National Water Commission Amendment Bill 2012

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Law and Bills Digest Section

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National Water Commission Amendment Bill 2012

Date introduced: 22 March 2012

House: Senate

Portfolio: Sustainability, Environment, Water, Population and Communities

Commencement: Sections 1 to 3 commence on the day the Act receives Royal Assent. All items under Schedule 1, Part 1 commence on 1 July 2012, while all items under Schedule 1, Part 2 commence on the day the Act receives Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the National Water Commission Amendment Bill 2012 (the Bill) is to implement the Government’s response to the Independent Review of the NWC (the Independent Review).1

Consistent with the recommendations of the Independent Review, the Bill continues the National Water Commission (NWC) beyond the 30 June 2012 sunset date as set out in the National Water Commission Act 2004 (NWC Act)2, and enables the NWC to continue to operate for the duration of the National Water Initiative (NWI).3

The Bill also seeks to focus the NWC on four key functions identified by the Review: audit, monitoring, assessment and knowledge leadership.4

The Bill also closes the Australian Water Fund Account (AWF)5, therefore ending the NWC’s specific ability to administer AWF funds, but permits the NWC to administer Australian Government funding programs that may be allocated to it in the future.

5. The AWF provided funds for three programs: Water Smart Australia, Raising National Water Standards and the Community Water Grants Program. The first two programs were administered by the NWC, with Water Smart
The Bill also reduces the number of NWC Commissioners (including the Chair) from seven to five. This was not a recommendation of the Review. 

Background

The National Water Initiative

The 2004 Intergovernmental Agreement on a National Water Initiative (NWI) represents an agreed position of Commonwealth, state and territory governments on water reform issues.

The objectives of the NWI are to achieve ‘a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes’. 

The NWI established a schedule of deliverable outputs by the signatories. Set out in Schedule A to the NWI, these were largely to be completed by 2012.

The National Water Commission

With the agreement of the Council of Australian Governments (COAG), the NWC was established by the Commonwealth under the NWC Act to assess progress in implementing the NWI, and to advise on actions required to better realise the objectives of the NWI.

The role of the NWC also included monitoring and advising on the transition from existing policy frameworks shaping water reform, namely the 1994 *COAG Water Reform Framework* and the National Competition Policy.

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8. Ibid., clause 23.
12. Ibid., clause 23.
14. On 11 April 1995, COAG members signed three agreements which, together, created the National Competition Policy. One of the areas covered by the agreements was water resource policy and regulatory reform: National Competition Policy website, viewed 21 May 2012.

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The NWC’s institutional structure and role are described in Schedule C to the NWI. The Schedule specifies that the NWC is to comprise seven members, with four (including the Chair) to be appointed by the Commonwealth and three by the state/territory governments.

Since the establishment of the NWC, there have been significant institutional reforms approved by COAG and by the Commonwealth Government, including:

- in 2007, establishment of the Murray-Darling Basin Authority and the Commonwealth Environmental Water Holder as new statutory bodies and
- in 2008, establishment of the COAG Reform Council and the delegation by the Council of certain water assessment functions to the NWC.

Reflecting these changes, the Water Act 2007 (the Water Act)\(^\text{15}\) gives the NWC the function of auditing the effectiveness of the implementation of the Murray-Darling Basin Plan and associated water resource plans. Additionally, under delegation from the COAG Reform Council, the NWC has an assessment role with respect to National Partnership Payments.\(^\text{16}\)

The Independent Review

Section 38 of the NWC Act requires a review to be conducted prior to the end of 2011 of the ongoing role and functions of the NWC in the management and regulation of Australia’s water resources.

