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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 5 2002-03

National Environment Protection Council Amendment Bill
2002

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Contents

Purpose	1
Background	1
The National Environment Protection Council (NEPC)	1
National environment protection measures	2
The review of the <i>National Environment Protection Council Act 1994</i>	3
Main Provisions	4
Schedule 1 - Amendment of the <i>National Environment Protection Council Act 1994</i>	4
Endnotes	5

National Environment Protection Council Amendment Bill 2002

Date Introduced: 26 June 2002

House: House of Representatives

Portfolio: Environment and Heritage

Commencement: Sections 1 to 3 commence on Royal Assent. However, the operational sections of the Bill (schedule 1) commence on a day to be fixed by proclamation, or twelve months after Royal Assent, which is the earlier.

Purpose

The amend the *National Environment Protection Council Act 1994* so as to:

- enable the NEPC Secretariat to provide support and assistance to other environment-related ministerial councils;
- provide a simplified process for making minor variations to national environment protection measures; and
- require five-yearly reviews of the Act.

Background

The National Environment Protection Council (NEPC)

Schedule 4 of the 1992 [Intergovernmental Agreement on the Environment](#) (IGAE) provided for the establishment of a national body to make certain nationally consistent measures for the protection of the environment. The schedule also provided for legislation to be developed:

which will enable the Commonwealth and State Parliaments to authorise the [body] to establish any measures. The legislation will also establish mechanisms for the application of measures in the States. The legislation will ensure that any measures established by the [body]...will apply...throughout Australia, as a valid law of each jurisdiction.¹

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The Commonwealth passed the *National Environment Protection Council Act* (NEPCA) in 1994, with corresponding 'mirror' legislation being made in the other jurisdictions at the same time.² Membership of the NEPC is made up of Commonwealth, State and Territory Ministers (not necessarily environment Ministers). It is currently chaired by the Commonwealth Environment Minister, the Hon David Kemp. The NEPC is supported by an officials-level Committee. Secretariat and operational support functions are performed by the NEPC Service Council. Both the Committee and the Service Council were established by the NEPCA.

In June 2001, the Council of Australia Governments established the Environment Protection and Heritage Council. Under this arrangement, the NEPC effectively became a constituent part of the new Ministerial Council, but retained its identity as a statutory body with its powers and functions deriving from the NEPCA.

National environment protection measures

Section 14 of the NEPCA sets out the environmental issues the NEPC may address through the making of national environment protection measures, or NEPMs. These are:

- ambient air quality;
- ambient marine, estuarine and fresh water quality;
- the protection of amenity in relation to noise, but only if differences in environmental requirements relating to noise would have an adverse effect on national markets for goods and services;
- general guidelines for the assessment of site contamination;
- environmental impacts associated with hazardous wastes;
- the re-use and recycling of used materials; and
- motor vehicle noise and emissions.

In introducing the NEPCA, the Government said that the NEPMs were designed to:

give all Australians the benefit of equivalent environment protection and to ensure that investment decisions of business are not distorted by variations in environmental standards between Australian jurisdictions.³

The NEPCA sets out a public consultation period for the development of NEPMs.⁴ NEPMs are also disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.⁵

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Decisions to approve the final form of the NEPM require a two-thirds majority of NEPC members. Once the relevant NEPM comes into operation following tabling in the Commonwealth Parliament and not having been disallowed, NEPM implementation becomes mandatory for all the NEPC member jurisdictions.

The NEPCA was supplemented by the *National Environment Protection Measures (Implementation) Act 1998* which set out various ways by which NEPMs may be applied to Commonwealth places and activities, eg through applying State laws, making of Commonwealth regulations or through use of environmental audits or environmental management plans. More background on the issues surrounding the 1998 Act can be found in the relevant [Bills Digest](#).

In the last four years, the NEPC has made six NEPMs. These are:

- Ambient air quality (July 1998)
- Movement of controlled waste between states and territories (July 1998)
- National pollutant inventory (July 1998)
- Assessment of site contamination (December 1999)
- Used packaging materials (July 1999), and
- Diesel vehicle emissions (June 2001).

A NEPM on 'air toxics'⁶ is also under development by the NEPC.

