

SOIL AND LAND CONSERVATION AMENDMENT BILL 2021

EXPLANATORY MEMORANDUM

Background to the *Soil and Land Conservation Act 1945*

The *Soil and Land Conservation Act 1945* (the Act) is the principal legislation in Western Australia (WA) relating to the conservation of soil and land resources and to the mitigation of the effects of erosion, salinity and flooding. Much has changed in the field of soil and land resource management policy since the Act was first developed in 1945.

There is growing understanding not only of the need to prevent or reduce land degradation, but also a strong desire to address issues relating to soil health more broadly. This broader interest reflects an increasing awareness by the community of links between healthy soils and the nutritive value of food produced in those soils, thereby strengthening the foundations of our agricultural industry. Land degradation affects both quality of life and economic viability for the community relying on the land for agricultural produce.

The Act provides for the appointment of a Commissioner of Soil and Land Conservation. The Commissioner's functions are the prevention and mitigation of land degradation and promotion of soil conservation.

To support the Commissioner and advise the Minister on the condition of soil and land resources, the Act provides for the appointment of the Soil and Land Conservation Council (the Council). Council membership is prescribed under section 9 of the Act, with appointments made on a representative basis from members of industry groups, government agencies and conservation bodies for a fixed period of time.

The Council ceased to operate when the then membership expired in December 2003. The Act, however, was not amended and there is still a statutory requirement for a Council. Moreover, it is clear that issues of soil health and quality require more focus than they are currently receiving.

In early 2018, in the absence of a sitting Council, a Soil Ministerial Advisory Committee (Advisory Committee) was established to advise the Minister on new and emerging science supporting soil health and land condition improvement in WA, and to initiate a review of membership of the Council. The Advisory Committee concluded the Council could better serve its function if its membership represented wider community interests in soils with appointments made on a skills basis rather than representative of particular groups or interests. A modern, skills-based Council will bring a broader, more innovative approach to developing policies rather than having a purely regulatory focus.

The Council was reactivated and a new Council was appointed on 1 October 2019. Initial tasks of the Council included providing advice on issues arising from the recent Office of Auditor General reports into pastoral land management and salinity management, plus development of a soil health strategy for the State.

Overview of the Bill

The *Soil and Land Conservation Amendment Bill 2021* (the Bill) makes three key changes to the Act.

Firstly, the Bill makes amendments that are designed to ensure the Act is consistent with contemporary legislation in jurisdictions around Australia for the selection and management of members of Councils, Committees and Boards.

In particular, the amendment provisions –

1. replace the current stakeholder nominated Council memberships with up to ten Ministerial appointments based on expertise and experience, for up to three-year terms and potential reappointment. The Commissioner of Soil and Land Conservation is a member of the Council with the Minister appointing up to nine members who must have, between them, expertise and experience in the following:
 - (a) agricultural production;
 - (b) environmental conservation;
 - (c) land management;
 - (d) local government and planning;
 - (e) managing pastoral land;
 - (f) soil conservation;
 - (g) soil science;
2. provide that the Minister designate a Chairperson and Deputy Chairperson of the Council;
3. provide that council positions become vacant in circumstances consistent with modern schemes;
4. provide that the Minister may remove a member of the Council on grounds of neglect of duty; misconduct or incompetence; mental or physical incapacity (other than temporary illness) that impairs the performance of the member's duties; and for any other reasonable cause;
5. provide for an extension of a term of office, for 6 months or until the vacancy is filled, where a member's terms of office expires by effluxion of time;
6. provide for alternate members to be appointed and act temporarily when a Council member is on leave;
7. provide that members of the Council be paid remuneration and allowances as determined by the Minister, on recommendation of the Public Sector Commissioner;
8. provide for the remote attendance of Council members to meetings; and
9. provide for disclosure of material personal interests by Council members, including Council procedure and quorum where a material personal interest has been disclosed;

Secondly, the Bill repeals Part VA and all references to the Landcare Trust which was wound up in 2002. Repeal of Part VA removes the formal requirement for annual reporting.

Thirdly, the Bill amends the language throughout the Act to make it gender neutral.

