EXPLANATORY MEMORANDUM

COVID-19 Response and Economic Recovery Omnibus Bill 2020

OVERVIEW

This Explanatory Memorandum relates to this Bill as introduced into Parliament.

The COVID-19 Response and Economic Recovery Omnibus Bill 2020 (the Bill) represents a flexible, responsive legislative solution to numerous problems occasioned by the COVID-19 pandemic. It is intended to deliver measures that will facilitate business continuity in the COVID-19 environment, for both industry and Government, and to enable aspects of the economic recovery from the current crisis.

This flexible and responsive Bill addresses Western Australia's current circumstances, and ensures the Government is empowered to react appropriately as this pandemic progresses. Most of the measures in this Bill are temporary, and mechanisms contained within it are subject to oversight by Parliament to ensure the maintenance of accountability.

The Bill provides:

- Standard provisions, that will apply (for a limited time) to classes of problems common to various Acts or processes. These provisions are designed to provide economic relief and make the processes contemplated by these Acts possible in the COVID-19 environment. For example, they relate to the waiving of fees, the holding of meetings or addressing processes incompatible with social distancing requirements.

- Specific provisions that modify, for a limited time, certain obligations or authorisations under Acts. This will enable the business or administrative processes contemplated by those Acts to be conducted in a manner reflective of the COVID-19 environment, consistent with purposes in this Bill.

- Other specific provisions that modify, for a limited time, certain Acts relating to mental health or the administration of justice.

- Provisions, which apply permanently, relating to the administration of justice or environmental matters. These, respectively, allow many manual court and related processes to be automated electronically, and permit certain applications and processes under environmental legislation to be done by electronic means.

- Other permanent amendments are made to miscellaneous Acts. These permit Executive Council meetings to occur by teleconference or remote communication; facilitate the administration of justice by electronic processes in relation to specific

matters (issue of certain notices, lodgement of these or the giving of evidence); and, amend the *Interpretation Act 1984* to support the provisions in this Bill.

The Bill also operates to validate many actions taken, which may not have been in strict compliance with statutory requirements, but were necessary to enable business or Government processes to continue in an environment that was suddenly affected by disruptive measures such as travel restrictions, social distancing or self-isolation requirements.

CLAUSE NOTES

Part 1 – Preliminary

This part deals with preliminary matters, including the short title and commencement of this Bill.

Clause 1 – Short title

This clause provides that the name of the Bill is *COVID-19 Response and Economic Recovery Omnibus Bill 2020*.

Clause 2 – Commencement

This clause indicates when the Bill will come into force. Part 1 (being these preliminary provisions) begins on the day it receives assent from the Governor. The rest of the Bill commences on the day thereafter.

Clause 3 – Primary purposes of the Act

This clause outlines that the Bill has 3 primary purposes;

a) to provide for the amelioration of problems in relation to compliance with statutory requirements, and impediments to the processes of Government, arising from the emergency response to the COVID-19 pandemic;

b) to provide for the amelioration of problems arising from the emergency response to an outbreak, or to the risk of an outbreak, of COVID-19 in the State;

c) to facilitate aspects of the economic recovery from the emergency response to the COVID-19 pandemic; and

Those are the primary purposes of the Bill. The Bill has other purposes, which are:

- to make related amendments to various Acts; and
- to validate certain actions taken immediately before, during or following the state of emergency declared in relation to the pandemic; and
- for related purposes.

Clause 4 – Terms used.

This clause contains the defined terms in this Bill. Relevantly:

In March 2020 the Government of Western Australia declared a State of Emergency and a Public Health Emergency in response to COVID-19 coronavirus. These were made under the *Emergency Management Act 2005* and *Public Health Act 2016,* respectively. The definition of a "COVID emergency declaration," which is relevant to certain provisions in this Bill, therefore encompasses a declaration made under either or both of these Acts.

The application of this Bill spans multiple portfolios. Therefore, different Ministers will be able to exercise powers under it. Where the Bill refers to a "portfolio Minister", this is the Minister responsible for the administration of the Act referred to.

On occasion *the* Minister is referred to. This will be the Minister responsible for the administration of this Bill (subject to context), which will be the Premier.

Clause 5 – Act binds the Crown

The Crown is bound by the provisions of this Bill.

Clause 6 – Relationship of this Act to other laws

This clause indicates the Bill is designed to take precedence over other legislation.

Part 2 – Provisions of General Application

In order to contain community transmission of the virus, Western Australians have been required to self-isolate, practice social distancing and comply with travel restrictions. Some of these measures, significantly affected, or continue to so affect, the processes by which ordinary business activities or Government processes are undertaken. For instance, meetings could not be held in ordinary ways and financial relief was, and continues to be, needed from the costs of using some public services or processes. This Part addresses such issues. It enables Government to provide financial relief to the community by waiving fees and charges associated certain services. It also provides for meetings to occur in a manner reflective of COVID-19 environment.

Division 1 – Fees and Charges

Subdivision 1 - Preliminary

Clause 7 – Terms used

This clause contains definitions for the purpose of this Division.

The word "fee" is intended to mean a fee, however described, and the instances described at clause 7 (a) – (c) do not limit the general meaning of the word "fee."

Subdivision 2 – CEO and chief employee orders

Clause 8 – CEOs or chief employees may reduce, waive or refund fees and charges

Subsection (1) of this clause enables the CEO or chief employee of an agency or non-SES organisation to issue an order which waives, reduces or refunds a fee or charge.

This allows officers, such as directors general (of departments responsible for administering the Acts listed in subsection (3)) to facilitate economic relief to the public, in accordance with Government policy. This efficient measure overcomes difficulties like the absence of a head of power to waive fees in an Act.

Subsection (3) lists the Acts in relation to which this power can be used. The list indicates that economic relief can be delivered to range of matters, such as those concerning planning, transport, environmental, and commercial matters.

The list includes, at subsection (3)(t), "a prescribed enactment." As such, regulations made under this Bill may prescribe other Acts for the purposes of this provision.

Orders have the status of subsidiary legislation and must be published on the relevant body or Government department's website (see clause 104).

Clause 9 – CEOs or chief employees may extend timeframes for payment of fees and charges

Subsection (1) enables the CEO or chief employee, of an agency or non-SES organisation, to issue an order which postpones a deadline for payment or extends the period for payment of a fee or charge.

Currently the only Act to which this applies is the *Environmental Protection Act 1986.*

There is no extension or postponement powers in relation to fees for licences, works approvals and registrations under regulation 5O of the *Environmental Protection Regulation 1987*, or under regulation 18 or 19B of the *Environmental Protection (Noise) Regulations 1997* for an application fee for approvals for sporting, cultural and entertainment events and venues those events take place in. In cases where work or operations under a licence, works approvals or registrations are delayed or events cannot go ahead due to physical distancing measures or lock downs during a "second wave" of COVID-19, this clause provides the CEO of Department of Water and Environmental Regulation the power to extend payments deadlines, thus assisting business continuity and thereby ensuring instruments are not revoked or voided for non-payment.

The list includes, at subsection (2)(b), "a prescribed enactment." As such, regulations made under this Bill may prescribe other Acts for the purposes of this provision.

Orders have the status of subsidiary legislation and must be published on the relevant body or Government department's website (see clause 104).

Clause 10 - Subdivision and orders cease to have effect

This clause indicates that the powers available under this subdivision are time limited.

It is considered prudent and necessary to empower CEOs to make such orders until 31 December 2021. This enables a continued response to business continuity needs, particularly in the event of a "further wave" of COVID-19, and helps facilitate economic recovery from the COVID-19 pandemic.

Its cessation may be postponed under clause 28.

An order made under this Subdivision ceases to have effect when this Subdivision ceases to have effect.

Subdivision 3 – Validation of reductions, waivers and refunds

Clause 11 – Validation of reductions, waivers and refunds

In late March 2020, in order to alleviate the economic impact of the COVID-19 pandemic the Premier announced a freeze to certain fees and charges and a deferral or waiver in the payment of others. In response, certain Government departments or agencies stopped charging certain fees, deferred payments or processed refunds, despite, in some cases, there being no head of power to do this.

This validation provision is required to ensure any person who benefitted from economic relief, can validly rely on it. This ensures no question of legal invalidity arises in relation to

any, for example, licence, permit or authority, simply because the business operator or licence holder was granted a fee waiver or refund in circumstances where there was no legal power to do so.

The "validation period" in subclause (1) commences from 1 April 2020, being the time from which the announcements were acted upon. The period extends for 6 months after the commencement of the Bill. This is to cover the measures (like fee waivers) which some Departments have applied until next year. The "validation period" as defined in the Bill needs to be long enough to enable the waiver of fees, until the waiver is properly made under a CEO order or by some other mechanism (for example by amending regulations) permitted by this Bill.

Subsection (4) contains the list of Acts to which this validation provision applies.

Division 2 — Meetings

Subdivision 1 — Meetings

This subdivision addresses the various restrictions and potential consequences arising from COVID-19 as these relate to meetings. These provisions ameliorate compliance difficulties, particular to meetings, which are occasioned by social distancing, travel restrictions, the potential for illness of members of the Board and isolation requirements, amongst other matters. This subdivision provides the flexibility necessary to maintain business continuity at this time.

Clause 12 – Terms used: body

This clause identifies that a Development Assessment Panel (DAP) falls within the description of a body. This ensures these provisions apply to DAP meetings.

