brought the environmental assessment process closer to government, which was a significant shift in function and philosophy from the 1986 legislation (Bache, 1998, p. 164).

### **Judicial Appeals.**

This change in philosophy embodied in the 1993 amendments resulted in a greater use of judicial appeals. The case of *Chappel v Environmental Protection Authority and Ors*, was an attempt to compel the EPA to reinstate its earlier decision, to conduct a formal assessment of the Burrup Peninsula plan. While the court upheld the EPA decision, it was nonetheless critical of the Authority. The court suggested that the original decision had been an attempt by the EPA to extend its powers beyond its statutory obligations (Bache, 1998, p. 164). This was the first legal ruling that indicated the EPA may have endured a significant paradigm shift since the 1993 amendments. However, more compelling evidence followed to support the earlier predictions of a weakened and less independent EPA. This was revealed in the judgement handed down in *Coastal Waters Alliance of Western Australia Inc v Environmental Protection Authority*. The case involved an appeal by an alliance of interest groups against a 1994 EPA recommendation, which allowed the continuation of shell-sand mining in Cockburn Sound (Amalfi, 1996, p.1). On 26 March 1996, the Supreme Court ruled that the EPA had strayed beyond its statutory powers and that the report contained in Bulletin 739 had nothing to with environmental factors associated with the company's mining plans.

The implications of the ruling were considered serious enough to warrant an urgency motion in the Legislative Council the following day to debate the issue. Chief Justice David Malcolm's findings were revealed in Parliament during the debate (WAPD, 27 March 1996, p. 483, 487). Justice Malcolm found,

...That the EPA report was fundamentally flawed in so far as it attempted to find a political or commercial compromise of a kind which the relevant Ministers should be responsible for finding with the assistance of other advisers, having received a report on environmental matters.

The Opposition, minor parties and conservation groups expressed alarm that the EPA based its recommendation on political rather than environmental factors. Labor Opposition Leader in the Legislative Council John Halden, questioned the credibility of the EPA. He said that the EPA had gone from a "watchdog to a lame dog" as a direct result of the Government separating the bureaucracy from the Authority in 1993 (WAPD, 27 March 1996, p. 486). He called on the Government to re-establish the integrity of the EPA by clarifying the roles of the Authority and the Department of Environmental Protection (DEP). An editorial in *The West Australian* on 28 March 1996 was extremely critical of the 1993 legislative impact on the EPA. It cited a damning statement by the new Environment Minister Peter Foss, following the Supreme Court ruling in the *Costal Waters* case. Foss said, "where the EPA went wrong is that it anticipated what the former minister would decide". The editorial stated that any suggestion of political manipulation of the EPA eroded the reason for its existence (*The West Australian*, 28 March 1996, p. 12). The EPA must provide fearless independent advice on environmental matters and leave political decisions to the elected government of the day.

### **Lack of Environmental Protection Authority (EPA) Independence?**

The extent of EPA independence was also questioned during its assessment of the Northbridge tunnel proposal. The tunnel was part of the infrastructure designed to alleviate traffic congestion in the City of Perth, with an estimated cost of 200 million dollars (Betti, 1996, p. 4). The northern traffic bypass system was an extensive project undertaken by the State Government and the decision to incorporate the tunnel under the City was extremely controversial. However, the EPA decided that the tunnel proposal only required a low level of assessment known as an Informal Review (Betti, 1996, p. 4). This decision was based on advice received from the Department of Environmental Protection (DEP). It was revealed by the Cities for People Group under the Freedom of Information Act, that the DEP assessed the entire formal tunnel proposal, in just three and a half-hours (Betti, 1996, p. 6). The DEP did not consider air pollution, ground-water or excavation as areas of concern when it formulated its checklist to the EPA. Former EPA member John Bailey said that the checklist was incomplete and that it had suggested the department had done the EPA's job (Betti, 1996, p. 6). This raises doubts about the capacity of the EPA to be truly independent when it has to rely on the DEP for administrative support. While the EPA makes the final decision on what level of assessment is required, it is significantly, curtailed by its small number of staff and resources.