A clause by clause commentary of the content of the Bill is provided below.

Clause 1 Short title

Provides that the title of this Act is the *Soil and Land Conservation Amendment Act 2021*.

Clause 2 Commencement

Sets out the commencement provisions and provides that different sections of the Act will commence on different days. Part 1, which includes the Short Title and Commencement provisions, commence on the day on which the Act receives Royal Assent. The rest of the Act will commence on the day after that day.

Clause 3 Act amended

States that this Act amends the *Soil and Land Conservation Act 1945*.

Clause 4 Section 4 amended

Clause 4(1) deletes the definitions of ***Trust*** and ***Trust Account***. These definitions are referred to in Part VA of the Act. These definitions have been removed in line with the deletion of Part VA of the Act (Landcare Trust). Part VA of the Act has been removed because the Landcare Trust no longer operates.

Clause 4(2) inserts the definition of ***appointed Council member*** in section 4, to mean a Council member appointed under new section 9A(3). Section 9A(3) provides that the Minister may appoint up to 9 members.

The definition of “appointed Council member” is also used in new section 9C (Terms and conditions of appointment), section 9D (Casual vacancies) and 9E (Extension of term of office).

Clause 4(2) inserts the definition of ***Department*** in section 4, to mean the department of the Public Service principally assisting in the administration of this Act. The definition replaces the references to “Department of Agriculture” throughout the Act and has been defined to avoid outdated references to the Department of Agriculture.

Clause 4(2) inserts the definition of ***unable to act*** in section 4, to mean in relation to an officer holder, being unable to act because the office holder is on leave, whether extended or not and whether for illness or not. This definition is used in section 7A (Deputy Commissioner), section 9B (Chairperson and deputy chairperson) and section 9F (Alternate members).

Clause 4(3) amends the definition of ***Council*** in section 4 by deleting the words “appointed by the Governor under this Act” and replacing it instead with the words “established by section 9”. The definition removes the reference to the Governor because this is no longer relevant.

Clause 5 Part II Division 1 heading inserted

Clause 5 inserts at the beginning of Part II, the heading “Division 1 – General”.

Clause 6 Section 7A amended

Clause 6 amends section 7A(2) to remove the words “absent or is temporarily incapable of fulfilling his duties” and inserts instead, the words, “unable to act”.

This links to the new definition of “unable to act” that has been inserted in section 4 and which is used consistently throughout the Act.

Clause 7 Part II Division 2 heading and Part II Division 2 Subdivision 1 heading inserted

Clause 7 inserts after section 8, the heading:

“Division 2 – Soil and Land Conservation Council
Subdivision 1 – Council constituted”

Clause 8 Sections 9, 9A and 10 replaced

Clause 8 deletes section 9, 9A and 10 of the Act and replaces these sections with new sections 9, 9A, 9B, 9C, 9D, 9E, 9F and 10.

New Section 9

Section 9 replaces the old section 9(1) and removes outdated references to the Governor, and establishes a body called the Soil and Land Conservation Council.

New Section 9A

Section 9A provides for the membership of Council and replaces the old s.9(2)-(3). New section 9A provides for a more modern, skills-based Council.

Section 9A provides that –

- (1) the Council is to consist of up to 10 members. This wording (i.e. “up to”) has been used to prevent any doubt about whether the Council is validly constituted if there are less than 10 members at a given time;
- (2) the Commissioner is a member of the Council;
- (3) the Minister may appoint up to 9 members;
- (4) the Minister must ensure that the Council members have, between them, expertise or experience in the following –
 - (a) local government planning;
 - (b) agricultural industry;
 - (c) managing pastoral land;
 - (d) soil science;
 - (e) land management;

- (f) environmental conservation;
- (g) soil conservation

Subsection 9A(4) inserts the requirement that Council members be appointed based on their expertise and experience. This is in line with a modern, skills-based Council which will bring a broader more innovative approach to developing policies rather than having a purely regulatory focus.

New Section 9B

Section 9B provides for the Chairperson and deputy Chairperson and replaces the old section 9(4). The old section 9(4) referred to the Governor appointing the Chairperson and Deputy Chairperson. New section 9B reflects the current approach that the Minister designate a Council member to be the chairperson of the Council, and another to be the deputy chairperson of the Council.