Clause 13 – Meetings under relevant enactments may occur by instantaneous communication

This provision makes the practice of holding meetings electronically permissible for bodies, boards and committees who operate under the Acts listed in subsection (4). This practice was, and remains, required to enable business continuity for many boards, committees and bodies across Government.

Subclause (1) and (2) provide that where a meeting is required or permitted to be held, or a person required or permitted to attend a meeting, this can be done by audio-visual means. This contemplates the use of online applications such as Zoom or Microsoft Teams, or by telephone conferencing.

Under subclause (3), a person who participates in a meeting in reliance on this clause, is deemed to have attended the meeting and, if they vote, to have voted. The Acts to which this provision applies are listed in subsection (4). The list includes "a prescribed enactment." As such, regulations made under this Bill may prescribe other Acts for the purposes of this provision.

Clause 14 – Decisions without meetings

This clause is directed at permitting what are commonly termed "circulating resolutions." This is where a decision is taken by a board, without having to meet. Rather, the members consider a written proposal, circulated amongst them.

This clause permits decisions to be made by circulating resolution, if a majority of the members agree to it in writing. It will allow for decision making to take place in an efficient way that overcomes the challenges arising from any restrictions in place in response to COVID-19.

Clause 15 – Public meetings

Under this clause, any requirement that a meeting be held in public, is met if the public can observe a meeting through audio-visual means. This provision applies to meetings held pursuant to the *Planning and Development Act 2005*. The list of enactments to which this applies includes "a prescribed enactment." As such, regulations made under this Bill may prescribe other Acts for the purposes of this provision.

Clause 16 – Locations of meetings

Under subclause (1), where there is a requirement to publish a meeting's location, so the public can observe the meeting, this is met if means by which the public can observe through audio-visual means are provided.

Further, where there is a requirement to provide a person with a meeting's location, so that he or she can attend the meeting, this is met if the person is given details of how they can participate by telephone, audio-visual means or other means of instantaneous communications.

This provision applies to meetings held pursuant to the *Planning and Development Act 2005.* The list of enactments to which this applies includes "a prescribed enactment." As such, regulations made under this Bill may prescribe other Acts for the purposes of this provision.

Clause 17 – Venues for meetings

Under subclause (1), where there is a requirement to provide a meeting venue, this is met, if means by which the meeting can be conducted through audio-visual means, is provided.

This provision applies to meetings held pursuant to the *Planning and Development Act 2005*. The list of enactments to which this applies includes "a prescribed enactment." As such, regulations made under this Bill may prescribe other Acts for the purposes of this provision.

Clause 18 – Subdivision ceases to have effect

The provisions relating to fees and the conduct of meetings, provided for in this section, cease on 31 December 2021.

The period is considered appropriate to facilitate aspects of the economic recovery from the emergency response to the COVID-19 pandemic and to enable business continuity measures

to ameliorate the restrictions occasioned by the response to the crisis. Thereafter, the provisions cease to have effect and cannot be relied upon to modify any statutory requirement concerning the holding of meetings or the payment of fees or charges.

The expiry of this subdivision may be postponed by proclamation issued by the Governor, on the recommendation of the Minister.

Subdivision 2 — Validation of meetings and decisions

Clause 19 – Validation of meetings and decisions

A number of meetings, across various boards, committees and other bodies, were held, but using means such as teleconference or through other means of instantaneous communication such as applications like Zoom or Microsoft Teams. As such, the business of these bodies continued to be conducted, but may not have been in strict compliance with certain statutory requirements.

For example, meetings held by Development Assessment Panels (DAPs) would ordinarily be held in physical venues, where members of the public could attend and observe the meetings. After the state of emergency was declared, compliance with requirements as to venue and public meetings became difficult, if not impossible, with social distancing measures in force and restrictions on the numbers of people allowed to physically meet together. As such, DAP meetings were held over the Zoom application, with details as to how to observe this meeting provided to the public through the published agenda. This enabled the important business of determining significant development applications to continue, whilst enabling public access to, and the observation of, the meetings.

This provision validates any meetings held, during the state of emergency, which may not have met the statutory requirements concerning the holding of the meeting.

The meetings relevant to this provision would have been held under the Acts listed in subclause (3).

Division 3 – Public availability of documents

Subdivision 1 – public availability of documents

Clause 20 – public availability of documents

Some Acts require that certain documentation be made available in certain locations, should a member of the public wish to inspect it. This is typical of documents required for planning processes, for example, amendments to planning schemes are often to be made available at certain locations, like the offices of the Western Australian Planning Commission or a relevant local government.

This requirement is not unique to planning legislation. For example, any code or subsidiary legislation adopted, as referred to in section 98(2) of the *Waste Avoidance and Resource Recovery Act 2007,* must be available for public inspection during normal office hours at the Department of Water and Environmental Regulation's head office.

In the COVID-19 environment, requirements pertaining to the public inspection of physical documents presents a public health risk and are inappropriate, given the risk of transmission of the virus through contact with surfaces.

Accordingly, this clause ensures that legislative requirements for the public inspection of documents at a physical location can be replaced by the online publication of these documents.

This clause will also reduce potential risks to the community during the COVID-19 pandemic, by minimising travel to locations where the documents can be physically inspected.

Clause 21 – Subdivision ceases to have effect

The provisions of this Subdivision cease to have effect on 31 December 2021.

The period is considered appropriate to enable business continuity measures to ameliorate the restrictions occasioned by the response to the crisis. Thereafter, the provisions cease to have effect and cannot be relied upon to modify any statutory requirement concerning the public availability of documents.

The expiry of this Subdivision may be postponed by proclamation issued by the Governor, on the recommendation of the Minister.

Subdivision 2 – Validation of things done

Clause 22 – Validation of things done

Certain public venues, where documents may have been available for inspection, were closed during the phases of the response to the pandemic. In the event these measures precluded compliance with statutory requirements, clause 22 operates to validate any processes or matters that were affected by measures taken, that impeded the public's access to documents that would otherwise be available to them.

Division 4 - Presence and dealing with documents by audio-visual communication

During the height of the COVID-19 emergency response, social distancing measures (particularly when restrictions imposed limits of 2 people to a room), and requirements to self-isolate, made it extremely difficult for members of the public to interact with certain government agencies or for certain ordinary business activities to be undertaken. For example, the witnessing of documents was problematic.

This Division ameliorates problems occasioned by these restrictions by permitting certain dealings with documents to be done by audio-visual means.

Clause 23 – Presence by audio-visual communication

This clause allows for witnessing requirements to be met through audio-visual means.

Under subclause (1), the focus is on what a person has to do. A person (person A), who is required (or permitted) to do something by a written law before or in the presence of a witness, is considered before that witness if, when person A does that thing, by audio-visual communication he or she and the witness can see and hear each other and the witness watches person A do that thing.

For example, subclause (1) would apply to persons making a declaration under the *Oaths Affidavits and Statutory Declarations Act 2005*. The person is considered before a witness if, when he or she makes the declaration, he or she and the witness are connected using audio-visual communication (e.g. Microsoft Teams) they can see and hear each other and the witness observes the declaration be made.

Under subclause (2) the focus is on the thing to be done. If anything is required (or permitted) to be done in the presence of a witness, that thing is considered done before a witness if, when person A does that thing, by audio-visual communication he or she and the witness can see and hear each other and the witness watches person A do that thing.

For example, this would apply to activities such as duly affixing the common seal under the *Litter Act 1979* (section 6(2) and First Schedule item 10(3)) before or in the presence of a witness. The seal is considered affixed before a witness if, when person A affixes it, he or she and the witness are connected using audio-visual communication (e.g. Microsoft Teams) they can see and hear each other and the witness observes the affixing occur.

Under subclause (3) witnesses are deemed present at the same time as other witnesses if they can see and hear each other.

Clause 24 – Signing documents witnessed by audio-visual communication

Clause 24 stipulates what the witness must do, if clause 23 permits audio-visual witnessing. It contains requirements as to endorsements the witness must make and the timing applicable to such endorsements.

Under subclause (2), if clause 23 applies, any requirement upon a witness to sign a document dealt with by person A, is met if the witness:

a) is satisfied what he or she is signing, is the document (or a counterpart or copy of it) signed by person A;
b) signs the document (or a counterpart or copy of it); and
c) writes a statement to say the documents (or a counterpart or copy of it) was dealt with under this provision.

Subclause (3) sets out when the witness must so sign and endorse the document (or a counterpart or copy of it). This must be done either according to requirements in a relevant Act, or, if those circumstances do not apply, this must be done whilst still before person A or as soon as practicable thereafter.

Clause 25 - Relevant enactment

Clause 25 sets out the list of relevant Acts which retain requirements to which clauses 23 and 24 can apply. The list of enactments to which this applies includes "a prescribed enactment." As such, regulations made under this Bill may prescribe other Acts for the purposes of this provision.

Many of these Acts are included because they contain specific witnessing requirements relevant to a corporate seal, which prove incompatible with the social distancing requirements occasioned by COVID-19. Those Acts are the *Heritage Act 2018*, the *Land Information Authority Act 2006*, the *Litter Act 1979*, the *Metropolitan Redevelopment Authority Act 2011*, the *National Trust of Australia (W.A.) Act 1964*, the *Planning and Development Act 2005*, the *Public Transport Authority Act 2003*, the *Water Agencies (Powers) Act 1984* and the *Western Australian Land Authority Act 1992.*

The *Mining Act 1978* and the *Petroleum Act 1936* are included to permit affidavits required or permitted under these Acts to be witnessed electronically. This will assist the resource industry to more easily comply with Warden's Court requirements.

