

# Independent review of the National Environment Protection Council Acts

July 2019

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The Hon. Sussan Ley MP  
Minister for the Environment  
Chair—National Environment Protection Council  
PO Box 6022  
Parliament House  
Canberra ACT 2600

Dear Minister

In accordance with the terms of reference, I am pleased to provide you with the Independent Review of the *National Environment Protection Council Act 1994 (the Act)*. The Review is required under the Act. The Act provides a way for national environment protection measures to be implemented collaboratively, and in consideration of regional factors. I was asked to review the operation of the Act and the extent to which the object of the Act has been achieved.

My findings, and the overwhelming message from the consultation conducted during the review, support the need for the Act to be retained, although in a more efficient form. The review recommends implementing reforms through changes to the Act or replacement with a new Act that upholds the National Environment Protection Council (NEPC) principles. The Act encourages cooperation between jurisdictions and formalises co-funding arrangements for inter-jurisdictional projects. Importantly, the Act also seeks to provide certainty to business and discourage market distortion through more consistent environmental regulation across states and territories.

The Review recommends a broad range of changes, both legislative and non-legislative, that will improve existing processes and create a new framework for more effective, streamlined and flexible National Environment Protection Measures (NEPMs).

The review also proposes a new framework for NEPMs. This framework will provide immediate benefits to governments, businesses and the community by reducing the regulatory burden of interpreting the goals and requirements for individual NEPMs. The new framework will also encourage better monitoring of the success of NEPMs, and reward industry with reduced regulatory burden where the object of NEPMs are being met. I also considered the outstanding recommendations from the 2012 review of the Act and have provided advice on implementing these recommendations in the current context. I would like to acknowledge the support of the review working group comprised of state and territory government officials. I would also like to particularly acknowledge the valuable assistance provided by the NEPC section within the Commonwealth Department of the Environment and Energy, in ensuring the efficient and timely progression of this review.

Yours sincerely  
Terry Bailey Independent Reviewer



11 July 2019

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# Executive summary

This report presents the findings of the fourth statutory review (the review) of the National Environment Protection Council Acts (NEPC Act) (Commonwealth, state and territory Acts). Under Section 64 of the Commonwealth Act, a review is required to be undertaken every five years.

The review found there is a strong need for an Act, although in a more efficient form. There is a need for an Act that encourages cooperation between jurisdictions, consistency of environmental protection across Australia, and provides certainty for business. While this review recommends broad changes to the NEPC Act's operation and administration, there are many positive and important features that should be retained.

The NEPC Act was a ground-breaking and innovative statutory framework when introduced, and created a new basis for cooperation between governments on environmental protection. But the NEPC Act is, of course, a product of its time and is in need of modernisation. Since the NEPC Act was introduced in 1994, the nature of intergovernmental relations has evolved, along with the Commonwealth's role in environmental regulation and the administrative practices of bureaucracies in all jurisdictions.

This review found the cumbersome and inefficient operation of the NEPC Act has limited the Act's ability to fully meet its objectives. The review recommends a number of efficiency-focused amendments to the NEPC Act that will streamline processes, delegate more responsibilities to senior officials, and modernise consultation requirements. While the legislative amendments recommended are broad ranging, most are minor in nature but would considerably improve the NEPC Act's ability to respond to emerging risks to both human and environmental health. The most significant recommendation concerns groundwork for a proposed new NEPC framework.

The review proposes a new framework for National Environment Protection Measures (NEPMs) that will allow more flexibility in responding to emerging environmental protection issues. The framework is based on a spectrum of regulation, from industry led regulation to strict and enforceable standards. In particular, the proposed new framework includes the creation of 'interim NEPMs' that allow senior officials to respond to environmental protection issues without protracted legislative and administrative steps.

The proposed new NEPC framework will:

- improve the speed and efficiency that NEPMs are created, varied, or revoked;
- improve clarity over roles, responsibilities, monitoring and compliance for NEPMs;
- encourage greater use of NEPMs; and
- provide the flexibility for individual NEPMs to be responsive and tailored to particular environmental protection issues.