Section 9B also introduces two new subsections. Subsection (2) provides that if the chairperson is unable to act or the position of chairperson is vacant, the deputy chairperson is to act in the chairperson's place. Subsection (3) provides that an act or omission of the deputy chairperson acting in the chairperson's place cannot be questioned on the ground that the occasion for acting had not arisen or had ceased. These subsections have been included to make the role of deputy chairperson clear. Its inclusion was based on modern regimes of Boards and Councils¹.

New Section 9C

Section 9C provides for the terms and conditions of appointment. It replaces the old section 9(5) and (6) and has been modernised to reflect current regimes². Under section 9C, an appointed Council members holds office for the period, not exceeding 3 years, specified in their instrument of appointment and is eligible for reappointment. Under the old section, this term was 5 years. A shortened term of 3 years ensures there are more regular reviews of appointments providing certainty as to the effectiveness of the person in the relevant position.

Subsection (2) provides that an appointed Council member holds office on the terms and conditions of appointment determined by the Minister. This was previously set out under section 9(5) but referred to the Governor.

New Section 9D

Section 9D provides for casual vacancies. It replaces the old section 9(7) and 9(8). It also introduces other circumstances (subsections (1)(b)-(d)) in which a vacancy arises to be consistent with modern schemes.

¹ *Infrastructure Western Australia Act 2019*, s.27

² *Infrastructure Western Australia Act 2019*, s.28(3) and (4).

Under the old section 9(8), the office of a member of the Council became vacant if the member died, resigned or was dismissed by office by the Governor.

Under new section 9D(1), the Office of an appointed Council member becomes vacant if the member –

- (a) dies, resigns or is removed from office under this section; or
- (b) is, according to the *Interpretation Act 1984* section 13D, a bankrupt or a person whose affairs are under insolvency laws; or
- (c) is convicted of an offence punishable by imprisonment for more than 12 months; or
- (d) when a council member is convicted of an offence under section 11A(1) (Disclosure of material personal interests).

Section 9D(2) provides that an appointed Council member may at any time resign from office by writing signed and given to the Minister.

New section 9D(3) sets out the grounds of removal of a Council member by the Minister. The old section 9(7) provided that a Council member could be dismissed if that person was guilty of any act or conduct which in the opinion of the Governor renders that person unfit to be a member of the Council. The new section 9D(3) clearly sets out the grounds for removal of a Council member, and retains a flexible power of removal. The Minister may remove an appointed Council member from office –

- (a) on the grounds of –
 - (i) neglect of duty; or
 - (ii) misconduct or incompetence; or
 - (iii) mental or physical incapacity, other than temporary illness, impairing the performance of the member's duties;
- or
- (b) for any other reasonable cause.

“Misconduct” is defined in section 9D(4) to include conduct that renders the Council member unfit to hold office as a member even through the conduct does not relate to a duty of the office.

Under new section 9D there is no requirement that the person who is appointed to fill a vacancy is retained for the remainder of the term of the office of the original council member (as was set out in the old section 9(9)). It is not necessary to link the replacement with the remainder of the term of office of the previous member because doing so creates an administrative burden with the paperwork. For example, if a replacement is appointed two months prior to the expiry of the original member.

New section 9E

Section 9E is a new provision that provides for an extension of the term of office.

Section 9E(1) provides that if the office of an appointed Council member becomes vacant because the member's term of office expires by effluxion of time, the member continues to be a Council member during that vacancy until the earlier of –

- (a) the end of the period of 6 months immediately following the expiry of the term of the office;
- (b) the vacancy being filled.

This section has been adopted in line with modern schemes³ and has been included to account for the need for relatively frequent appointments (3 years). The Minister may not always be able to appoint someone in time and so this provision ensures there are no vacancies should this scenario arise.

Section 9E(2) provides that section 9E is subject to section 9D which relates to casual vacancies (as set out above).

New section 9F

Section 9F provides for alternate members. It replaces the old section 9A which provided for deputy members to be appointed in the absence of a council member. The content of the provisions is similar in nature.