The *Coroners Act 1996* has been included to allow affidavits under section 15 of that Act to be witnessed electronically. Section 15 of the Coroners Act provides that an affidavit relating to an investigation by a coroner may be sworn "before" a coroner's registrar or investigator.

The *Family Court Act 1997* has been included to allow affidavits under section 214C of that Act to be witnessed electronically. As with the *Coroners Act*, section 214C of the *Family Court Act* provides for affidavits which are for use in proceedings before the Magistrates Court to be sworn "before" an authorised witness under the *Oaths, Affidavits and Statutory Declarations Act 2005*.

The *Oaths, Affidavits and Statutory Declarations Act 2005* is listed as a relevant Act to permit oaths, affidavits and statutory declarations to be witnessed by audio-visual communication.

Clause 26 – Relationship with other laws relating to electronic processes

This clause provides that, except under subclause (2), the measures available under this division do not replace existing law, but supplement it.

The exception is that r.3 and r.4 of the *Electronic Transactions Regulations 2012* do not apply in circumstances in which this Division applies. This is because those regulations currently have the ability to override the operation of section 8(1) and Part 2 Division 2 of the *Electronic Transactions Act 2011*.

Clause 27 – Division ceases to have effect

The provisions of this Division cease to have effect on 31 December 2021.

The period is considered appropriate to enable business continuity measures to be taken to ameliorate the restrictions occasioned by the response to the crisis. Thereafter, the provisions

cease to have effect and cannot be relied upon to modify any statutory requirement concerning the witnessing of documents.

The expiry of this Division may be postponed by proclamation issued by the Governor, on the recommendation of the Minister.

Division 5 — General provisions

Clause 28 - Postponing cessation of Divisions and Subdivisions

The provisions of this Part cease to have effect on 31 December 2021.

The period is considered, at this point in time, to be appropriate. These measures ameliorate compliance problems concerning meetings, public availability of documents and the witnessing of documents or transactions, which are occasioned by, or arise from, the emergency response to the COVID-19. These measures also empower CEOs to issue notices in relation to fees and charges, to facilitate aspects of the economic recovery from the pandemic.

However, the COVID-19 illness is not fully understood, and the measures needed to facilitate the economic recovery from the emergency response are not fully ascertainable at this time. No vaccine has been formulated, nor have certain border restrictions been lifted. We cannot tell how long we may need to live with some of the measures provided to ameliorate the effects of this pandemic, the emergency response to it, or what further emergency responses may be required.

As such, this clause provides for the capacity to postpone the expiry of provisions. This capacity is circumscribed to ensure it is not postponed unless duly necessary or expedient for a primary purpose of the Bill. Such postponements are limited to up to 12 months at a time and cannot in any event, extend beyond 30 June 2025 at which point all provisions in this Bill cease, save for certain permanent amendments effected to legislation and the validation provisions.

Any extension is made by the Governor by proclamation, upon recommendation of the Minister.

The effect of subclause (5) is that any proclamation would be subject to scrutiny and disallowance by Parliament as if it were regulations, thus ensuring Parliament retains oversight and control of any step to postpone the cessation of these Divisions or Subdivisions.

Part 3 – Provisions affecting obligations or authorisations under Acts

The State Government administers numerous regulatory regimes, from the issuing of licences to drive a vehicle, to the administration of schemes designed to regulate the use or development of land. These regimes serve a vital community function. They ensure certain activities are conducted in a manner approved of by law, which normally reflects a balance between protecting the public whilst promoting economic activity.

The COVID-19 pandemic lead to an unprecedented shutdown of normal business activity. This had, and continues to have, an effect on the administration of regulatory regimes and the validity or, continued validity of, approvals, licences, permits or other authorisations issued pursuant to these regimes. There is a need to extend the validity period of many authorisations, modify conditions applying to these or obviate the need for certain authorisations or requirements under a regulatory regime.

This Part addresses such issues. It enables regulatory authorities or decision makers to extend authorisations timeframes, modify conditions or respond in a manner that is appropriate and proportionate to the current crisis and economic recovery phase.

Division 1 — Preliminary

Clause 29 – Terms used.

This clause contains definitions of certain terms used in Part 3 of this Bill.

Division 2 — Authorisations generally

These provisions provide decision-makers the power to postpone expiry dates, or modify or remove conditions, that apply to authorisations. The term “authorisations” includes, but is not limited to “approvals, licences or permit.”

These powers are discretionary, can only be exercised for a purpose in the Bill and are largely directed at addressing administrative issues generated by the emergency response to the COVID-19 pandemic, in order to minimise the effect this had, and assist with the economic recovery from it.

For example, work approvals and clearing permits may need to be extended, to address delays occasioned by the pandemic. This clause reduces the regulatory burden on industry, by, (for example) enabling the decision maker to issue an order, extending expiry periods for a class of authorisations, thus providing certainty to the industry (which may promote the retention of employees) whilst also removing the time and cost of applying for a new authorisation.

Clause 30 – Decision-maker may set new expiry day for authorisations during operative period.

Subclause (1) contains definitions for terms used in this clause.

Subclause (2) lists certain authorisations (like permits, licences and approvals), and the decision-maker responsible for approving or issuing these, in a table. It empowers the relevant decision maker to (before the authorisation expires), by issue of an order, set a new expiry date for an authorisation. This can be done if the decision maker is satisfied the extension is necessary or expedient for a purpose of the Bill. An extension of up to 12 months can be made to the authorisations listed in this clause.

This clause covers the following types authorisations:

- Clearing permits, certain licences and works approvals under the *Environmental Protection Act 1986;*
- Jetty licences or berthing permits under the *Jetties Act 1926;*
- Licences and permits under the *Road Traffic (Authorisation to Drive) Act 2008* and *Road Traffic (Vehicles) Act 2012;*
- Licences issued under the *Tobacco Products Control Act 2006;*
- Licences under the *Water Services Act 2012;* and
- Any other authorisation prescribed by regulations.

Subclause (3) clarifies that an order can be issued in relation to an authorisation more than once, and there is flexibility in how the extension is made – it can be either by stating a specific date on which the approval expires, or adding a set amount of time to the original expiry date.

Subclause (4) confirms that the effect of this provision is to set a new expiry date for an authorisation, and that where this occurs, the original expiry date does not apply.

Subclause (5) confirms that the Act regulating the authorisation continues to apply, save for the terms relating to expiry of the authorisation which are overridden by this provision. This means, the remaining provisions of a relevant Act that apply to suspend, cancel or otherwise end an authorisation, can be used to affect the authorisation, notwithstanding this order or clause. These provisions ensure that the ordinary processes by which authorisations are monitored, or compliance with obligations or conditions attaching to these are enforced, continue to apply. So, if a person obtains an extension to his driver's licence for a year under clause 30, but 2 weeks later is disqualified from holding such a licence (i.e. see cl.30 (5)(b)), the order has no effect on the disqualification. The disqualification prevails.

Clause 104 applies to orders made under this section. That means such orders are subsidiary legislation and publication requirements apply.

Regulations made under clause 106 may prescribe further authorisations and decision-makers for the purposes of this section.

Clause 31 – Decision-maker may modify or remove conditions of authorisations during operative period

This clause allows the Minister for Water to modify or remove conditions from clearing licences under the *Country Areas Water Supply Act 1947* or metering conditions from section 5C licences under the *Rights in Water and Irrigation Act 1914* as set out in the *Rights in Water and Irrigation Regulations 2000*.

To make such an order the decision maker (Minister for Water) must be satisfied it is necessary or expedient for a purpose in the Bill.

An order can be made more than once in relation to an authorisation. Orders must only apply to the authorisation for 12 months, or a shorter time specified in the order.

The effect of subclause (6) is to deems the act of complying with the order, to be compliance with the conditions of the authorisation.

Clause 104 applies to orders made under this section. That means such orders are subsidiary legislation and publication requirements apply.

Regulations made under clause 106 may identify further authorisations and decision-makers for the purposes of this section.

Clause 32 - Decision-maker may decide order no longer applies to relevant authorisation if condition of order breached

This clause provides a mechanism to decision makers to address matters arising from non-compliance with orders issued.

Where a condition of the order is not met, the decision maker can decide that the order no longer has effect on that authorisation (i.e. it is withdrawn). Before such a decision can be made the holder of the order is afforded natural justice through the process outlined in subclause (2) and the decision maker must consider any submissions received from the order holder.

Subclause (3) requires the decision maker to issue the holder of the order a copy of their decision and the reasons in support of that.

Division 3 – Specific provisions

Planning schemes are instruments that control development. They stipulate how land can be used or the way physical development can happen. There are two key types of schemes.

- Local planning schemes, which regulate in detail, the use of land and physical works required to develop it.
- Region planning schemes. These are high level, broad brush planning instruments, focused on giving strategic direction on the general use of land.

In the Perth Metropolitan area, Peel region and Greater Bunbury region, land is regulated by both a local planning scheme and a region planning scheme.