The review of the *National Environment Protection Council Act 1994*

Paragraph 64(1)(b) of the NEPCA requires that the NEPCA and its State and Territory equivalents be reviewed after five years operation to establish the extent to which the objects of the Acts have been achieved. This review was commissioned in 2000. The terms of reference of the review included an examination of the effectiveness of both the NEPC 'model' and the current NEPMs in terms of meeting the environmental protection and non-distortion objectives expressed in the IGAE and NEPCA. The terms of reference also included an examination of the various procedural practices of the NEPC and its development of NEPMs.

The [review](#)⁷ concluded:

the National Environment Protection Council (including its support structure) has been as effective as could reasonably be expected...however I consider that the time has come when it is appropriate to make decisions about where the Council is going....

It would be possible to continue the Council along much the same lines as it has been operating during recent years. This reflects what has been described as the "existing

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philosophy” of making NEPMs only for issues which are of a truly national complexion and which are most efficiently handled by a statutory national process....

Alternatively, it would be possible to give the Council a broader mandate, with a responsibility to develop national environmental policies and, as appropriate, nationally consistent regulatory measures across the full spectrum of matters listed in section 14(1) of the Acts. Such an approach would, in my opinion, be more in keeping with the intent of those who drafted the IGAE....

I think it important that the members of Council address this fundamental question before any other decisions are taken. In doing so, they will need to have regard to the financial implications.⁸

The issue of the role of the Council has been largely dealt with by the incorporation of the NEPC into the Environment Protection and Heritage Council, as mentioned above.

The report also recommended that proposed variations to NEPMs that the NEPC consider to be of a minor nature be made through less complex notification and consultation procedures. The report's conclusions and full list of the recommendations can be found in paragraphs 386-403.

Main Provisions

Schedule 1 - Amendment of the *National Environment Protection Council Act 1994*

Items 1 and 3 amend subsection 6(1) and section 13 respectively to provide that the NEPC can direct the Services Corporation to 'provide assistance and support' to other environment-related Ministerial Councils.

Item 5 inserts **new Division 2A** to 'streamline' the procedure for making minor variations to NEPMs. This is main element of the Bill.

Under **new subsection 22A(1)**, the streamlined procedure only applies where:

- the proposed variation is supported by a unanimous NEPC resolution, and
- the resolution states that the variation will not involve a 'significant change in the effect' of the NEPM.

There is no guidance in the Bill or the NEPCA on what would constitute a 'significant change'. There is no requirement for the Council to have reasonable grounds on which to base its conclusion as to the significance of the variation, although this issue must be included in the public consultation explanatory statement (see next paragraph).

Under the streamlined procedure, the NEPC must prepare a draft of the proposed variation and a statement that explains the reasons for the proposed variation, the nature and effect of the proposed variation, and the reasons why the Council is satisfied it is minor (ie not a

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significant change in its effect): **new subsection 22A(2)**. The draft and explanatory statement are available for public comment for at least one month.⁹ Notice of the public comment period must be published in a newspaper circulating in the relevant states or territories: **new subsection 22B(2)**.

When making a final decision on the proposed minor variation, **new subsection 22C** provides that the NEPC must have regard to:

- any submissions it receives
- the consistency of the measure with the principles of environmental policy set out in section 3 of the IGAE
- relevant international agreements to which Australia is a party, and
- any regional environmental differences in Australia.

Item 8 inserts **new subsections 64(3) and (4)** to provide for the NEPCA to be reviewed at a rolling series of five yearly intervals. This would mean the next review would start in 2005. The report of each review must to be tabled in Parliament within 12 months of the end of the relevant five year period.

Endnotes

- 1 Schedule 4 also allows the Commonwealth or a State or Territory to retain any *existing* more stringent environmental standards.
- 2 Unless otherwise stated, where reference is made to particular provisions of the NEPCA, it should assumed that equivalent provisions are contained in the State and Territory 'NEPC' Acts.
- 3 Second reading speech, the Hon Senator Chris Schacht, *Senate Debates* 6 June 1994 p. 1315.
- 4 Existing sections 16–20.
- 5 Existing section 21.
- 6 These are described by the NEPC as 'hazardous gaseous, aerosol or particulate pollutants which are present in the air in low concentrations'.
- 7 Donald McMichael, *Review of the National Environment Protection Acts*, 31 January 2001 at: http://www.nepc.gov.au/pdf/NEPC_Act_Review.pdf
- 8 Paragraphs 387–395.
- 9 This compares to a two month public comment period for a variation of a NEPM under current procedures: existing section 20. Also, the current procedures require a comprehensive impact statement to be drawn up as part of the consultation process.

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