The principles on which NEPC was conceived, and the foundations the NEPC Act is built on, remain important. Through the implementation of the recommendations in this review, governments can streamline and modernise NEPC, and make it once again the tool of choice for national environment protection across all governments in Australia.

### Table of recommendations contained in this review

Recommendation	Legislative change required?	Timeframe for implementation
1 A NEPC Act with the ability to make NEPMs should be maintained in legislation.	No	Medium
2 The NEPC Act should be repealed or amended in order to fully adopt the framework described in Chapter 8.	Yes	Medium
3 The consultation requirements set out in s.16-20 of the NEPC Act should be repealed and the nature and extent of the amended provisions be responsive to regulatory risk frameworks and comply with the OBPR's Guidance Note—Best Practice Consultation (February 2016).	Yes	Medium
4 The NEPC Committee should establish a three year rolling work plan that is reviewed annually and reported against in the Commonwealth Department of Environment and Energy's Annual Report, and be linked to the NEPC website.	No	Immediate
5 The NEPC Act should be amended to allow NEPC to delegate to the NEPC Committee the ability to create, vary and revoke NEPMs.	Yes	Medium

Recommendation	Legislative change required?	Timeframe for implementation
6 NEPC Act reporting requirements should be modernised to be timely, accessible and easy to understand. Reporting should be delivered through existing mechanisms which include 'real time' online reporting and jurisdictional annual reports.	Yes	Medium
7 The secretariat should prepare and distribute to jurisdictions a service charter that defines the roles and responsibilities of the secretariat and participating jurisdictions.	No	Short
8 Provision for a Special Account be retained given the operation of the special account has enabled practical, cost effective, collaboration between jurisdictions that would otherwise have not occurred.	No	Ongoing
9 Redraft the Object of the Act to ensure the Australian community and the environment benefit from protection(s) as agreed by the NEPC.	Yes	Medium
10 The Object of the Act should continue to ensure the decisions of the business community are not distorted and markets are not fragmented.	Yes	Medium
11 That s.14 of the NEPC Act be amended to establish that NEPC can make NEPMs for any 'National Environment Protection issue', such as waste, pollutant or other material or substance that has, will or is likely to enter the environment and pose a potential risk to human health and/or cause environmental harm.	Yes	Medium



Recommendation	Legislative change required?	Timeframe for implementation
12 Implement the 2012 recommendations assessed as 'Remains valid' in Appendix B.	Yes	Medium
13 Implement the 2012 recommendations assessed as 'Partially valid' or 'Valid in principle' as described under the column '2019 validity' in Appendix B.	Yes	Medium
14 That NEPC develops a publicly available policy statement regarding when s.22A–C (minor variations) can be applied.	No	Immediate
15 Implement the framework as described in Figures 1 and 2 consistent with the features outlined in Chapter 8.	Yes	Medium
16 NEPC secretariat maintains a publicly available register of the NEPMs agreed by the NEPC, which notes if jurisdictions have fully implemented, partially implemented or not implemented NEPMs or that the NEPM is not applicable in the jurisdiction.	No	Medium

Notes: Immediate = at the next NEPC meeting; Ongoing = currently in place; Short = achievable within 6 months; Medium = achievable within 1 year; Long = achievable within 3 years.

# 1. Background and scope of this review

## Background

In 1992 the Intergovernmental Agreement on the Environment (IGAE) was settled with the aim of defining the roles, responsibilities and interests of all levels of government in relation to the environment. The IGAE provides a mechanism to facilitate:

- a cooperative national approach to the environment;
- a better definition of the roles of the respective governments;
- a reduction in the number of disputes between the Commonwealth and the states and territories on environment issues;
- greater certainty of government and business decision making; and
- better environment protection.

The *National Environment Protection Council Act 1994* (the NEPC Act) was established to give effect to Schedule 4 of the IGAE by achieving more consistent environmental regulation between states, territories and the Commonwealth on issues of national environment protection.