When the COVID pandemic struck, the Minister for Planning responded by issuing an exemption notice in relation to various requirements for local planning schemes. This notice was an effective means of responding to, and mitigating, the planning and development impacts arising from the state of emergency. For example, the notice exempted certain conditions of approval from applying, such as those related to operating hours and loading/unloading of goods at supermarkets; it exempted certain changes of use from the need to obtain development approval (so restaurant owners could sell take-away without having to secure a new approval) and so on.

The notice was issued under clause 78H, Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (the LPS Regulations). It is termed the "Clause 78H Notice" is this Explanatory Memorandum. Amendments to the LPS Regulations, made in early April 2020, introduced Clause 78H.

However, no equivalent head of power existed, or could be made through regulations, to address the same issues with region planning schemes. That is addressed by this division. These provisions provide equivalent exemptions or extensions of approval, at a region scheme level, to those available under local planning schemes pursuant to the "Clause 78H Notice." This enables a consistent approach to the amelioration of the planning and development impacts arising from the state of emergency and for the facilitation of economic recovery from this crisis.

Clause 33 - Exemption from local planning scheme taken to be exemption from region planning scheme

This clause deems, for the purposes of a region planning scheme, that anything a person did, or does, in reliance of an exemption granted from requirements of a local planning scheme under clause 78H of the LPS Regulations, is valid.

This provision delivers an equivalent exemption for region planning scheme requirements, to that issued under the Clause 78H Notice for local planning schemes, in order to achieve consistency in planning requirements. This is necessary because, at the time that notice was issued, there was no equivalent power to dispense with any equivalent requirements that applied at a region scheme level.

Clause 34 – Extension of certain time limits under relevant schemes

The Clause 78H Notice provided a 2 year extension of time to a proponent to substantially commence any development, which was approved under a local planning scheme. This clause 34 delivers the same extension to planning approvals under a region planning scheme or improvement scheme. It ensures consistency where multiple schemes regulate land or an improvement scheme applies.

Subclauses (1) and (2) clarifies which approvals it applies to. The dates match the Clause 78H Notice. It applies to an approval:

- that was validly in place on 8 April 2020 (being the date when the Clause 78H Notice took effect); or
- is granted between 8 April 2020 and the date a COVID emergency declaration ceases to have effect.

Subclause (3) extends the relevant timeframe by two years.

Subclause (4) deems compliance with the timeframes permitted under this clause, to constitute compliance with the original requirements.

Whilst clause 34 provides an automatic extension to development approval timeframes, subclause (5) clarifies these timeframes can also be amended through the ordinary process of making an application under the relevant scheme.

The Clause 78H Notice ensured development approvals under local planning schemes remain valid for an extended period of time, during this period of economic volatility. This measure provides the development industry with extended approval periods under other schemes, to accommodate the uncertainty and economic difficulty faced due to COVID-19.

Division 4 – End of operative periods for Provisions of Part

Clause 35 - Postponing ending of operative period for provisions of this Part

The operative period for this Part is defined in clause 29 as beginning upon the day when clause 29 comes into force and concluding on 31 December 2021 (unless altered by this clause).

The period is considered, at this point in time, to be appropriate to enable business continuity measures to be applied, such as the extension of certain authorisations, to ameliorate compliance problems occasioned by, or arising from, the emergency response to COVID-19 and to facilitate aspects of the economic recovery from the crisis.

However, the COVID-19 illness is not fully understood, and the measures needed to facilitate the economic recovery from the emergency response are not fully ascertainable at this time. No vaccine has been formulated, nor have certain boarder restrictions been lifted. We cannot tell how long we may need to live with some of the measures provided to ameliorate the effects of this pandemic, the emergency response to it, or what further emergency responses may be required.

As such, this clause provides for the capacity to postpone the expiry of provisions. This capacity is circumscribed to ensure it is not postponed unless duly necessary or expedient for a primary purpose of the Bill. Such postponements are limited to up to 12 months at a time and cannot in any event, extend beyond 30 June 2025 at which point all provisions in this Bill cease, save for certain permanent amendments effected to legislation and the validation provisions.

Any extension is made by the Governor by proclamation, upon recommendation of the Minister.

The effect of subclause (5) is that any proclamation would be subject to scrutiny and disallowance by Parliament as if it were regulations, thus ensuring Parliament retains oversight and control of any step to postpones the cessation of these provisions.

Clause 36 – End of operative period does not affect things done during period

This clause clarifies that if a provision ceases to have effect, that does not affect anything done in reliance upon the provision. It ensures the continuing validity of actions taken in reliance upon the provisions of this Part.

Clause 37 – Orders cease to have effect at the end of 30 June 2025

This clause confirms the temporary nature of the capacity to make, and the effect of, orders or notices under this Bill. Any order, not already terminated or otherwise lapsed by the end of 30 June 2025 ceases to have effect on that day, by operation of this provision.

Part 4 – Modification of Acts

This Part modifies the provisions of certain Acts, for a limited period of time.

These modifications are directed at:

- Providing for audio-visual processes to assist with the administration of justice under the *Bail Act 1982* and *Sentencing Act 1995*;
- Providing for audio-visual processes to facilitate assessments under the *Mental Health Act 2014;*
- Providing for audio-visual processes to assist with the administration of justice under the *Sentencing Act 1995* and the *Criminal Procedure Act 2004*.

Division 1 — *Bail Act 1982* modified

This Division modifies the *Bail Act 1982* (Bail Act). The intent of the modification is to temporarily expand section 43A to provide that sureties can be entered into over video link where it is impracticable for the proposed surety to appear in person. Ordinarily, sureties can only be entered into over video link where the proposed surety is in another State or Territory.

Clause 38 – Act modified

Subclause (1) provides that the Bail Act applies as if modified as set out in Division 2.

Subclause (2) provides that the modification period ceases to have effect at the end of 31 December 2021.

Subclause (3) provides that the cessation of the modification period may be extended under clause 53, that is, by proclamation made by the Governor on the recommendation of the Minster.

Clause 39 – Section 43A modified

Clause 39 deletes existing subsection 43A(2) from the Bail Act and replaces it with a new subsection (2) for the modification period.

Section 43A of the Bail Act permits a surety undertaking to be entered into by video link where the proposed surety is interstate. The effect of clause 39 is to temporarily modify section 43A(2) by expanding the application of section 43A to also allow a surety to be entered into by video link where it is impracticable for the proposed surety to enter into a surety undertaking in person before the relevant official (being the person before whom the surety undertaking is to be entered into) irrespective of their location.

The intent of this provision is to accommodate circumstances where a person who is providing a surety may be located within the State, but that person is unable to appear in person; for example, due to COVID-19 travel restrictions, isolation or quarantine requirements.

Division 2 – *Mental Health Act 2014* modified

Among other things, the Bill amends the *Mental Health Act 2014* (MH Act) to address certain issues arising from the COVID-19 pandemic.

The MH Act provides for the treatment, care and protection of people experiencing mental illness that come within the scope of the MH Act, particularly involuntary patients. While the COVID-19 pandemic is currently well managed in Western Australia, there continues to be urgent issues in relation to certain obligations and protections set out in the MH Act. These issues require legislative amendment to ensure that timely access to assessments and examinations under the MH Act continue.

Part 6 Division 2 of the MH Act deals with the conduct of assessment of persons. Section 48 sets out how assessments must be conducted, with section 48(2) requiring that both the practitioner performing the assessment and the person being assessed are in one another's physical presence, or where that is not practicable, that they must be able to hear one another without using a communication device. The exception to this requirement is set out in section 48(3) which allows for audio-visual means to be used for assessment, but only for persons outside of the metropolitan area who cannot be assessed in accordance with section 48(2). Even in this situation, there is still a requirement for a health professional and the person being assessed to be in one another's physical presence. Where that is not practicable, that they must be able to hear one another without using a communication device, see section 48(3)(c).

Part 6 Division 3 of the MH Act sets out the provisions relating to examinations. Certain examinations must be conducted with the psychiatrist and person being in each other's physical presence. Again, there is an exception which allows for audio-visual means to be used, but only for some types of examinations, and then only for persons outside of the metropolitan area, see sections 79(2) and 79(3). There are also certain examinations which must be carried out with the parties in each other's physical presence, see section 79(4).

To deal with the COVID-19 pandemic, Mental Health Infection Control Directions (Directions) were made and published on 6 April 2020 and took effect on 7 April 2020. The Directions apply to the assessment or examination of persons under the MH Act, if certain conditions exist. These are: where the patient meets the risk factors for COVID 19; or has confirmed COVID-19; or if the practitioner carrying out the assessment or examination is in isolation.

The Directions require practitioners and psychiatrists to use appropriate infection control measures when conducting assessments and examinations under the MH Act, during the COVID-19 pandemic. The infection control measures include using: personal protective equipment, social distancing, use of a physical barrier, or audio-visual communication, for the purposes of carrying out an assessment or examination. The Directions apply to both metropolitan and non-metropolitan regions across the State. A penalty applies if the Directions are not complied with.

Therefore, the following scenario could arise: a practitioner or psychiatrist complies with the Directions and conducts an assessment or an examination of a person using audio-visual communication, but in doing so they are in breach of the provisions of the MH Act. If a person

is then made subject to an involuntary treatment order, there is a risk that the resulting order may be held to be invalid when reviewed by the Mental Health Tribunal.

These amendments are therefore required to ensure that assessments and examinations may take place without the risk of psychiatrists and practitioners being unable to follow the provisions of the MH Act. The amendments will also ensure that any orders that are made are not subsequently held to be invalid.