A lack of resources was highlighted in the 1994-95 EPA Annual report. The EPA considered it had a clear idea of its operational requirements, having operated for a full financial year under the new administrative arrangements. As a result, the EPA sought an increase in its budget from \$340,000 to a total of \$550,000 to function as required (EPA Annual Report, 1994-95, p.19). This public plea for more money highlighted the

lack of independence enforced on the EPA under the 1993 amendments, and raised questions about funding guarantees under s17A. The following year, the EPA chairman Ray Steedman expressed concern with the relationship between the EPA and the Department. He suggested that the problem could be resolved by giving the EPA corporate responsibility over the DEP (EPA Annual Report, 1995-96, p. 23). Moreover, Steedman was more outspoken during his public address to the Environment Institute in April 1997. He maintained that the EPA had no independence, no funds and no power, to carry out projects as these decisions were taken by the CEO of the Department. The EPA Chairman stated that, "on numerous occasions the EPA has said we would like to proceed with a project, only to have it knocked back by the CEO" (Environment Business, April 1997, p. 8). This illustrated the problem of having a CEO responsible to the Minister, and an EPA dependent on the CEO for administrative decisions. This clearly indicated a complete loss of independence as a result of the 1993 amendments.

### **Conclusion.**

Following the election in 1993, the Coalition Government displayed its commitment to speed up development proposals, by closing down the Social Impact Unit. Furthermore, the Government's decision to alter the structure of the EPA before Parliament met in June 1993 was clearly deemed to be unnecessary and politically motivated. The events that followed amounted to a direct attack on the integrity of the EPA members, and on its chairman Barry Carbon in particular. This was perceived as an attempt to silence the EPA and allow miners and developers to override environmental standards (Nicholson, 24 May 1993, p. 4). After widespread controversy, the Government finally introduced the *Environmental Protection Amendment Act 1993* into Parliament to split the Authority and the Department. This move was widely criticised by various experts

including former chairman Bert Main, and was inconsistent with the Independent Advisory Committee's recommendations. It was also contrary to the advice provided to the Labor Government by Professor Richard Harding (WAPD, 9 September 1993, p. 3531). Moreover, the findings in the *Coastal Waters* case supported the predictions of a weakened and less independent EPA. These views were also backed up by inadequate allocation of resources to the EPA and the inability of the Chairman to direct resources into specific areas. Hence the evidence indicated, that the legislative amendments in 1993 weakened the 1986 EP Act, and reduced the power and influence of the EPA in environmental management in Western Australia.



## **Chapter Five**

### **Conclusion.**

The purpose of this study was to examine the main environmental legislation, governing the Environmental Protection Authority (EPA), in Western Australia from 1971 to 1996. This involved an analysis of the original *Environmental Protection Act 1971* (EP Act), and its replacement 1986 EP Act. In addition the study explored the 1980 amendments to the 1971 EP Act, and the 1993 amendments to the 1986 EP Act. The task for this research was to determine

- i) whether the legislative changes significantly altered the structure and function of the EPA, and
- ii) whether these changes advanced or impaired the capacity of the EPA to provide adequate environmental advice.

The main Environmental Protection Acts and the amendments reviewed in this study have significantly altered the structure and function of the EPA. With the exception of the 1986 EP Act, successive legislation has not evolved to meet the challenges of a rising population and development. In particular the 1980 amendments to the 1971 EP Act, and the 1993 amendments to the 1986 EP Act, appear to have restricted the scope for EPA involvement in environmental management. As a result, the amendments reduced the capacity of the EPA to provide adequate environmental advice to government in Western Australia. To a large extent the debate surrounding environmental legislation was impeded by ideological constraints among the major political parties. The main area of contention was the opposing view relating to a large EPA within the department, or a separated EPA serviced by the Department. Hence,

instead of seeking to improve existing environmental legislation the debate was reduced to and revolved around the “perceived” strength and independence of the EPA.