New section 9F clearly sets out the provisions that are to apply when alternate members are appointed. It provides that if a council member other than the commissioner or the chairperson is unable to act, the Minister may appoint another person as an alternate member to act temporarily in the member's place. The commissioner and chairperson are excepted from this process because the deputy commissioner will automatically step into the position of commissioner should they be unable to act. Similarly, the deputy chairperson will act in the position of chairperson should they be unable to act. The old section 9A did provide for the deputy chairperson to be excepted, however, this has been removed from the new section because there is not an obvious replacement and an alternate member will need to be appointed in the event the deputy chairperson is unable to act.

The new definition of "unable to act" is used in section 9F(1) and, in relation to a council member, includes, without limitation, that the council member is on leave, whether extended or not and whether for illness or not.

Section 9F(2) provides that if the deputy chairperson is acting in the chairperson's place, the Minister may, under subsection (1) appoint another person as an alternate member to act temporarily in the deputy chairperson's place.

Section 9F(3) sets out that while acting in accordance with their appointment, an alternate member is taken to be a council member and to have the equivalent entitlements (if any) of the council member in whose place they are acting. Section 9F(3) refers to alternate members taking on all equivalent entitlements of a council member, and this updates the old section 9A(2) which referred only to attendance of meetings.

³ *Infrastructure Western Australia Act 2019*, s.31.

New Section 10

Section 10 provides for the remuneration of members. It replaces the old section 10 which referred to remuneration being prescribed by the regulations. Those regulations then referred to remuneration and travelling allowances being determined by the Minister, on recommendation of the Public Sector Commissioner.

The new section 10 removes the unnecessary layer of regulations (repealed in clause 22) and provides that a council member is entitled to the remuneration and allowances determined by the Minister, on the recommendation of the Public Sector Commissioner.⁴

Subsection (2) provides that a council member is not entitled to remuneration if the member holds a full-time office or position that is remunerated out of moneys appropriated by Parliament. This new subsection is designed to avoid remunerating a member twice if they are a public servant.

Clause 9 Part II Division 2 Subdivision 2 heading inserted

Clause 9 inserts before section 11, the heading –
“Subdivision 2 – Council procedures”

Clause 10 Section 11 amended

Clause 10(1) amends section 11(1) to delete “Chairperson” and insert instead “chairperson”. This amendment removes the capital “C” in chairperson to provide consistency with the use of the term throughout the Act.

Clause 10(2) deletes section 11(2) which provides for a quorum of 6. As the number of members of the Council is being changed with the Minister being able to appoint “up to” 9 members, it is necessary to update the quorum for a meeting.

New section 11(2) provides that the quorum for a meeting of the Council is one half of the number of Council members. As the Council may not always consist of 10 members at any given time, this provision allows for some movement in the quorum.

New section 11(2A) provides that the presence of a council member at a meeting of the Council need not be by attendance in person but may be by that member and each other member at the meeting being simultaneously in contact by telephone or other means of instantaneous communication. This provision has been included because it expressly enables meetings to be held remotely, which is common in modern regimes⁵, and is pertinent in current times.

⁴ Drafting has been based on the *Biosecurity and Agriculture Management Act 2007*, s.48(4).

⁵ *Infrastructure Western Australia Act 2019*, s.39.

Clause 11 Part II Division 2 Subdivision 3 inserted

Clause 11 inserts after section 11, Subdivision 3 which deals with disclosure of material personal interests and is a new subdivision. This requirement was previously in the Council's own rules and will enable better compliance and enforcement as part of the Act. The provisions are based on common and modern provisions relating to Councils in other Acts.

New Section 11A

Section 11A provides for disclosure of material personal interests.

Subsection (1) provides that a Council member who has a material person interest in a matter being considered or about to be considered by the Council must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature and extent of the interest at a meeting of the Council. The penalty of \$5,000 has been accorded to this section which reflects the maximum amount that would only ever be awarded in the most serious case.

Subsection (2) provides that if a council member has, in the opinion of the person presiding at a meeting of the Council, a material personal interest in a matter being considered or about to be considered by the Council, the person presiding –

- (a) may call on the member to disclose the nature and extent of the interest; and
- (b) if the member does not disclose the nature and extent of the interest, may determine that the member has the interest.