There has been an additional amendment made to section 79 which will allow for health professionals, who are involved in an examination under section 79(3) of the MH Act, to be able to be physically separate from a person during an examination if required.

Clause 40 – Term used: Mental Health Infection Control Directions

Clause 40 provides a definition for the Directions.

These are currently available at the following website:

https://www.wa.gov.au/government/publications/mental-health-infection-control-direction

Clause 41 – Act modified

Subclause (1) provides that the MH Act applies as modified as set out in Division 2.

Subclause (2) provides that the modification period ceases to have effect when the Directions (or any replacement directions) cease to have effect.

Clause 42 – Section 48 modified

Clause 42 inserts subsection (5) into section 48 of the MH Act.

This modifies section 48 to provide that an assessment may be conducted using audio-visual communication if the practitioner is satisfied that it is necessary to do so to comply with the Directions.

Clause 43 – Section 79 modified

Subsection (1) deletes replaces section 79(3)(c) with a new provision.

Currently, during the examination of a person by audio-visual means under section 79, a health professional must be in the person's physical presence. The Directions did not provide for the health professional to be physically apart from the person being examined. Clause 43 now amends subsection (3)(c), by inserting a paragraph that now specifically allows for the health professional and the person being examined to *not* be in each other's physical presence, if it is not practicable, as long as they can hear one another without using a communication device. The paragraph gives the example of them being able to hear one another through a door, instead of being in one another's physical presence. (The wording adopts the existing wording in section 48(3)(c)).

Subsection (2) inserts a new subsection (7) after subsection (6).

This modifies section 79 to provide that an examination may be conducted using audiovisual communication if the psychiatrist or practitioner is satisfied that it is necessary to do so to comply with the Directions.

Clause 44 – Validation of assessments and examinations

Clause 44 is a validating provision. It provides that any assessment or examination conducted using audio-visual communication, in compliance with the Directions (but in non-compliance with the MH Act), is as valid and effective as it would have been if these amendments had been in place at that time. The validating provision applies to any assessment, examination, orders or referrals that may have been made during the period from the Directions taking effect, being 7 April 2020, until the date these amendments take effect.

Division 3 – *Oaths Affidavits and Statutory Declarations Act 2005* modified

Clause 45 – Act modified

Subclause (1) provides that the *Oaths Affidavits and Statutory Declarations Act 2005* applies as modified as set out in this Division.

Subclause (2) provides that the modification period ceases to have effect at the end of 31 December 2021.

Subclause (3) provides that the cessation of the modification of the *Oaths Affidavits and Statutory Declarations Act 2005* may be postponed under section 53, that is, by proclamation made by the Governor on the recommendation of the Minster.

Clause 46 – Section 9 modified

Clause 46 modifies the list in section 9 (6) of persons who can witness an affidavit under the *Oaths Affidavits and Statutory Declarations Act 2005*.

The effect of this modification is to permit regulations to be made, to prescribe persons *other* than those already authorised by section 9, to witness affidavits, where such affidavits are made while a COVID emergency declaration is in effect. This has the effect that affidavits may only be witnessed by a larger group of people, as prescribed in regulations, while a COVID emergency declaration is in effect.

Division 4 – *Sentencing Act 1995* modified and consequential modification

This Division modifies the *Sentencing Act 1995* to permit sentencing by audio link in specified circumstances to account for travel restrictions where it may not be possible for an offender to appear before the court either in person or by video link. It also consequentially modifies the *Criminal Procedure Act 2004*.

Subdivision 1 - Sentencing Act 1995 modified

Clause 47 – Act modified

Subclause (1) provides that the *Sentencing Act 1995* applies as modified as set out in this Subdivision.

Subclause (2) provides that the modification period ceases to have effect at the end of 31 December 2021.

Subclause (3) provides that the cessation of the modification of the *Sentencing Act 1995* may be postponed under section 53, that is, by proclamation made by the Governor on the recommendation of the Minster.

Clause 48 – Section 14 modified

Clause 48 modifies section 14 of the *Sentencing Act 1995*. Section 14 of the *Sentencing Act 1995* provides that a court is not to sentence an offender unless the offender is personally present in court or appears before the court by video link under section 14A. As this Bill seeks to modify the *Sentencing Act 1995* to temporarily allow sentencing by audio link under new section 14B, section 14(1) requires a modification to insert a reference to this new section.

Clause 49 – Section 14B inserted

Clause 49 inserts new section 14B: Use of audio link for sentencing into the *Sentencing Act 1995* after section 14A.

The intent of this provision is to permit sentencing by audio link in specified circumstances. This provision has been included to account for entry restrictions in remote communities as a result of COVID-19 which could prevent magistrates from attending the community's courthouse in person, and where video link is not already available. New section 14B provides that a court may sentence an offender by audio link when:

- the offender has applied for a direction that the matter be dealt with by audio link; and
- the offender has been convicted of an offence on a plea of guilty; and
- the court proposes to impose a non-custodial sentence on the offender in respect of the offence; and
- the court is satisfied that an audio link is available or can reasonably be made available; and
- the direction is in the interests of justice.

"Audio link" has been defined to mean facilities, including telephones, that enable, at the same time, a court at one place to hear a person at another place, and vice versa. This definition has been taken from section 3(1) of the *Criminal Procedure Act 2004* and is included in new section 14B in full for consistency with the inclusion of the full definition of "video link" in section 14A of the Sentencing Act.

"Non-custodial sentence" has been defined as a sentence imposed under Part 7, 8, 8A, 9 or 10 of the *Sentencing Act 1995*. These Parts deal with:

- Part 7 – Conditional release order;

- Part 8 – Fine;
- Part 8A – Suspended fine;
- Part 9 – Community based order; and
- Part 10 – Intensive supervision order.

For the avoidance of doubt, subsection (4) of new section 14B provides that the place where an offender attends for sentencing is taken to be part of the court for the purposes of the sentencing.

Subsection (5) of new section 14B provides that audio must not be used if video is available or can reasonably be made available. This is to ensure that audio link is only used in specified circumstances and that, where it is possible for the offender to be present by video link for sentencing, audio link cannot be used.

Clause 50 – Section 34 modified

Clause 70 modifies section 34 of the *Sentencing Act 1995*. Section 34 of the *Sentencing Act 1995* requires a court sentencing an offender to explain the effect of its sentence and any additional orders, together with any obligations of the offender and the consequences of not complying with those obligations. Section 34 currently applies where an offender is personally present in court or appearing by video link. Clause 70 therefore modifies section 34(1) by expanding its application to include where the offender is attending by audio link under new section 14B.

Subdivision 2 —Criminal Procedure Act 2004 modified consequentially

Clause 51 – Act modified

Subclause (1) provides that the *Criminal Procedure Act 2004* applies as modified as set out in this subdivision.

Subclause (2) provides that the modification period ceases to have effect at the end of 31 December 2021.

Subclause (3) provides that the cessation of the modification of the *Criminal Procedure Act 2004* may be postponed under section 53, that is, by proclamation made by the Governor on the recommendation of the Minster.

Clause 52 – section 77 modified

This clause deletes section 14A in section 77 of the *Criminal Procedure Act 2004* and replaces it with “section 14A of 14B.”

Division 5 — Postponing cessation of modifying provisions

Clause 53 – Postponing cessation of modifying provisions.

These provisions operate to modify Acts in certain ways, for a set period of time (i.e. until 31 December 2021).

These periods are considered, at this point in time, to be appropriate to enable the modified provisions to operate to ameliorate compliance problems occasioned by, or arising from, the emergency response to COVID-19.

However the COVID-19 illness is not fully understood. No vaccine has been formulated, nor have certain boarder restrictions been lifted. We cannot tell how long we may need to live with some of the measures provided to ameliorate the effects of this pandemic, the emergency response to it, or what further emergency responses may be required.

As such, this clause provides for the capacity to postpone the expiry of provisions. This capacity is circumscribed to ensure it is not postponed unless duly necessary or expedient for a primary purpose of the Bill, such postponements are limited to up to 12 months at a time and cannot in any event, extend beyond 30 June 2025 at which point all provisions in this Bill cease, save for certain permanent amendments effected to legislation and the validation provisions.

Any extension is made by the Governor by proclamation, upon recommendation of the portfolio Minister. Part 4 temporarily modifies Acts relating to mental health or the administration of justice. Under clause 53, either the Minister for Mental Health or the Attorney General, can extend the modification period for Acts there are responsible for as they are the relevant portfolio Ministers for legislation modified by Part 4.

The effect of subclause (5) is that any proclamation would be subject to scrutiny and disallowance by Parliament as if it were regulations, thus ensuring Parliament retains oversight and control of any step to postpone the cessation of these provisions.

Part 5 — Acts amended: facilitating electronic transactions

The amendments made to various act by this Part enable a range of transactions to be undertaken through electronic means.

Division 1 — Extending application of *Courts and Tribunals (Electronic Processes Facilitation) Act 2013*

This Division extends the application of Part 2 of the *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* (the CTEPF Act) to a number of Acts within the portfolio of the Attorney General and the Minister for Police to allow many manual court and related processes to be automated in accordance with regulations or rules of court.

Part 2 of the CTEPF Act provides for the use of electronic technology in relation to court and related proceedings, and the record of those proceedings. This includes:

- allowing for things required to be done "in writing" under an applied Act to be done electronically;
- electronic lodgement of documents with courts and tribunals;
- electronic recordkeeping;
- electronic authentication; and
- giving and obtaining of information,

provided these processes are done in accordance with regulations or rules of court. These amendments are intended to be permanent.

