SQUIRE PATTON BOGGS

Impact of Proposed Amendments to The *Environmental Protection Act 1986* (WA) on WA Environmental Licences

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On 9 June 2020 the *Environmental Protection Amendment Bill 2020* (WA) (**Bill**) was read for a second time in the Legislative Council. The Bill was introduced following a period of public consultation on an Exposure Draft and Discussion Paper. This article highlights some of the key changes proposed for applications for licences and works approvals, and amendments to them, with a particular focus on existing licence holders and new applicants where a referral to the EPA does not occur. As for the Regulations, which appear to be key to understand the impact of some of the amendments, no draft has been released for comment and the devil will be in the detail.

Licensing of Activities Not Premises

One of the well publicised changes is that licensing will no longer be of 'premises' but of 'activities'. This change will overcome various issues such as uncertainties regarding undertaking additional activities which would not ordinarily be the subject of regulation on a licenced premises. It is also said to be better for situations where different operators carry out independent operations in the same area or multiple operators are involved in the same business. However, at this stage there is little clarity around its practical operation, and industry queries around this were answered in the consultation summary by reference to it being dealt with in the Regulations (which have yet to be released for comment).

The transitional provisions in the Bill provide for the continued operation of existing licences and works approvals and a contemplated conversion to the new licence format. However, the precise way conversion will be implemented is not currently clear.

Changes to Licence, Works Approval and Amendment Application Process

The Bill does away with 'works approvals' and merges these with applications for amendments to the licence, with the intent of reducing the regulatory burden of the dual 'licence' and 'works approval' system. However, in doing so, a number of changes are made to the licence amendment process. Under the existing Act no requirements exist for publication or consultation in respect of applications for licence amendments. Under the Bill that changes, imposing a regime consistent with that for licence applications.

The publication aspects of the application regime has also changed. Previously, only prescribed details of a licence application were required to be published. However, under the Bill the entire licence application (or amendment application) and supporting documents are required to be published. This change is significant, albeit it is consistent with the practice adopted by DWER in recent years. Given the detail required in such applications, confidentiality concerns are inevitable. An attempt to leave (sensitive) information required by the form out will require a refusal to deal with the application. The Bill does introduce a new section (s122B(4)(b)) to enable Regulations to make provision for measures and procedures for maintaining confidentiality, including the manner in which requests are to be made and dealt with. Given the unsatisfactory absence of any clear procedure regulating the DWER's current practice, detailed Regulations to do so would be welcome. However, until draft Regulations are released, anxiety around confidentiality is warranted. Will the criteria and assessment for publication be in line with FOI? Will there be a right of appeal to an independent decision maker? This detail is important, as the DWER has had proposed decisions to release confidential information under FOI overturned by the WA Information Commissioner in the past where DWER had not adequately recognized its sensitive commercial nature. Issues with confidentiality have similarly arisen in the context of appeals before the Appeals Convenor, with the informal and non-specific assurances providing little comfort for those involved in the process, but it is not clear if Appeals will be included in the Regulations.

Changes to The Amendment Process (Including Following Appeals)

Under the existing legislation, before a licence amendment is made, notice must be given to the licence holder. The Bill introduces two new exemptions to this requirement: where the licence amendment was at the application of the licence holder or to give effect to a decision of the Minister on appeal. In terms of applications for licence amendments, this change will heighten the importance of detailing the precise licence condition being requested in an amendment application to avoid the risk DWER may draft a condition which might be inconvenient to the license holder. Similarly, it poses potential issues upon determination of an appeal by the Minister, if the existing practices of the Minister and the DWER are continued.

Our experience of existing practices in an appeal is that the Minister in making a determination on the appeal will not necessarily consult the licence holder as to the precise terms of additional licence conditions he or she is proposing to impose as part of determining the appeal. Further, the Minister might include a mandate to the DWER to "insert a new condition requiring [X]" and for the DWER to then convert that instruction into a more detailed licence condition. In doing so, DWER's position has been that it is entitled to elaborate on the precise instruction provided by the Minister (for example, if the Minister's decision was to require a third party review, the DWER might include requirements as to the qualifications of any reviewer), rather than being limited to the wording provided by the Minister. Given the absence of a right of appeal from such an amendment, a strategic approach in appeals will be necessary to militate risk.

Appeals

In merging the works approval process with the licence amendment process, a gap which exists under the current legislation whereby no right of appeal to the Minister is conferred if the CEO refuses to make a requested licence amendment, is closed. The Bill provides for an applicant whose amendment application is refused the right to lodge an appeal. The Bill notably continues with appeals by way of the Minister/Appeals Convenor and does not include the establishment of a specialist Environmental Court or transferring jurisdiction for appeals to the State Administrative Tribunal. Further, the Bill does nothing to provide any real guidance on the processes that might be followed during an appeal, or to ensure that a licence holder is given a proper opportunity to comment on the terms of licence conditions that might be imposed on it as part of determining an appeal.

The above is a high-level summary of select changes only. If you have concerns as to how the Bill might impact your circumstances if it becomes law, please contact our team at Squire Patton Boggs who are ready to provide advice. We have significant experience in assisting clients in Western Australia with licence applications and dealing with amendments to licences, including acting and advising in appeals and judicial review applications.

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