The introduction of environmental protection legislation in Western Australia corresponded with government policy throughout a number of First world countries. Hence, the 1971 EP Act was a direct response to growing environmental awareness. The Act provided for a main administrative body the EPA, which was given wide ranging responsibility to protect and enhance the environment (WAPD, 23 September 1971, p. 1738). The EPA’s powers, however, were restricted by a number of deficiencies in the legislation. This was particularly evident in section 28-57, which contained the requirements for environmental protection policies (EPPs). These requirements were extensive, lacked clarity and helped explain why no EPPs were developed by the EPA for the entire duration of the 1971 EP Act (Cox, 1994, p. 307). Other deficiencies in the Act included a narrow definition of the “environment” and the non-specific provisions to deal with land clearing to control salinity. As a result the EPA lacked significant power and was restricted to an advisory role (Conacher, 1980, p. 54; Main, 1988, p. 135). This lack of power may have helped persuade the Authority to pursue a more educative role in environmental management.

From its inception in 1971, the EPA embarked upon an educative role to increase public involvement and awareness in environmental protection. Accordingly, a Committee for Understanding the Environment was established in 1973 by the EPA to ensure greater public participation (EPA, Annual Report, 1973, p. 10). The importance of public involvement was a constant objective of the EPA. This was achieved with regular advertisements for public submissions and published accounts of EPA

recommendations. As a result, greater openness and accountability ensued which increased public awareness on environmental issues (Main, 1991, p. 23). Consequently, one of the main early achievements of the EPA was its contribution to enhanced public knowledge on environmental matters. In addition, the EPA was required to undertake various functions including pollution control measures and environmental impact assessment (EIA) procedures.

Initially, a different system of EIA procedures was developed in Western Australia, when the EPA adopted an *ad hoc* approach for development proposals. However, a more direct involvement for the EPA in environmental impact assessment, became inevitable following a Commonwealth State agreement in 1977 (EPA Annual Report, 1976-77, p. 19). Of course, this allowed for increased public scrutiny and made government decision making more difficult, especially when the decision was contrary to EPA recommendations. For example, in 1979 the Coalition Government came under intense pressure when it rejected EPA advice and granted approval for the Worsley Alumina refinery. At the time, this was widely reported as among the main reasons for introducing changes to the EP Act in 1980.

The 1980 amendments were the first significant change to the 1971 EP Act since its formation. The changes resulted in removing the Director of Conservation and Environment from his position as chairman of the EPA (Hollick, 1985, p. 123). This in effect separated the EPA from the Department and was widely seen as a clear attempt to weaken the Authority. A number of environmental groups including the Australian, and the Western Australian Conservation Councils', expressed alarm at the attack on the independence of the EPA (*The West Australian*, 21 October 1980, p. 3). Moreover, the

Labor Opposition was extremely critical of the restrictions placed on the EPA to publish its recommendations. The Opposition also expressed concern with the potential for greater interference by the Minister in the EPA (WAPD, 20 November 1980, p. 3813). In the aftermath of the 1980 amendments the efficiency and independence of the EPA was constrained under the split roles. This was due to a lack of specific administrative guidelines, combined with the diverging opinions and personalities of the respective heads, namely Barry Carbon and Colin Porter (Hodge, 1991, p. 98). Hence following a change to a Labor Government in 1983, and a period of apparent hesitancy, the first decisive action undertaken by the newly appointed, Minister for the environment Barry Hodge in 1986, was to realign the Department and the EPA to overcome these difficulties.