Clause 54 – *Administration Act 1903* amended

Clause 54 amends the *Administration Act 1903* by inserting new section 3A, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit manual processes associated with probate and administration to be automated. For example, section 140 of the *Administration Act 1903* requires the Principal Registrar of the Supreme Court to keep a book of records of all grants of probate and administration. Applying Part 2 of the EPF Act will ensure that this process can be automated.

Clause 55 – *Coroners Act 1996* amended

Clause 55 amends the *Coroners Act 1996* by inserting new section 4A, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit manual processes associated with administering the State coronial system to be automated. For example, section 48 of the *Coroners Act 1996* provides for evidence given at an inquest to be recorded in writing. Applying Part 2 of the EPF Act will ensure that this process can be automated.

Clause 56 – *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* amended

Clause 56 amends section 6 of the CTEPF Act.

Section 6 of the CTEPF Act lists all Acts to which Part 2 of the CTEPF Act applies. Clause 56 at subclause (2) inserts the following Acts in alphabetical order:

- *Administration Act 1903*
- *Coroners Act 1996;*
- *Criminal Investigation Act 2006;*
- *Criminal Investigation (Extra-territorial Offences) Act 1987;*
- *Criminal Investigation (Identifying People) Act 2002;*
- *Family Court Act;*
- *Juries Act 1957; and*
- *Sentence Administration Act 2003.*

Clause 57 – *Criminal Investigation Act 2006* amended

Clause 57 amends the *Criminal Investigation Act 2006* by inserting new section 5, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit manual processes associated with warrants, orders and affidavits to be automated. For example, where an application for an order or warrant has been made by remote communication under section 13 of the *Criminal Investigation Act 2006*, a judicial officer must attach a copy of the electronic warrant or order they issued, together with any affidavit received from the applicant, and make them available for collection. Applying Part 2 of the EPF Act will ensure that this process can be automated.

Clause 58 – *Criminal Investigation (Extra-territorial Offences) Act 1987* amended

Clause 58 amends the *Criminal Investigation (Extra-territorial Offences) Act 1987* by inserting new section 3B, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit manual processes relating to search warrants to be automated. For example, section 4(2) of the *Criminal Investigation (Extra-territorial Offences) Act 1987* requires the grounds of an application for a search warrant to be verified by evidence in writing under oath. Applying Part 2 of the EPF Act will ensure that the process of recording that information "in writing" can be automated.

Clause 59 – *Criminal Investigation (Identifying People) Act 2002* amended

Clause 59 amends the *Criminal Investigation (Identifying People) Act 2002* by inserting new section 4A, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit manual processes relating to warrants, orders and affidavits to be automated. For example, where an application for an order or warrant has been made by remote communication under section 15 of the *Criminal Investigation (Identifying People) Act 2002*, a judicial officer must attach a copy of the

electronic warrant or order they issued, together with any affidavit received from the applicant, and make them available for collection.

Clause 60 – *Family Court Act 1997* amended

Clause 60 amends the *Family Court Act 1997* by inserting new section 9B, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit manual processes relating to the operation of the Family Court of Western Australia to be carried out electronically or automated where appropriate. This will bring the Family Court of Western Australia into line with other Western Australian courts that are already able to rely on the CTEPF Act to facilitate electronic and automated processes.

Clause 61 – *Juries Act 1957* amended

Clause 61 amends the *Juries Act 1957* by inserting new section 3B, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit some manual processes relating to service and certification of summonses to be automated. For example, section 33 of the *Juries Act 1957* relates to the service of a summons and states that an officer must prepare a list in the prescribed form and sign and date the certificate. Applying Part 2 of the EPF Act will ensure that this process can be automated.

Clause 62 – *Sentence Administration Act 2003* amended

Clause 62 amends the *Sentence Administration Act 2003* by inserting new section 4A, which will apply Part 2 of the CTEPF Act.

The CTEPF Act has been applied to this Act to permit some manual processes relating to warrants to be automated. For example, section 117 of the *Sentence Administration Act 2003* requires that a warrant be in a prescribed form and signed by the person who issued it. Applying Part 2 of the EPF Act will ensure that this process can be automated.

Division 2 — Amendment of environmental and water related legislation

This Division amends certain environmental and water related legislation to provide the option for applications and certain processes to be undertaken by electronic means. Electronic communication provided critical during the COVID-19 pandemic lockdown, as it enabled business continuity. These amendments ensure the benefits delivered by electronic transactions or processes can continue. These measures promote efficiency and reduce costs, thus their continued application represent an economic benefit.

Subdivision 1 – Contaminated Sites Act 2003 amended

Clause 63 – Act amended

This clause specifies the amendments that relate to the *Contaminated Sites Act 2003*.

Clause 64 – Schedule 2 amended

This clause inserts a new regulation making power, Item 1A, into Schedule 2 to the *Contaminated Sites Act 2003*.

This will enable the making of regulations to provide for notices, reports, approvals or other documents required to be given, sent or served under the *Contaminated Sites Act 2003* by electronic communication (as defined in the *Electronic Transactions Act 2011* section 5(1)) and providing for the proof of that giving, sending or service.

Subdivision 2 – Litter Act 1979 amended

Clause 65 – Act amended

This clause specifies the amendments that relate to the *Litter Act 1979*.

Clause 66 – Section 33 amended

The regulation making power in section 33 of the *Litter Act 1979* is amended by this clause to insert a head power to make regulations providing for notices or other documents to be given, sent or served under *Litter Act 1979* by electronic communication (as defined in the *Electronic Transactions Act 2011* section 5(1)) and providing for the proof of that giving, sending or service.

Subdivision 3 — Rights in Water and Irrigation Act 1914 amended

Clause 67 – Act amended

This clause specifies the amendments that relate to the *Rights in Water and Irrigation Act 1914* (RIWI Act)

Clause 68 - Section 6 amended

This clause amends section 6 of the RIWI Act to allow the Minister to indicate how submissions made in relation to a proclamation in relation to any watercourse or wetland may be provided.

Section 6(6)(b)(iii) of the RIWI Act previously required notices to be delivered or posted. The amended clause would allow submissions to be made electronically if the Minister required it.

Clause 69 - Section 26GZB amended

This clause amends section 26GZB of the RIWI Act to provide for public submissions on a proposed plan to be given to the Minister in the manner designated by the Minister.

Section 26GZB(b) required the submissions to be delivered or posted. The amended clause would allow submissions to be made electronically if the Minister designated it so.

Clause 70 – Section 26GZG amended

This clause amends section 26GZG(4)(b) of the RIWI Act to provide for written submissions requiring a plan to be amended, revoked or a new plan substituted, to be given in the manner designated by the Minister.

Section 6GZG(3)(b) required the submissions to be delivered or posted. The amended clause would allow submissions to be made electronically if the Minister designated it.

Clause 71 – Section 26N amended

This clause amends section 26N of the RIWI Act to allow how submissions may be provided in relation comments on a proposed making, amending or repealing of local by-laws under section 26L.

Section 26N requires the Minister to call for public comment by circulating a notice which, amongst other things, shows the address to which submissions may be delivered or posted. The amended allows the notice to indicate how submissions may be provided and as such would allow for these to be provided electronically if required.

Clause 72 – Section 27 amended

This clause amends the regulation making power in section 27 of the RIWI Act allowing regulations to be made for the giving, sending or serving of notices or other documents under the RIWI Act by electronic communication (as defined in the *Electronic Transactions Act 2011* section 5(1)) and providing for the proof of that giving, sending or service.

Clause 73 – Section 66 amended

This section amends provisions in the RIWI Act relating to the services of notices under that Act to allow for any notices to be served electronically if required.

Subdivision 4 — Waste Avoidance and Resource Recovery Act 2007 amended

Clause 74 – Act amended

This clause specifies the amendments that relate to the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act).

Clause 75 – Section 28 amended

This clause amends section 28 of the WARR Act to ensure the public can provide electronic submissions to the Waste Authority during consultation on the draft Waste Strategy.

The amendment will also support electronic submissions during a public consultation process for the review of the Waste Strategy (*Waste Avoidance and Resource Recovery Act 2007* s 33(4)(b)).

The clause introduces a head power to prescribe the manner in which electronic submissions can be made to the Waste Authority under section 28 in regulations.

Clause 76 – Section 47 amended

This clause amends section 47 of the WARR Act to ensure the public can provide electronic submissions to the Waste Authority on an extended producer responsibility scheme, as recommended for implementation and operation.

This amendment will allow for an online consultation process if the Waste Authority recommends an extended responsibility scheme during the COVID-19 period.

The clause introduces a head power to define the manner in which electronic submissions can be made to the Waste Authority in section 47 in regulations.

Clause 77 – Schedule 3 amended

This clause inserts a new regulation making power in Schedule 3 of the WARR Act, to support notices, directions of other documents being given, sent or served via electronic communications – for example, emails. This new regulation making power also extends to the proof of the giving, sending or service of the notices, directions and other documents through electronic means.