In accordance with this requirement, on behalf of COAG, on 11 July 2011, the Federal Government commissioned the Independent Review by Dr David Rosalky.\(^\text{17}\) Dr Rosalky presented his final report to the Government on 6 December 2011, and it was tabled in the Parliament on 14 March 2012.\(^\text{18}\)

Key findings of the Independent Review were:

The NWI remains a relevant and active reform agenda supported by most stakeholders. It has matured in that essential elements have been implemented, but the full benefits from those initiatives require further elements of the NWI to be put in place. However, the timetable adopted for the completion of the NWI’s milestones was ambitious and several of the key reforms have not yet been implemented because they have proven to be technically and politically difficult and demanding of scarce resources.


\(^{\text{17}}\) D Rosalky, op. cit.

The elements of the NWI still to be implemented are, by their nature, the more difficult ones and the role that can be played by a specialist and independent body like the NWC is likely to be even more important in the future.19

The Independent Review identified a number of core functions which it considered necessary to progressing future water reform, and in which it considered the NWC to have provided key services:

- monitoring and audit of reform activity
- assessments of reform activity and
- knowledge leadership.20

The Independent Review concluded that ‘the NWC should continue, without sunset, for the duration of the NWI agenda and within essentially the same governance arrangements that it now has with its legislation strengthening its independence as a COAG body’.21 The Independent Review also recommended that there should be a comprehensive external review of the NWC every five years.22

The Independent Review concluded that ‘the function of providing audits and assessments remains relevant and valuable and the NWC is best placed to continue in this role while the NWI is the operational agenda in water reform’, and that the function of ‘knowledge leadership’, in which the NWC ‘has played a key role’ to date ‘needs to continue’.23

In addition, the Independent Review recommended that the role of the NWC should include all reforms associated with implementation of the NWI, including those associated with the Murray-Darling Basin.24

Although the Bill proposes a reduction in the number of commissioners25, the Independent Review considered the present seven commissioners ‘appropriate and effective’, and that this number ‘provides a range of external views to bear on the issues confronting water reform’.26

**Basis of policy commitment**

In a media release dated 14 March 2012 the Government announced its intention to accept the recommendations of the Independent Review and to continue the NWC to oversee the COAG national water reform agenda.27

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20. Ibid., pp. iii-iv.
22. Ibid., p. 54.
23. Ibid.
24. Ibid.

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Committee consideration

The Bill was referred to the Senate Environment and Communications Legislation Committee (the Committee) on the recommendation of the Selection of Bills Committee in its report of 22 March 2012.  The Committee released its report on the Bill in May 2012.

The Committee recommended unanimously that the Bill be passed before 30 June 2012. In making this recommendation, the Committee took note of the seven submissions received, all of which supported continuation of the NWC.

In supporting the continuation of the NWC, the Water Services Association of Australia (WSAA) noted the strong collaborative relationship which it had developed with the NWC since its inception. WSAA also noted its support for ‘an independent voice of water reform at a federal level’. Supportive views of the NWC were also expressed by the Australian Water Association (AWA), the National Farmers’ Federation and GE Energy.

The South Australian Government, while also supporting the role of an independent body such as the NWC ‘to work with jurisdictions to implement complex water reforms and streamline monitoring and accountability functions’, expressed concern that the role of the NWC in evaluating the Commonwealth’s management of environmental water is not clear, and suggested that there should...


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be provisions in the Bill to allow COAG to request this. The South Australian Government suggested that the NWC should be required, annually, to submit its plan of work and activities to COAG.35

In response to these concerns, the Committee’s report notes the submission from the Department of Sustainability, Environment, Water, Population and Communities to the effect that the Water Act requires the NWC to complete audits of the effectiveness of the Basin Plan at least every five years, and to provide a report of its audit to the Minister and relevant state Ministers, and also, to the Murray-Darling authority. The Department also drew attention to proposed paragraph 7(1)(f) in item 6 of Schedule 1 of the Bill, which requires the NWC, at the Minister’s request, to advise and make recommendations to the Commonwealth in relation to the general functions of the NWC outlined in proposed paragraphs 7(1)(a) to (d).36

The Bill was also reviewed by the Senate Standing Committee for the Scrutiny of Bills. That Committee had no comments on the Bill.37

**Policy position of non-government parties/independents**

All members of the Senate Environment and Communications Legislation Committee, including two members of the Liberal/National Coalition, and one member of the Australian Greens, supported the passage of the Bill before 30 June 2012.38

**Position of major interest groups**

Stakeholder support for the continuation of the NWC has been mentioned earlier in the ‘Committee Consideration’ section of this Bills Digest.