In the same year, the Burke Labor Government finally introduced the long awaited revised environmental protection legislation into Parliament. While the original 1971 EP Act failed to give the EPA or the Minister any real power, the replacement 1986 Act was a significant improvement in that regard. The strength of the legislation was enhanced by the primacy given to the EP Act over the majority of Western Australian statutes (5), and the guarantee of EPA independence from Ministerial directions (8). In terms of protecting the environment, the 1986 EP Act was among the best in Australia and was adopted as a model in various parts of the world (Nicholson, 26 August 1992, p. 11). Therefore, this study found that the 1986 EP Act was the strongest environmental legislation enacted in Western Australia. Consequently, the capacity for the EPA to provide effective environmental advice was at its highest, following the proclamation of the 1986 EP Act, until the election of the Coalition Government in 1993.

The 1986 EP Act increased the power and influence of the EPA with specific (EIA) procedures, and a broader definition of the "environment" to cover an increased number of social aspects (Bailey & English, 1991, p. 191). In addition to EIA's the 1986 EP Act provided the EPA with two other important statutory measures to assist with some of its functions (Singleton, 1992, p. 35). This involved improving the capacity for the EPA to develop environmental protection policies in Pt III, and with the allocation of pollution control measures in Pt V. These statutory arrangements were offset by the advisory nature of EPA recommendations, with the final decision taken by the elected Government of the day (Johnson, 1988, p. 142). However, the success of any environmental legislation largely depends on the degree of political commitment given to it. Regrettably political commitment to the main environmental legislation in Western Australia has not been consistent over a number of decades. Hence, instead of seeking to improve deficiencies in the legislation, the Coalition Government set about restructuring the EPA after gaining office in 1993.

Following the election in 1993, the Coalition Government disbanded the Social Impact Unit and upheld its controversial promise to separate the combined position of chairman of the EPA and chief executive of the Department. This in effect meant dispensing with the services of Barry Carbon, who had held the position for eight years (Nicholson, 26 April 1993, p. 1). The decision to do so before Parliament resumed, combined with the inappropriate attempts to invalidate the contracts fuelled the controversy and provoked three months of polarised public debate (Nicholson, 27 October 1993, p. 23). After failing to revoke the contracts, the Government was forced to introduce the *Environmental Protection Amendment Act 1993* into Parliament to split the Authority and the Department. This move was widely perceived as a direct attempt to weaken the

EPA (Gardner, 1993, p. 40). These concerns appeared to be justified in March 1996, when the findings in the *Coastal Waters* case supported the earlier predictions of a weakened, less independent EPA. These views were also backed up by inadequate allocation of resources to the EPA and the inability of the Chairman to direct resources into specific areas (Environment Business, April 1997, p. 8). Moreover, the decision to provide "adequate" funding to the EPA, under s 17A was in effect determined by the particular values and priorities of the government of the day (Bache, 1998, p. 164). Hence, the 1993 amendments significantly compromised the independence of the EPA, and the evidence suggested that the changes were largely due to ideological beliefs.

A significant finding of this study, was the clear ideological difference between the two major parties concerning environmental legislation, and the strength and independence of the EPA. The Labor Party presided over stronger environmental legislation, during their time in office in Western Australia. This resulted in a more prominent role for the EPA under various Labor Governments. It was the Tonkin Labor Government that introduced the original 1971 EP Act, which established the EPA. While the Act was deficient in a number of areas the intention was to produce effective legislation for the protection of the environment in Western Australia (WAPD, 23 September 1971, p. 1737). The enactment of the 1971 EP Act was also consistent with government policy throughout a number of Western democracies, and was an important first step in Western Australia. In 1986, the Burke Labor Government realigned the Department and the EPA, to overcome difficulties that emanated from the 1980 amendments. In the same year the Government introduced the 1986 EP Act which significantly improved the existing environmental legislation and increased the power and influence of the EPA (Bache, Bailey and Evans, 1996, p. 487).