Subdivision 5 — Water Agencies (Powers) Act 1984 amended

Clause 78 – Act amended

This clause specifies the amendments that relate to the *Water Agencies (Powers) Act 1984* (WAP Act)

Clause 79 – Section 36 amended

This clause amends the regulation and by-laws making power in section 36 of the WAP Act to allow for regulations to be made that allow for notices to be given, sent or served electronically. This new regulation making power also extends to the proof of the giving, sending or service of the notices, directions and other documents through electronic means.

Subdivision 6 — Water Services Act 2012 amended

Clause 80 – Act amended

This clause specifies the amendments that relate to the *Water Services Act 2012* (WS Act).

Clause 81 - Section 222 amended

Section 222 of the WS Act allows the Governor to make regulations under the Act.

This clause amends section 222 to provide for the head power to make regulations that allow for notices and other instruments and documents to be served electronically. This new regulation making power also extends to the proof of the giving, sending or service of the notices, directions and other documents through electronic means.

Part 6 — Acts amended: miscellaneous matters

This part contains permanent amendments to various Acts.

Division 1 — *Bail Act 1982* amended

This Division amends the Bail Act. The amendment proposed in this Division is for permanent operation and will facilitate electronic bail processes.

Clause 82 – Act amended

Clause 82 provides that this Division amends the *Bail Act 1982*.

Clause 83 – various provisions amended

Clause 83 seeks to amend sections 13B(1), 32(1) and 45(1) of the *Bail Act 1982*.

These sections all deal with the provision of notices to accused persons (sections 13 and 32) and sureties (section 45) where the accused's next time and date to appear before the court has been substituted. It is proposed that the words "in urgent cases or with the accused's consent," will be deleted from section 13B(1)(c) and 32(1)(c) and the words "in urgent cases or with the surety's consent," will be deleted from section 45(1)(c)(ii). This will remove a current restriction on the issue of these bail notices electronically as a matter of course. The *Bail Regulations 1988* already outline that notice by electronic means under sections 13 and 32 may be achieved by fax, email or text message; and notice by electronic means under section 45 may be achieved by fax or email. The regulations also outline the circumstances in which that notice is presumed to be received.

These amendments are proposed for permanent operation to facilitate increased use of technology in court processes.

Division 2 — *Constitution Acts Amendment Act 1899* amended

Clause 84 – Act amended

This clause that the *Constitution Acts Amendment Act 1899* is amended by this division.

Clause 85 – Section 45A inserted

This clause will insert a new provision, to enable the Executive Council to meet by audio-visual means. This is required to enable Executive Council meetings to be facilitated through contemporary technology. Currently Executive Council can only meet in person. This is explained below.

The *Letters Patent Relating to the Office of Governor of the State of Western Australia 1986* clauses VI to IX provide for the establishment and operation of the Executive Council. Clause VIII provides as follows:

> "VIII Governor to preside over Executive Council
>
> The Governor shall preside at meetings of the Executive Council but if the Governor is unable to preside the member appointed by the Governor to preside, or in the absence of such member, the senior member in order of appointment actually present, shall preside."

Clause VIII currently permits meetings of the Executive Council only where the person presiding, and all other attendees are present in person. This interpretation arises from the use of the words "preside" and "actually present" in clause VIII, which imply physical presence at the meeting. Meetings therefore cannot be held by any form of remote communication, whether by teleconference or videoconference. Meetings are required to be held in person, even in circumstances (such as the COVID-19 pandemic) where the Governor or other members might be prevented by illness, social isolation requirements or other restrictions from attending in person.

The power to revoke, alter or amend the Letters Patent is reserved by clause XXII to the Sovereign. They could not be amended by the Governor.

The proposed new section 45A will modify the application of clause VIII, and provide that meetings of the Executive Council may be held in person, by remote communication, or by a mix of those 2 ways of meeting. Remote communication is defined as any technology that enables all persons taking part in a meeting to communicate with each other at the same time in a reasonably continuous way. This would include attendance by teleconference or videoconference.

A person (including the Governor or any member who is presiding) who participates in a meeting of the Executive Council using remote communication is taken to be present at the meeting. This is to make it clear that meetings where some or all participants attend by remote communication are validly held.

The amendment is intended to be permanent, as the ability to hold meetings of the Executive Council by remote communication may be useful or necessary in the future in circumstances similar to the pandemic or in other circumstances where some or all members of the Executive Councillors are unable to attend a meeting in person.

Both New South Wales (NSW) and Queensland have recently legislated for virtual Executive Council meetings. The Queensland amendment is permanent, while the NSW amendment is temporary and lasts for 1 year. Clause 85 in this Bill follows the Queensland approach of

including a self-contained provision, rather than the NSW approach of providing for regulations to specify particular ways and forms in which Executive Council meetings are to be held. The Queensland approach is sufficiently flexible to provide for future developments in technology. As an amendment to the *Constitution Acts Amendment Act 1899*, it would seem to be more appropriate that the provision be self-contained rather than rely on further elaboration by regulations.

Division 3 — *Criminal Procedure Act 2004* amended

This Division amends the *Criminal Procedure Act 2004* (CP Act). The amendments proposed in this Division are intended for permanent operation and will facilitate electronic lodgement of prosecution notices by providing that all prosecution notices need only be signed by the person who is commencing the prosecution. This will remove the current requirement of a secondary signature from a Justice of the Peace (JP) or prescribed court officer for some prosecuting authorities in order to create a streamlined electronic lodgement process that applies equally to all prosecuting authorities.

Clause 86 – Act amended

This clause states that this Division amends the *Criminal Procedure Act 2004.*

Clause 87 – Section 21 amended

Clause 87 amends section 21 of the CP Act by replacing subsection (3).

Section 21 of the CP Act outlines when a prosecution can be commenced. At present this varies depending on whether the prosecution notice for the particular prosecution is signed under section 23 of the CP Act: by two people (the prosecutor and a JP or prescribed court officer) or by an authorised investigator alone. Consequential to the proposed amendment to section 23 of the CP Act at clause 87, the Bill seeks to replace section 21(3) of the CP Act to provide that all prosecutions will commence on the day on which the prosecution notice, signed in accordance with section 23, is lodged with the court. This is to ensure a consistent commencement date for all prosecutions, whether the prosecution notice is lodged electronically (whereby "signing" and "lodgement" happen simultaneously) or in hard copy (where the notice may have been signed some days before lodgement with the court).

Clause 88 – Section 23 amended

Clause 88 amends section 23 of the CP Act. Section 23 of the CP Act sets out formal requirements for prosecution notices.

Firstly, subclause (1) amends section 23(2)(d) to delete the words "in accordance with subsection (3) and, if necessary, subsection (4)." and replaces them with "by the person who is commencing the prosecution". This will provide that prosecution notices need only be

signed by the person commencing the prosecution and will no longer need to be signed in the presence of a JP or prescribed court officer in certain circumstances.

As a consequence of this amendment to 23(2)(d), subsections (3), (4) and (5) of section 23 are no longer required and are proposed to be deleted by subclause (2).

The purpose of allowing a single signature on prosecution notices is to permit electronic lodgement of prosecution notices, no matter the jurisdiction of the prosecuting authority. Under section 23(3)(a)(i) of the CP Act, a prosecution notice can only be signed alone by an "authorised investigator". In all other cases the notice must be witnessed and countersigned by a JP or a court officer. As the definition of "authorised investigator" does not extend to persons working in departments of the Commonwealth or another state or territory, these external agencies can only lodge prosecution notices that are witnessed and countersigned. This is an impediment to electronic lodgement.

Clause 89 – Schedule 1 clause 3 amended

Clause 89 amends Schedule 1 clause 3(2) of the CP Act.

This amendment is consequential to the deletion of subsections (3)-(5) of section 23. The current reference to section 23(3) in clause 3(2) of Schedule 1 is deleted and replaced with a reference to "section 23".

Division 4 – *Evidence Act 1906* amended

Division 4 amends the *Evidence Act 1906* (Evidence Act) to facilitate the timely administration of justice by ensuring that witness evidence can be given despite a key witness not being able to attend the court.

Clause 90 - Act amended

Clause 90 provides that Division 4 amends the Evidence Act.

Clause 91 - Section 106K amended

Section 106K currently provides that a judge may make any order he or she thinks fit when hearing an application under section 106I(1)(b) for a child to be able to give evidence at a special hearing in respect of a Schedule 7 proceeding at which the whole of the child's evidence is recorded on a visual recording.

Clause 91(1) deletes current section 106K(3)(a) and inserts new provisions that expand the orders that a judge can make regarding where the accused person is located and how the accused person can observe the special hearing proceedings.

The current provisions in section 106K(3)(a)(i) and (ii) are retained, but have been consolidated into new subsection (3)(a)(i). This provides that an accused is not to be in the same room as the child when the child's evidence is being given but is to be capable of observing the proceedings by means of closed circuit television system and at all times is to have the means of communicating with his or her counsel.

New subsection (3)(a)(ii) introduces an alternative means of the accused being able to hear the special hearing proceedings, which can be ordered in rare circumstances. Where a judge is of the opinion that new subsection (3A) applies, a judge can order that the accused is to listen to the special hearing proceedings by means of audio link, and at all times must have the means of communicating with his or her counsel.

Clause 91(2) inserts new subsections (3A) and (3B). New subsection (3A) will apply to the accused if, in the opinion of the judge, it is not desirable for the accused to attend court due to the accused's health or another reason the judge thinks fit. New subsection (3B) will provide that if the accused is ordered to hear the proceedings by audio link under new subsection (3)(a)(ii), the accused must be provided with a reasonable opportunity to view a copy of the visually recorded evidence before that evidence is presented in court.