Similar support was expressed for the NWC in submissions by stakeholders to the earlier Independent Review. For instance, the AWA submitted to the Independent Review that ‘the effectiveness of the National Water Initiative has been greatly enhanced’ by the NWC, and that ‘an independent entity, accountable to all participants, has advantages over a single government department in overseeing the NWI’.39

35. Ibid., pp. 8 and 9.
36. Ibid., p. 9. Further details of the proposed functions of the NWC are provided under the ‘Key Provisions’ heading in this Bills Digest.

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Support was also forthcoming from the WSSA, which recommended the continuance of ‘an independent statutory body, such as the NWC’\(^{40}\), and from the Australian Competition and Consumer Commission, which pointed to the ‘constructive role’ played by the NWC to date with respect to water reform.\(^{41}\)

In its comments to the Independent Review, the Western Australian Department of Water, reaffirmed the view expressed by that Department in its submission to the NWC during the writing of the 2011 biennial assessment, that:

> The role that the NWC plays is an essential part in ensuring that national communications are streamlined and effective, and that funding programs were clearly identified and managed. WA supports the preservation of the NWC in promoting the objectives and outcomes of water reform. We view the NWC as a useful independent auditor of the reform implementation process that holds the Commonwealth to account as well as the states. It would be in the best interest of the states if the NWC were to continue to independently maintain the management of water reform issues.\(^{42}\)

In its submission to the Independent Review, the New South Wales Government expressed the view that:

> It would be useful to continue the knowledge generation function and funding of research/pilot projects that the NWC has supported to date. When properly targeted, these functions provide useful support to jurisdictions in implementing the NWI requirements.\(^{43}\)

The NSW Government also noted that the increasing roles of the Murray Darling Basin Authority and the Productivity Commission ‘may present opportunities to refocus the NWC’s activities to a smaller number of key reforms’.\(^{44}\)

The National Farmers’ Federation has also stated that ‘the Commission will continue to play a critical, and perhaps most importantly, independent role in the audit, assessment, and monitoring of the National Water Initiative now on a triennial basis, and will also undertake the new function of auditor of the Murray-Darling Basin Plan, as required by the \textit{Water Act 2007}’.\(^{45}\)

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44. Ibid., p. 7.

45. National Farmers’ Federation, ‘NFF backs independent water regulator’, Stock and Land website, 15 March 2012,

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Financial implications

The Explanatory Memorandum states that the Bill will have a minimal financial impact. Funding is provided within the provisional budget estimates for the NWC.\textsuperscript{46}

Key provisions

Schedule 1 – Proposed Amendments to the NWC Act

\textbf{Item 6} replaces existing subsections 7(1), (2) and (3) with \textit{proposed new subsection 7(1)} which sets out the revised functions of the NWC.

\textit{Proposed paragraph 7(1)(a)} provides the NWC with a general function to audit progress in water reform if requested by COAG. \textit{Proposed paragraph 7(1)(b)} provides the NWC with a specific function to undertake triennial assessments of progress on implementation of the NWI. \textit{Sub-item 7(1)} is an applications provision which operates so that the first assessment will occur in 2014.

\textit{Proposed paragraph 7(1)(c)} provides the NWC with a general function to conduct assessments on matters that are significant for achieving the NWI objectives and outcomes.

\textit{Proposed paragraph 7(1)(d)} gives the NWC a general monitoring function of areas that are significant for achieving the objectives and outcomes of the NWI.

