

National Environment Protection Council (Western Australia) Amendment Bill

Explanatory Memorandum

General Background to the Bill

Purpose of Amendments

The purpose of the *National Environment Protection Council (Western Australia) Amendment Bill* (the Bill) is to implement minor amendments to the *National Environment Protection Council (Western Australia) Act 1996* (NEPC (WA) Act). The NEPC (WA) Act is mirror legislation of the *National Environment Protection Council (NEPC) (Commonwealth) Act 1994* (NEPC (Cth) Act), which sets up a National Council of Ministers to meet, determine and evaluate National Environment Protection Measures (NEPMs) for the nation. The proposed amendments align the NEPC (WA) Act with the amendments that were contained within the *National Environment Protection Council (Commonwealth) Amendment Act 2002* (NEPC (Cth) Amendment Act). Some of the amendments affected by the NEPC (Cth) Amendment Act to the NEPC (Cth) Act are viewed as appropriate only for the Commonwealth to enact and consequently, the Bill does not exactly mirror all the NEPC (Cth) Amendment Act provisions. Those minor differences are explained in the Clause Notes below (see clauses 10 and 13).

The amendments, which have been agreed to nationally through the NEPC, were based on a statutory review of the Commonwealth, State and Territory National Environment Protection Council Acts (the McMichael review).

Main Effect of Amendments

The main effect of the amendments is to:

1. allow the National Environment Protection Council (NEPC) Service Corporation to provide support and assistance to other Ministerial Councils¹;
2. provide a simplified process for making minor variations to the NEPMs; and
3. require five-yearly reviews of the NEPC (WA) Act.

1. Service Corporation Assistance

One of the amendments (Clause 5) is the product of a review of Ministerial Councils by the Council of Australian Governments which resulted in the NEPC and the Environment Protection and Heritage Council (EPHC) meeting jointly. It was subsequently agreed by NEPC that the NEPC Service Corporation should extend its secretariat and project management services to the EPHC.

2. Minor Variations

Currently, every variation to a NEPM, no matter how administrative, must go through an extensive, resource-intensive consultation and impact assessment process. This is necessary for significant variations but a simplified process for minor administrative variations will enable changes to be made without a complete revision of the NEPM. Minor variations would occur only after agreement by the Ministers on the NEPC. This provides the opportunity for Western Australia to consider the impact of minor variations before committing to them.

3. Five-Yearly Reviews

The introduction of five-yearly reviews of the NEPC (WA) Act will provide a mechanism to ensure that the NEPC's objectives continue to meet the needs and expectations of the community that it serves.

General

The remaining amendments contained within the Bill are administrative and have no significant impact on Western Australia.

¹ "Ministerial Council" is newly defined in the Bill, mirroring the new definition in section 6 of the NEPC (Cth) Act, and means a council, comprising one or more Ministers of the Commonwealth and Ministers of one or more of the States or Territories, that includes environmental protection in its functions.

The amendments contained in the Bill ensure that Western Australia's legislation complies with the 1992 Inter-Governmental Agreement on the Environment, where it was agreed that Commonwealth legislative changes affecting the NEPC (Cth) Act should be incorporated in the corresponding legislation in all States and Territories.

The Bill will have no financial impact on Western Australia.

Outlined below is an examination of the contents of the Bill on a clause by clause basis.

Clause Notes

Clause 1: Short title and citation.

Clause 2: This clause provides that the commencement date for the provisions of the Bill is the day after the day on which it receives Royal Assent.

Clause 3: This clause identifies the ***National Environment Protection Council (Western Australia) Act 1996*** (NEPC (WA) Act) as the Act being amended.

Clause 4: This clause inserts into section 6(1) of the NEPC (WA) Act a definition of "**Ministerial Council**" that will enable the NEPC Service Corporation to service Ministerial Councils that include environmental protection in their functions, and a definition of "**minor variation**" which means a decision made under the new section 22A(1) to vary a national environment protection measure.

Clause 5: This clause amends section 13 of the NEPC (WA) Act to provide that the National Environment Protection Council (Council) has the power to direct the NEPC Service Corporation to provide assistance and support to Ministerial Councils in addition to the Council.

Clause 6: This clause amends section 20 of the NEPC (WA) Act which entitles the Council to vary or revoke national environment protection measures. This clause inserts a new sub-section (5) into section 20 of the NEPC (WA) Act to provide that sections 20(2) and 20(4) do not

apply to a minor variation of a national environment protection measure under new Division 2A.

Clause 7: This clause inserts a new Division 2A – Minor variation of national environment protection measures – into the NEPC (WA) Act. This Division provides for the making of minor variations to national environment protection measures by the Council and contains the procedures the Council must follow when making a minor variation.

The new section 22A(1) sets out the conditions under which the Council may determine whether a variation to a national environment protection measure is a minor variation. The new section 22A(2) requires that the Council prepares a draft of the proposed variation and a statement explaining the reasons for making the variation, the nature and effect of the variation and the reasons why the Council is satisfied the variation is a minor variation.

The new section 22B prescribes the public consultation requirements that the Council must complete before a minor variation is made.

