2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

NATIONAL WATER COMMISSION AMENDMENT BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Parliamentary Secretary for Sustainability and Urban Water, Senator the Honourable Don Farrell)
GENERAL OUTLINE

1. The National Water Commission Amendment Bill 2012 (the Bill) will continue the National Water Commission (NWC) as an independent statutory body beyond its current sunset date of 30 June 2012. The Bill implements the Government’s response to the independent Review of the NWC and refocusses the NWC’s role to oversight and assessment of national water reforms (primarily the National Water Initiative (NWI) and Murray-Darling Basin (MDB) reforms).

2. The independent Review of the NWC was commissioned by the Commonwealth Government on behalf of the Council of Australian Governments, in accordance with the NWI and section 38 of the NWC Act. The Review concluded that the NWC should continue, without sunset, for the duration of the NWI.

3. The Review found that implementation of the NWI is occurring within a highly complex and evolving environment. This complex environment requires an independent and specialist institution to credibly engage with, and report on, the progress of water reform.

4. The purpose of this Bill is to amend the National Water Commission Act 2004 (NWC Act) which establishes the NWC. The Bill will amend the functions of the NWC by refocussing its operations to deliver three core ongoing functions (monitoring, audit, assessment). These three functions capture all the formal commitments in the NWI and other agreements. The NWC will also assist with the implementation of the NWI by providing advice, information and guidance on these three core functions, as well as performing activities to promote the objectives and outcomes of the NWI. These functions are designed to enable the NWC to meet its principal purpose, which is to ‘assist and pursue, through strategic guidance and information, implementation of water reforms by all jurisdictions leading to the effective and timely achievement of the NWI objectives’.

5. With the ending of all programs funded from the Australian Water Fund (AWF), the Bill closes the AWF Account and the NWC’s specific ability to administer any AWF funds, but will enable the NWC to administer Australian Government funding programs that may be allocated to it in the future.

6. The Bill will reduce the number of NWC Commissioners (including the Chair) from seven to five, due to the NWC’s refocused functions. The Bill will remove the sunset clause from the current Act, enabling the NWC to continue to operate, without sunset, for the duration of the NWI. It provides that the NWC’s performance will continue to be evaluated with a statutory review to be conducted once every five years.

7. The Bill also makes minor amendments to update the terms and definitions currently in the NWC Act, as well as minor administrative amendments to ensure the effective operation of amendments to the functions and governance arrangements for the NWC.

FINANCIAL IMPACT STATEMENT

8. This Bill will have a minimal financial impact. Funding is provided within the provisional budget estimates for the NWC.
REGULATORY IMPACT STATEMENT

9. The NWC does not have a regulatory or compliance function. There will be no additional regulatory burden on businesses or not for profit organisations resulting from this Bill. A Regulatory Impact Statement is not required.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS- PART 3 HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011

10. This Bill amends the NWC Act which established the NWC in 2004 to assist with the implementation of the NWI. The principal provisions of the Bill which provide for the continuation of the NWC with refocussed functions do not engage with any of the human rights recognised or declared in the instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

11. This Bill also makes administrative and technical amendments including amending the offence provision in section 43 relating to confidentiality.

12. The amendment to section 43 corrects a technical drafting error which meant that, if read literally, section 43 would prevent the making of a record or disclosure of information unless this was done both in the course of performing duties under the Act and was also separately authorised by law. The amendment clarifies that information may be recorded or disclosed if one of these exemptions is satisfied, consistent with the original legislative intent. The restrictions on disclosure in section 43 engage the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights. Article 19 permits restrictions on freedom of expression as provided by law, when necessary to protect public order which includes the protection of confidential information. The restrictions on record-making and disclosure in section 43 are compatible with the Article as they are necessary to protect the confidentiality of information held by the NWC.