Subsection (3) provides that a disclosure under subsection (1) or a determination under subsection (2) must be recorded in the minutes of the meeting.

New Section 11B

Section 11B provides for participation by interested members. This provision is based on modern provisions in other Acts relating to Councils and Boards.⁶

Subsection (1) provides that a council member who has, or has been determined under section 11A(2)(b) to have, a material personal interest in a matter that is being considered by Council –

- (a) must not vote (whether at a meeting or otherwise) on a resolution on the matter; and
- (b) must not be present (whether in person or remotely) while the matter is being considered at a meeting.

⁶ Infrastructure Western Australia Act 2019, s. 46.

Subsection (2) provides that a reference in subsection (1)(a) or (b) to a matter includes a reference to a proposed resolution under section 11C(b) in respect of the matter, whether relating to that member or a different member.

Subsection (3) provides for exceptions to subsection (1) i.e. when a member who has a material personal interest in a matter, can be present at a meeting and vote. This provision is based on modern similar provisions in other Acts.⁷ The restrictions in subsection (1) do not apply to the extent that the Council has at any time passed a resolution that –

- (a) specifies the interested member, the interest and the matter; and
- (b) states that the members voting for the resolution are satisfied that the interest should not disqualify the interested member from considering the matter or considering and voting on the matter.

New Section 11C

Section 11C provides for the quorum where section 11B applies and a Council member is unable to act due to a material personal interest in a matter. This provision is based on modern provisions in other Acts.⁸

Section 11C provides that, despite section 11(2) i.e. the quorum of a meeting being one half of the number of Council members, if a Council member is unable to act in relation to a matter under section 11B (because of a material personal interest), a quorum is present during the consideration of the matter if the number of members present, who are entitled to vote on any motion that may be moved at the meeting in relation to the matter, is –

- (a) at least the quorum under section 11(2), less 1; and
- (b) not less than 3.

It is important to note that although some regimes provide that the Minister may deal with a matter if the Council cannot deal with it because a quorum cannot be met after excluding conflicted members, this Council's function is to advise the Minister and so it would not be appropriate for the Minister to be making a decision about a matter concerning advice to be provided. The Council is best placed to resolve these issues by itself, without the Minister having to intervene.

Clause 12 Part II Division 2 Subdivision 4 heading inserted

Clause 12 inserts before section 12, the heading –
“Subdivision 4 – Miscellaneous”

⁷ Infrastructure Western Australia Act 2019, s. 47.

⁸ Infrastructure Western Australia Act 2019, s. 48.

Clause 13 Section 23 amended

Clause 13 amends section 23(2)(b)(a) to remove the words “Commissioner, *ex officio* or his” and inserts instead “Commissioner or the Commissioner’s”. The reference to “*ex officio*” has been removed for consistency with the new provisions concerning the Council. Plain language drafting eschews the use of Latin.

Clause 14 Section 35 amended

Clause 14 amends section 35(3)(a) to remove the words “thereto;” and inserts instead “thereto; and”. This amendment tidies up section 35(3) by clearly linking 35(3)(a) and 35(3)(b) with the word “and”.

Clause 15 Part VA deleted

Clause 15 deletes Part VA of the Act.

Part VA of the Act dealt with the Landcare Trust which was primarily established to control and manage the making of donations to the Trust for the purposes of funding and promoting soil and land conservation projects in the State.

The Landcare Trust was wound up in 2002. There has been no activity since then and it is not operational so none of the provisions that were in Part VA are applicable. There is no money in the Landcare Trust. Repeal of Part VA removes the formal requirement for annual reporting.

Clause 16 Part 7 inserted

Clause 16 inserts after section 48, Part 7 which relates to transitional provisions for the *Soil and Land Conservation Amendment Act 2021*. The purpose of the transitional provisions is to set out what happens to the existing Council when the Bill is passed.

Part 7 comprises of sections 49, 50 and 51.