These amendments are being introduced to ensure that where a child is due to give evidence at a special hearing, the child is not prevented from doing so on account of the accused person not being able to attend the court. This is to remedy situations whereby child witnesses have suffered distress, anxiety and further trauma, by being delayed in giving sensitive evidence. This will also ensure the timely delivery of the evidence of child witnesses where the passage of time may cause issues with memory recall. This issue has been heightened during the COVID-19 pandemic, because the accused might be a person unable to travel to the court due to travel restrictions (including not being able to leave a prison); or may be a person at risk of contracting COVID-19 due to age or a pre-existing condition; or may be acutely unwell.

Clause 91(3) introduces offences that aim to deter any misuse by the accused or any other person of the audio link of the proceedings ordered under subsection (3)(a)(ii). The intent is that these offences apply to the accused, and to anyone else who may be with the accused at the time of hearing the proceedings, or after hearing the proceedings, or anyone who comes into possession of any unlawful copy of the audio of the proceedings.

These offences recognise that by allowing an accused, in rare circumstances, not to attend the court to observe the special hearing and instead hear the proceedings in an alternative location, that there is a greater risk of misuse of the audio material.

New subsection (4A) provides that a person must not make a copy of, or otherwise reproduce, the proceedings, or any part of the proceedings, heard by audio link. The penalty for contravening subsection (4A) is a fine of $5,000.

New subsection (4B) provides that a person must not play, supply or offer to supply a copy of, or reproduction of, the proceedings, or any part of the proceedings, heard by means of audio link. The penalty for contravening subsection (4B) is a fine of $5,000.

New subsection (4C) provides that a person must not broadcast the proceedings, or any part of the proceedings, heard by means of an audio link. The penalty for contravening subsection (4C) is imprisonment for 1 year and a fine of $100,000.

Clause 92 - Section 106N amended

Section 106N currently provides for video links and screening arrangements to be made for an affected child. "Affected child" is defined in section 106A as a child in respect of whom an application is made under clause 2 of Part A of Schedule 7, or whom it is alleged that an offence was committed, attempted or proposed in respect of a Schedule 7 proceeding.

Clause 92 amends section 106N(2)(a) to repeal and replace one of the current arrangements that may be put in place, whereby an affected child may give evidence outside the courtroom but within the court precincts (and the evidence be transmitted to the courtroom by means of video link).

Section 106N(2)(a) will now provide that an affected child may give evidence "at a place, other than the courtroom, that is approved by the court,"

This amendment will allow affected child witnesses to give evidence from regional or remote locations, and other locations that may be necessary to give evidence whether as a result of COVID-19 restrictions or otherwise, rather than having to travel to the court. The amendment will also allow pre-recordings of affected child witnesses' evidence in locations outside of the court while being afforded the protections that section 106N provides to affected child witnesses, including screening arrangements and one-way glass to ensure that the child cannot see the accused.

Division 5 — *Interpretation Act 1984* amended and consequential amendments

Section 45 of the *Interpretation Act 1984* is a general grant of additional power to make subsidiary legislation in relation to fees. That is, where there is already a power to make subsidiary legislation providing for fees, section 45 ensures that that power can be used to do the things listed in section 45(1) and (2).

Interpretation Act 1984 section 3(3) and section 45(3) mean that the additional powers in relation to fees under section 45(1) and (2) are not available in relation to Acts that were in existence before the *Interpretation Act 1984* came into operation (1 July 1984). Sections 3(3) and 45(3), and similar ones in the Act, are a residue of the transition from the *Interpretation Act 1918*.

It has not been possible to make regulations under a number of pre-1984 Acts to enable the reduction, waiver or refund of fees under those Acts during the COVID-19 emergency period because the Act itself did not empower such regulations and the *Interpretation Act 1984* section 45 could not apply.

Subdivision 1 makes the necessary amendments to remove this impediment to the application of the *Interpretation Act 1984* section 45 to these pre-1984 Acts.

Further, a number of pre-1984 Acts have been amended to overcome this impediment. Since that is no longer necessary, those Acts are amended in Subdivision 2 to remove what are now redundant provisions.

The specific provisions of the Bill, which give effect to these amendments are described below.

Subdivision 1 — Interpretation Act 1984 amended

This Subdivision amends the *Interpretation Act 1984*

Clause 93 – Act amended

This clause states that this Subdivision amends the *Interpretation Act 1984*.

Clause 94 – Section 3 amended

This provision deletes the reference to section 45 in the Interpretation Act. Section 3(3) is one of two provisions that stops the additional powers in relation to fees under section 45(1) and (2) from being available to pre-1984 Acts.

Clause 95 – Section 45 amended

This provision deletes subclause (3) from section 45 in the Interpretation Act. Subclause (3) is the second of two provisions that stops the additional powers in relation to fees under section 45(1) and (2) from being available to pre-1984 Acts.

Subdivision 2 — Consequential amendments

This Subdivision removes redundant provisions from several pre-1984 Acts which were amended to overcome the limitation posed by section 3(3) and section 45(3) of the *Interpretation Act 1984*.

Clause 96 – *Auction Sales Act 1973* amended

This clause removes a provision from the *Auction Sales Act 1973*, made redundant by the amendments to the *Interpretation Act 1984* under Subdivision 1 of this Division.

Clause 97 – *Debt Collectors Licensing Act 1964* amended

This clause removes a provision from the *Debt Collectors Licensing Act 1964*, made redundant by the amendments to the *Interpretation Act 1984* under Subdivision 1 of this Division.

Clause 98 – *Employment Agents Act 1976* amended

This clause removes a provision from the *Employment Agents Act 1976*, made redundant by the amendments to the *Interpretation Act 1984* under Subdivision 1 of this Division.

Clause 99 – *Finance Brokers Control Act 1975* amended

This clause removes a provision from the *Finance Brokers Control Act 1975*, made redundant by the amendments to the *Interpretation Act 1984* under Subdivision 1 of this Division.

Clause 100 – *Land Valuers Licensing Act 1978* amended

This clause removes a provision from the *Land Valuers Licensing Act 1978*, made redundant by the amendments to the *Interpretation Act 1984* under Subdivision 1 of this Division.

Clause 101 – *Motor Vehicle Dealers Act 1973* amended

This clause removes a provision from the *Motor Vehicle Dealers Act 1973*, made redundant by the amendments to the *Interpretation Act 1984* under Subdivision 1 of this Division.

Clause 102 – *Real Estate and Business Agents Act 1978* amended

This clause removes a provision from the *Real Estate and Business Agents Act 1978*, made redundant by the amendments to the *Interpretation Act 1984* under Subdivision 1 of this Division.

Clause 103 – *Transfer of Land Act 1893* amended

This clause removes a provision from the *Transfer of Land Act 1893*, made redundant by the amendments to the Interpretation Act 1984 under Subdivision 1 of this Division.

Part 7 – Miscellaneous

This Part contains mechanical provisions relevant to the operation of this Bill.

Clause 104 – Provisions about orders made under Act

This clause applies to provisions under this Bill, which permit an order to be made (for example, orders relating to waiving fees, changing expiry dates or modifying conditions for authorisations and so on).

This clause deals with the status of such orders. An order is declared to be subsidiary legislation, which means orders have legislative effect. Certain provisions of the *Interpretation Act 1984* apply as a result. For example, the orders:

- must be published in the Gazette under, and commence in accordance with, the *Interpretation Act 1984* section 41;
- will be able to be made in accordance with the provisions of the *Interpretation Act 1984* section 43.

Ordinarily, subsidiary legislation cannot be inconsistent with the legislation under which it is made - see the *Interpretation Act 1984* section 43(1). However, clause 104(3) of the Bill states that the *Interpretation Act 1984* section 43(1) and (6) do not apply in relation to the orders because orders under the Bill may modify or otherwise affect Acts or subsidiary legislation, in the manner specified in this Bill.

However, orders cannot be inconsistent with this Bill, see clause 104(3). As such, the limits in this Bill cannot be circumvented.

The effect of this clause is also to mandate, that an order must be published on a website. Ordinarily this will be the website of the Government department assisting in the administration of the Act to which the order relates.

Clause 105 – Effect of provisions of this Act, certain regulations and orders ceasing to have effect

Clause 37 of the *Interpretation Act 1984* is applied by this clause to provides general savings provisions to take effect when provisions or orders made under this Bill cease.

Clause 106 – Regulations

This is a general head of power enabling the Governor to make regulations to prescribe for matters required or permitted, or necessary or convenient, in order to give effect to this Bill.

It is an administrative power, akin to that ordinarily contained in an Act, to make regulations to give effect to a Bill.

Such regulations may be required to deal with savings or transitional issues that could arise when the temporary provisions of this Bill, or instruments made under it, like orders, cease to have effect. For that reason, this provision is directed at the scope and effect of such

regulations. Therefore, regulations made for the purpose of addressing savings or transitional issues may:

- override or modify other Acts;
- may deem certain states of affairs or circumstances to have been in place, or not, as the case may be, relevant to a time before the regulations commenced. However, such provisions cannot be made if they would disadvantage any person – unless that person is an authority like the State, a statutory body or local government.

Regulations made in relation to savings or transitional issues should be done quickly, cannot be made after 30 June 2025, and are supplementary to anything provided for of this nature in the *Interpretation Act 1984*.