NOTES ON INDIVIDUAL CLAUSES

Section 1 – Short Title

13. This clause provides that the Act is to be cited as the National Water Commission Amendment Act 2012.

Section 2 – Commencement

14. This clause specifies when different provisions of the Bill will commence.

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

Section 3 – Schedule(s)

16. This clause provides for amendments to the Bill specified in the Schedule.
Schedule 1 Part 1 – Amendments to the National Water Commission Act 2004 commencing on 1 July 2012

Clauses 1 to 5 Section 4 – Definitions

17. These clauses amend section 4 of the NWC Act by defining certain terms used in the Bill and repealing definitions which are no longer relevant to the operation of the NWC Act.

18. Clause 1 repeals the definition of the ‘Australian Water Fund’ (AWF) because the AWF no longer exists.

19. Clause 2 repeals the definition of the ‘Australian Water Fund Account’ (AWFA), because the AWFA will be closed by this Bill.

20. Clause 3 amends the definition of ‘COAG’ to provide clarification that a reference to COAG also includes subcommittees of COAG that deal with matters relating to water. These amendments are designed to provide the ability for the NWC to engage with the various water-related COAG subcommittees as are constituted from time to time, for example the Standing Council on Environment and Water.

21. Clause 4 repeals the definition of the Natural Resources Management Ministerial Council (NRMMC). The NRMMC was abolished in June 2011 as part of the restructure of COAG’s Ministerial Councils.

22. Clause 5 provides that the definition of the NRMMC continues to apply for the purposes of the Water Act 2007(Cth) as if the definition in section 4 had not been repealed.

Clause 6 Section 7 – Functions of the NWC

23. This Clause replaces current functions under the NWC Act with a refocused set of core functions in monitoring, audit and assessment.

24. Most of the functions are drafted broadly to provide flexibility for the NWC to determine key priority areas for its operations, in consultation with state and territory governments, through engagement with COAG water-related committees, on at least an annual basis. Specific reporting functions have generally been discontinued with these amendments. It is for the NWC to determine what is significant within each core function and it will determine how to prioritise its functions, according to available resources. The one exception is the provision requiring the NWC to perform triennial assessments of NWI parties’ progress in achieving the objectives and outcomes in the NWI.

Paragraph 7(1)(a) - Audit

25. New paragraph 7(1)(a) provides the NWC with a general function to audit progress in water reform if requested by COAG. In particular it will enable the NWC to carry out audits to determine whether parties to the NWI are implementing their commitments under the NWI, or any other agreement between the Commonwealth and a State or Territory, in relation to the parties’ management and regulation of their water resources, and the effectiveness of that implementation. This function is in addition to the audit function provided to the NWC under Part 3 of the Water Act 2007.

Paragraph 7(1)(b) – Triennial assessments
26. New paragraph 7(1)(b) provides the NWC with a specific function to undertake triennial assessments of progress on implementation of the NWI, with the first to occur in 2014. It maintains a similar function to that currently under paragraph 7(1)(h) of the NWC’s original functions, but amends the timeframe for performance to once every three years, rather than the two yearly assessments that have been performed by the NWC to date.

**Paragraph 7(1)(c) – Assessment**

27. New paragraph 7(1)(c) provides the NWC a general function to conduct assessments on matters that are significant for achieving the NWI objectives and outcomes. These assessments are to be performed by the NWC on a discretionary basis. It is expected that the NWC would consult COAG through its water officials committees on its proposed assessment work program. This program, however, would be a matter for the NWC Commissioners to determine. It is expected these assessments would contribute to the triennial assessments provided for under paragraph 7(1)(b).

**Paragraph 7(1)(d) – Monitoring**

28. New paragraph 7(1)(d) provides the NWC a general function to monitor areas that are significant for achieving the objectives and outcomes of the NWI. The NWC will be able to monitor trends and actions by all stakeholders in implementing the NWI. This paragraph replaces the specific monitoring functions the NWC had previously, and allows the NWC to determine when it should undertake monitoring activities. It is expected that the NWC would consult COAG through its water officials committees on its proposed monitoring activities. This program of activity, however, would be a matter for the NWC Commissioners to determine.