Section 49

Section 49 provides for the Terms used. New definitions include –

former Council means the Soil and Land Conservation Council under section 9(1) as in force before transition day;

transition day means the day on which the *Soil and Land Conservation Amendment Act 2021* section 8 comes into operation.

Section 50

Section 50 provides for the continuation of the former Council. It states that the Council established under section 9 is a continuation of the former Council.

Section 51

Section 51 provides for members of the former Council. This transitional provision sets out the specific details of the members of the Council, whose former appointments are to continue.

Subsection (1) provides that a person, other than the Commissioner, who was, immediately before transition day, a member of the former Council is taken to have been appointed on transition day to be a member of the Council under section 9A(3).

Subsection (2) provides that the person –

- (a) holds office, under section 9A –
 - (i) on the terms and conditions of their existing appointment; and
 - (ii) for the remainder of the term of their existing appointment;
- and
- (b) while the person holds office under this section, is entitled to the same remuneration, if any, and allowances to which they were entitled in respect of the office that they held immediately before transition day.

Subsection (3) gives the Minister the power to make a new determination if circumstances change when the *Soil and Land Conservation Amendment Act 2021* comes into operation.

It provides that subsection (2) does not prevent –

- (a) the person from resigning from or being removed from office, or their office becoming vacant, under section 9D; or
- (b) the remuneration and allowances of the person being determined under section 10.

Subsection (4) provides that subsection (1) and (2) have effect despite the limit in section 9A(1). The note for this subsection provides that the former Council consisted of 11 members immediately before transition day. This means that the former Council which consisted of 11 members will continue despite the 10 member limit in section 9A(1). The intention being that when the appointments expire, a person resigns or is removed, or their office becomes vacant, new appointments will be made in line with new section 9A(1) i.e. 10 member limit.

Subsection (5) provides that a person who was, immediately before transition day, the chairperson or deputy chairperson of the former Council, is taken to have been designated on transition day to be the chairperson or deputy chairperson, as applicable, of the Council under section 9B(1).

Clause 17 Various references to gender removed

There are male references used throughout the Act. Clause 17 inserts a Table which lists all the provisions in the Act that refer to “him”, “his” and “he”. Where each of these words appear in a provision of the Act, that word is being removed and replaced with a gender neutral reference.

Clause 18 Various penalties amended

There are a number of references throughout the Act where penalties are described using the words “Penalty —”. Where these are described in subsections (namely 21(5), 22(4), 28(1), 35(4) and 42(1)), clause 18 inserts a table to list these subsections and to amend the wording to “Penalty for this subsection: a fine of”.

These words are also used in section 30D and 34B of the Act, and Clause 18(2) and 18(3) removes these words and replaces them with “Penalty: a fine of”.

This amendment updates language to be consistent with how penalties are described in other Acts.

Clause 19 Various references to “Department of Agriculture” amended

Clause 19 identifies the provisions in the Act where the term “Department of Agriculture” is used. These appear in the section 4 definition of “chief executive officer”, section 25F, section 25G and subsections 25E(1) and (2).

Clause 19 removes the reference to “Department of Agriculture” and replaces them with “Department”. This amendment removes outdated references to the Department of Agriculture and also links to the new definition of “Department” as provided for in Clause 4(2) of the Bill.

Clause 20 *Constitution Acts Amendment Act 1899* amended

Clause 20 amends the *Constitution Acts Amendment Act 1899* to delete in Schedule V Part 3 the item relating to the Landcare Trust. This item has been removed because the Landcare Trust no longer operates and is consistent with the repeal of Part VA of the Act.

Clause 21 *Financial Management Act 2006* amended

Clause 21 amends the *Financial Management Act 2006* to delete the item in Schedule 1 relating to the Landcare Trust. This item has been removed because the Landcare Trust no longer operates and is consistent with the repeal of Part VA of the Act.

Clause 22 *Soil and Land Conservation Council (Remuneration of Members) Regulations 1991* repealed

Clause 22 repeals the *Soil and Land Conservation Council (Remuneration of Members) Regulations 1991*.

These regulations provide for the remuneration and travelling allowances of each member of the Council. As these provisions are to be set out in the Bill (new section 10), these regulations are no longer required.