On the other hand, the Liberal Party expressed concern with the joint roles under the original 1971 Act, it introduced legislation in 1980 to separate the combined roles, and it opposed that aspect of the 1986 Act (WAPD, 16 October 1986, p. 3182). Moreover, the Coalition Government's decision to restructure the EPA without Parliament approval in 1993 highlighted this ideological position. To achieve its aims, the Government introduced the *Environmental Protection Amendment Act 1993* into Parliament to separate the Authority and the Department. This decision was contrary to the Independent Advisory Committee's recommendations, and was inconsistent with advice provided to the Labor Government by Professor Richard Harding in 1992 (WAPD, 9 September 1993, p. 3531). As a result of this decision, the evidence indicated that the 1993 amendments restricted the scope of EPA involvement in environmental management. While this may ensure greater control by the Minister concerning environmental decision making, it can leave governments more open to criticism when errors occur or conflicts arise. It also required environmentalists to be more vigilant in raising public awareness and placing significant issues firmly on the political agenda.

However, the Coalition Government has performed well in particular areas of environmental management. It can claim credit for endorsing the majority of Conservation Through Reserves Committee (CTRC) recommendations in the late 1970s, which resulted in a significant portion of land being set aside for national parks (WAPD, 9 September 1993, p. 3549). In addition, it was the Coalition Government that first acted on salinity, by halting widespread land-clearing in the South West catchment areas in 1976. More recently, the Coalition Government was commended for its attempts to redress the extensive salinity problem facing Western Australia (Capp, 1998, p. 31). Yet despite, improvements in particular areas, governments of all persuasions

appear to be constrained by their incapacity to link environmental protection with economic benefit over the long-term.

### **Broader Implications of the Study.**

It would appear that the challenges facing environmentalists in gaining widespread acceptance for an alternative social paradigm are immense. While gains have been made in placing environmental concerns on the political agenda since the 1970s, the level of actual commitment is more difficult to quantify. For example, Mc Cormick (1995, p. 161) notes that the first ever Department of the Environment created in Britain was given greater significance than it deserved. In reality, the Department was a reorganisation of existing bureaucracy, which was given insufficient powers to cope with the magnitude of environmental management. The ideological belief that the free market provides the best means of solving environmental problems is common throughout First World countries, and stronger among conservative parties. This was apparent during the period of the Reagan administration in America, and for a large part of the Thatcher years in Britain (Mc Cormick, 1995, p. 260). As a result, environmentalism had to compete with and became subordinate to a range of policy issues such as business investment, employment, education, health and housing. Hence, within the more powerful First World countries the attitudes and assumptions of the dominant exclusionist paradigm are still intact (Porter, and Brown, 1991, p. 32).

The broader findings from this study would suggest that environmental concerns have not penetrated the exclusionist paradigm held by the main political parties in Western Australia. This contrasts with the more optimistic claims by Papadakis (1993, p. 1, 104) that political institutions in Australia have undergone a significant paradigm shift to



incorporate environmentalism. While governments have responded to environmental concerns at various stages since the 1970s, these responses have tended to be a direct reaction to growing public pressure. For example, the 1971 EP Act was enacted during heightened universal public awareness (O' Brien, 1978, p. 41). Moreover, in 1986 the Labor Government was able to introduce the strongest environmental legislation in Western Australia following a resurgence in public concern with environmental issues (Nicholson, 26 August 1992, p. 11; Wood and Bailey, 1994, p. 41). However, once the environment is displaced by more pressing issues on the public agenda governments shift their attention to higher priorities, as indicated by the Coalition Government's commitment to reduce State debt in 1993.

In addition, environmental problems are compounded by the adversarial nature of the political system adopted in Australia. Under this system, decisions are taken with an emphasis on short-term political advantage. Since environmental issues tend to have a cumulative effect on natural resources (EPA Annual Report, 1979-80, p. 4), the lack of long term environmental policy is a significant concern. For example, as early as 1973, the Western Australian EPA warned about the dangers of increased salinity, but governments failed to focus on the problem until the late 1990s. There are other examples of long term environmental problems that need to be addressed, including sustainable forest management and greenhouse gas emission reduction. However, the extent of these problems will only increase, unless governments adopt greater long-term vision, rather than pursue a reactionary response to environmental management.

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