**Paragraphs 7(1)(e), 7(1)(f) and 7(1)(g) – Incidental functions**

29. New paragraph 7(1)(e) provides the NWC with the ability to assist with the implementation of the NWI by providing information and guidance on the three core functions of auditing, assessment and monitoring outlined above, as well as to undertake activities that promote the objectives and outcomes of the NWI. This provides the NWC with the capacity to engage stakeholders and promote the outcomes of the audit, assessment and monitoring functions it performs.

30. New 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. The Chair of the NWC is required to keep the Minister informed of the general operations of the NWC in respect of the performance of its functions under s 9 of the NWC Act. This amendment provides the Minister the reciprocal ability to seek advice from the NWC.

31. New 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.

**Paragraph 7(1)(h) - Advice to COAG**

32. New 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 State or Territory relating to water management, where that agreement provides for the NWC to have such a role. The provision is very similar to the repealed section 7(1)(e) under which the NWC has assessed the implementation of the 2008 Intergovernmental Agreement on Murray-Darling Basin Reform.
Paragraph 7(1)(i) – Advice to COAG
33. New paragraph 7(1)(i) provides COAG (or appropriate subcommittee) 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. In relation to the 1994 COAG Water Reform Framework, this function is intended to provide COAG with the ability to request advice on any outstanding commitments under the Framework.

Paragraph 7(1)(j) – Other functions
34. New paragraph 7(1)(j) provides for the NWC to be able to perform any other function prescribed by other Commonwealth acts and regulations. This amendment reproduces the repealed section 7(1)(f), which has been used to confer upon the NWC the Murray-Darling Basin Plan audit function under the Water Act 2007 (Cth), and functions under the Carbon Credits (Carbon Farming Initiative) Regulations 2011.

Clause 7 Transitional and application provision – functions
35. This clause provides for two transitional provisions.
36. The first clause provides that the NWC is to conduct its first assessment under paragraph 7(1)(b) of the NWC Act in 2014.
37. The second clause allows any functions conferred or prescribed on the NWC under paragraph 7(1)(f) prior to the commencement of this Act to continue under new section 7(1)(j). This provision specifically relates to the functions conferred on the NWC by the Water Act 2007 and the Carbon Credits (Carbon Farming Initiative) Regulations 2011.

Clause 8 Subsection 7(5) - Parties to the NWI include the Commonwealth
38. The amendment to subsection 7(5) is a technical amendment to reflect that paragraph 7(2)(c) has been removed.

Clause 9 Paragraph 8(1)(b) – Constitution of the NWC
39. This paragraph amends the constitution of the NWC. It provides that there will be at least 2, but no more than 4, NWC Commissioners in addition to the Chair. This is a reduction from the current number of commissioners reflects the change in scope of the NWC resulting from this Bill.

Clause 10 Subsections 8(2) and (3) – Constitution of the NWC
40. These subsections are amended to reduce the maximum number of NWC Commissioners that may be nominated by the Commonwealth on the one hand, and the States and Territories on the other. This reflects the reduction to the number of Commissioners.
Clause 11 Subsection 19(1) – Meetings

41. This subsection is amended to reduce the number of Commission meetings that must be held each calendar year to five. This reflects the refocussing of the NWC’s functions.

Clause 12 Application provision – Meetings

42. The clause makes it clear that the amendment to the minimum number of meetings in subsection 19(1) will apply in relation to 2012 and later calendar years.

Clause 13 Subsection 19(3) – Meetings

43. This subsection is amended to reduce the number of Commissioners who constitute a quorum at a NWC meeting from 4 to 3. This reflects the overall reduction in the number of Commissioners.