\textit{Proposed paragraph 7(1)(e)} enables the NWC to assist with the implementation of the NWI by providing information and guidance on the auditing, assessment and monitoring functions outlined in the preceding paragraphs of \textit{proposed subsection 7(1)}, as well as to undertake activities that promote the objectives and outcomes of the NWI.

\textit{Proposed paragraph 7(1)(f)} provides for the NWC, if requested by the Minister, to advise and make recommendations to the Commonwealth in relation to the performance of the NWC’s audit, assessment and monitoring functions.

\textit{Proposed paragraph 7(1)(g)} provides for the NWC, if requested by the Minister, to advise and make recommendations to the Minister in relation to any Commonwealth program that relates to the management and regulation of Australia’s water resources.

\textit{Proposed paragraph 7(1)(h)} provides for the NWC to continue to have a role in assessing the implementation of agreements (other than the NWI) between the Commonwealth and a state or territory relating to water management, where that agreement provides for the NWC to have such a role.
Proposed paragraph 7(1)(i) provides COAG (or appropriate subcommittee) with the ability to commission the NWC to conduct any study or analysis, or to provide any report in relation to matters of national significance relating to water (including the sustainable management of water resources and access to, and use of, water), or the COAG Water Reform Framework.

Proposed paragraph 7(1)(j) provides for the NWC to be able to perform any other function prescribed by other Commonwealth acts and regulations.

Item 9 inserts proposed paragraph 8(1)(b) which amends the constitution of the NWC by reducing the current number of NWC Commissioners to at least two, but no more than four, in addition to the Chair.

Item 10 amends subsections 8(2) and (3) to reduce the maximum number of NWC Commissioners that may be nominated by the Commonwealth and the states respectively, from three to two.

Item 11 amends subsection 19(1) to reduce the number of Commission meetings that must be held each calendar year from eight to five. This proposed amendment is to apply in relation to 2012 and later calendar years (item 12).

Item 14 replaces existing paragraph 24(1)(a) with proposed paragraph 24(1)(a), which reflects the proposed closure of the Australian Water Fund Account. Under the proposed provision, the NWC is charged with the function of administering financial assistance, awarded by the Minister in relation to any Commonwealth program relating to the management and regulation of Australia’s water resources, referred to in proposed paragraph 7(1)(g).

The Explanatory Memorandum indicates that the intention ‘is to leave open to the government the option of program management by the NWC, should it be desired in the future’.  

Item 15 amends existing subsection 25(2) to increase the maximum period of appointment of the CEO from three years to five years.

Items 19 and 20 amend existing subsections 38(1) and (2) respectively to provide for future reviews of the NWC, the first by the end of 2017, and further reviews every five years. Written reports of reviews are required (proposed subsection 38(2B)).

COAG is empowered to establish the processes for conducting the reviews. If COAG exercises this power, a review must be conducted in accordance with that process (proposed subsection 38(2A)).

Item 21 abolishes the Australian Water Fund Account by repealing Part 6 of the NWC Act.

Item 22 inserts proposed section 44 which requires the NWC to publish on its website any audit or assessment (including any advice or recommendations) given under proposed paragraphs 7(1)(a), (b) or (c), unless the Minister does not agree. In that event, the Minister must publish on the website his or her reasons for withholding publication.

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46. Explanatory Memorandum, op. cit., p. 7, [44].

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Advice and recommendations given by the NWC in the exercise of its other functions must not be made public without the Minister’s agreement. However, details of other undertakings by the NWC not containing advice or recommendations may be made publicly available by the NWC at its discretion.

**Item 23** amends subsection 45(2) to require the NWC to include in its annual report details of any financial assistance administered from a Commonwealth program referred to in proposed paragraph 7(1)(g).

**Item 25** repeals section 39 of the NWC Act to remove the NWC Act’s current 30 June 2012 sunset clause.

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