The new section 22C provides that when making a minor variation the Council must have regard to any submissions it receives that relate to the proposed variation or explanatory statement, whether the measure is consistent with section 3 of the Intergovernmental Agreement On The Environment (which outlines the agreed environmental policy principles which should guide the development and implementation of environmental policy and programs by all levels of Government), relevant international agreements to which Australia is a party and any regional environmental differences in Australia.

Clause 8: This clause inserts a new section 36(aa) into the NEPC (WA) Act to enable the NEPC Service Corporation to provide assistance and support to other Ministerial Councils as directed by the Council. This clause also inserts a reference to section 36(aa) in section 36(b) to enable the NEPC Service Corporation to do anything

incidental or conducive to its provision of assistance to other Ministerial Councils.

Clause 9: This clause amends section 43 of the NEPC (WA) Act to clarify that the leave entitlements of the NEPC Executive Officer are not subject to section 87E of the *Public Service Act 1922* of the Commonwealth (that Act is now called the *Public Service Act 1999*, and there is no section 87E in the Act).

Clause 10: This clause amends section 49 of the NEPC (WA) Act by changing the Australian Public Service staffing provisions for the NEPC Service Corporation. The staffing powers will remain vested in the NEPC Executive Officer. It should be noted that the new section 49(2) of the NEPC (Cth) Act has not been included in the amendments to the NEPC (WA) Act. The new section 49(2) of the NEPC (Cth) Act provides:

“For the purposes of the *Public Service Act 1999* :

(a) the NEPC Executive Officer and the APS employees assisting the NEPC Executive Officer together constitute a Statutory Agency; and

(b) the NEPC Executive Officer is the Head of that Statutory Agency.”

This sets out essentially how certain matters are to be treated by the Commonwealth *Public Service Act 1999*, which are not within the jurisdiction of the State, and therefore the amendment is not included in the Bill. Further, the existing section 49(2) in the NEPC (WA) Act, which provides:

“The NEPC Executive Officer may exercise the powers conferred by section 49(2) and (3) of the Commonwealth Act”,

is no longer logical, and accordingly, section 49(2) of the NEPC (WA) Act is to be repealed pursuant to clause 10(2) of the Bill.

Clause 11: This clause amends the secondment accessibility provision in section 51 of the NEPC (WA) Act from 'officers and employees of Departments of the Australian Public Service and of' authorities of the Commonwealth to 'persons engaged under the *Public Service Act 1999* of the Commonwealth, and engaged by' authorities of the Commonwealth.

Clause 12: This clause amends section 56 of the NEPC (WA) Act by inserting a section 56(2), which allows the NEPC Service Corporation to invest any surplus money (money that is not immediately required for the purposes of the NEPC Service Corporation) it receives. Section 18 of the *Commonwealth Authorities and Companies Act 1997*, which governs the NEPC Service Corporation due to section 59(2) of the NEPC (Commonwealth) Act 1994, allows any Commonwealth authority which is not a Government Business Enterprise (GBE) or Statutory Marketing Authority (SMA) to invest surplus money it receives. The NEPC Service Corporation is not a GBE or SMA.

Clause 13: This clause repeals the existing section 59 of the NEPC (WA) Act and inserts:

- a new section 59(1) which provides for the requirement for a report to be prepared by the NEPC Service Corporation under section 63M of the *Commonwealth Audit Act 1901* to be substituted with a requirement for the NEPC Service Corporation to prepare an annual report as detailed under section 9 of the *Commonwealth Authorities and Companies Act 1997*; and
- a new section 59(2) which provides for the requirement for the NEPC Service Corporation to provide a copy of a report and financial statement given to the Commonwealth Minister under section 63M of the *Commonwealth Audit Act 1901* be given to other members of the Council to be substituted with a requirement for the NEPC Service Corporation to provide a copy of an annual report under section 9 of the *Commonwealth Authorities*

and Companies Act 1997 to each member of the Council as soon as practicable.

The new sections above essentially mirror sections 59(5) and (6) respectively in the NEPC (Cth) Act as they can be validly and appropriately provided for by a State. Section 59(1) to section 59(4) of the NEPC (Cth) Act are not mirrored in the Bill as those provisions set out how the *Commonwealth Authorities and Companies Act 1997* applies, inter alia, in relation to the NEPC Service Corporation, and application of Commonwealth legislation is not appropriately provided for by a State.

Section 58 of the NEPC (Cth) Act was repealed in the amendments to that Act as it was made superfluous when the amended section 59 was inserted into the NEPC (Cth) Act. Section 58 of the original NEPC (Cth) Act stated that the NEPC Service Corporation was a public authority to which Division 3 of Part XI of the *Commonwealth Audit Act 1901* applied. Even though section 58 of the NEPC (Cth) Act has been repealed, it is not appropriate that section 58 of the NEPC (WA) Act also be repealed. This is due to the fact that section 58 of the NEPC (WA) Act does not mirror section 58 of the NEPC (Cth) Act. Section 58 of the NEPC (WA) Act explains that the *Financial Administration and Audit Act 1985* (WA) does not apply to the NEPC Service Corporation. This clause is still relevant and necessary.

Clause 14: This clause inserts additional sections 64(3) and 64(4) which provide for the NEPC (WA) Act to be reviewed at 5 yearly intervals as soon as possible after the first 5 year review and for the report of each further review to be tabled in Parliament within 1 year after the end of the period to which it relates.