Clause 14 Subsection 24(1)(a) – Functions of the CEO

44. This subsection is amended to remove the CEO’s function to administer financial assistance, awarded by the Minister to particular projects relating to Australia’s water resources, from the Australian Water Fund Account. This reflects the closure of the Australian Water Fund Account as a result of this Bill. However, the CEO shall retain the function to administer financial assistance, awarded by the Minister to particular projects relating to Australia’s water resources, from any Commonwealth program that relates to the management and regulation of Australia’s water resources and referred to in paragraph 7(1)(g). The intent of this amendment is to leave open to the government the option of program management by the NWC, should it be desired in the future.

Clause 15 Subsection 25(2) – Appointing the CEO

45. This subsection is amended to increase the maximum period of appointment of the CEO from three years to five years. This increase is consistent with the current term of appointment of departmental secretaries that has occurred since the NWC Act commenced.

Clause 16 Subsection 25(3) – Appointing the CEO

46. This clause inserts a note into section 25. Where a person is appointed as both the CEO and a Commissioner, the increase to the CEO’s maximum term to five years has no bearing on the maximum term of a Commissioner’s appointment, which remains three years under section 11.

Clauses 17 to 20 Part 5 and Section 38 Subsections 38(1) and 38(2) – Reviews of the NWC

47. These amendments to subsection 38(1) and subsection 38(2) provide for future reviews of the NWC to take place. The first review is to be undertaken by the end of
2017, with further reviews to follow every five years. The amendments also provide COAG with the ability to establish the processes for conducting these reviews.

Clause 21 Part 6 – The Australian Water Fund Account

48. Deletion of this Part repeals the Australian Water Fund Account (a Special Account for the purposes of section 21 of the Financial Management and Accountability Act 1997 (Cth)). This reflects the scheduled closure of the Raising National Water Standards program. The Chair, Commissioners and CEO will be paid out of the NWC’s annual Departmental appropriation in future.

Clause 22 Section 44 – Public availability of audits and assessments

49. This section is amended to retain the intent of section 44 under the current NWC Act. It requires the NWC to make public on its website any audit or assessment (including any advice or recommendations) done under 7(1)(a), (b) or (c), unless the Minister does not agree. Where the Minister does not agree, the Minister is required to make public on the NWC’s website the reasons for withholding publication. Advice and recommendations done pursuant to the NWC’s other functions must not be made public without the agreement of the Minister. Anything else undertaken by the NWC, for example monitoring reports of observed facts, information and guidance, or studies or analysis in a report to COAG that does not contain advice or recommendations, may be made publicly available by the NWC at its discretion.

Clause 23 Subsection 45(2) – Annual report

50. This subsection is amended to reflect the closure of the Australian Water Fund Account under Clause 20. The amendment requires the NWC to include in its annual report details of any financial assistance administered from a Commonwealth program referred to in paragraph 7(1)(g).

Clause 24 Application provision—financial assistance and annual report

51. This clause provides that the amendment of subsection 45(2) applies in relation to the financial year ending on 30 June 2013 and later financial years. It does not apply in relation to the financial year ending 30 June 2012.

Schedule 1 Part 2 – Amendments to the National Water Commission Act 2004 commencing on Royal Assent

Clause 25 Section 39 – Sunset provision

52. This section is repealed to remove the NWC Act’s 30 June 2012 sunset clause. It is intended that NWC Act will continue for the life of the NWI.
Clause 26 Paragraph 43(c) – Confidentiality
53. This paragraph is amended to correct a minor drafting error to ensure section 43 operates as intended. This provision permits the making of a record or disclosure of information where the record or disclosure is made in the course of performing functions or duties under this Act, or where the record or disclosure is permitted by any other law.

Clause 27 Subsection 45(1) – Annual report
54. This subsection is amended to require the NWC to report pursuant to the relevant government guidelines. The NWC had previously been required to complete its annual report and present it to Parliament within 60 days after 30 June of each year.

Clause 28 Application provision – annual reports
55. This clause provides that the amendment to subsection 45(1) has effect in relation to the financial year ending on 30 June 2012 and later financial years.