Under the NEPC Act, a National Environment Protection Council (NEPC) is established with the power to make subordinate instruments called National Environment Protection Measures (NEPMs). States and territories establish and implement mirror legislation to the NEPC Act, while the Commonwealth administers the Act and provides secretariat support to NEPC, as well as establishing mirror legislation for application within its jurisdiction. The Object of the NEPC Act, as set out in Section 3 is:

*“... to ensure that, by means of the establishment and operation of the National Environment Protection Council:*

- (a) people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia; and*
- (b) decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.”*

Section 64 of the Commonwealth NEPC Act provides that a review of the operation of the NEPC Act should be undertaken every five years. On 7 December 2018, NEPC agreed to cause a review of the Act.

## Scope

This review covers the operation of the Act for the period 1 April 2012 to 31 March 2017. Consistent with the Act, the review assesses:

- (a) the operation of the Act and the Act of each other participating jurisdiction that corresponds to this Act; and
- (b) the extent to which the object of each such Act has been achieved.

In completing this assessment, the review also reports on:

- recommendations from the 2012 review of the NEPC Act that have not yet been implemented, including whether those recommendations remain valid, and options for implementation (Chapter 6 and Appendix B);
- an assessment of the opportunities for making administrative efficiencies to the NEPC Act, in lieu of legislative amendments (Chapter 7);
- priorities for legislative change to improve the operation or efficiency of the Act (Chapter 8); and
- options to make NEPMs more flexible and effective, including case studies on specific NEPMs (Chapter 3).

## Methodology

Guided by the terms of reference approved by NEPC (see Appendix A), the review was undertaken by an independent reviewer (Associate Professor Terry Bailey), supported by secretariat staff from the Commonwealth-State Relations section within the Australian Government Department of the Environment and Energy (the Department) and a working group comprised of officials from each jurisdiction.

The independent reviewer considered existing documents and publications in relation to NEPC including the legislation, three previous independent reviews and NEPC annual reports.

The review was also informed by consultation with a range of stakeholders including Commonwealth, state and territory officials responsible for managing and implementing NEPMs, the Australian Local Government Association, targeted industry groups, targeted non-government organisations, and the organisations established under the Act and its subsidiary NEPMs (such as the Australian Packaging Covenant Organisation). A number of the parties consulted provided supplementary material and/or submissions which were also considered by the independent reviewer. A full list of the organisations consulted is provided at Appendix C.

The independent reviewer notes that, given the limited level of consultation conducted, if the NEPC pursues recommendations from the review then further public consultation should be undertaken where the regulatory burden for business and/or for the community is materially altered.

## Past reviews of the NEPC Act

### First Review of the National Environment Protection Council Acts—2001

The first NEPC Act review was commissioned in 2000 and conducted by Professor Don McMichael (the McMichael Review). The McMichael Review made 14 recommendations, with a focus on improvements to the NEPC model.

In its response to the McMichael Review, the NEPC concluded only minor amendments to the Act were needed. These amendments were:

- the establishment of a simplified procedure for implementing minor variations to the NEPMs;
- allowing the National Environment Protection Council Service Corporation<sup>1</sup> to provide support and assistance to other ministerial councils; and
- introducing five-yearly reviews of the Act.

Commonwealth, state and territory NEPC Acts were subsequently amended to give effect to the findings of the McMichael Review.

### Second Review of the National Environment Protection Council Acts—2006

The second NEPC Act review was delivered by John Ramsay Consulting (the Ramsay Review) in 2006. The Ramsay Review's key recommendations included that:

- NEPM content should be updated to include measures of environmental and cost-effectiveness and to provide the NEPC with an improved evidence base;
- the NEPC Act should be amended to enable the NEPC to have committees to support its implementation and NEPM assessment function;
- the choice by the NEPC about whether to make, review or vary a NEPM should be underpinned by clear, consistent and streamlined policy and process documentation; and
- the NEPC Act should be amended to increase the NEPC's scope to make NEPMs on any environmental matter provided there were adequate safeguards.

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<sup>1</sup> The NEPC Service Corporation was an independent agency which administered the NEPC Act. In 2014 the NEPC Service Corporation was abolished and functions were instead provided by a hosting NEPC jurisdiction, which is currently the Commonwealth

Following the Ramsay Review, a number of policy changes were introduced to clarify and streamline the processes of the NEPC and the Service Corporation. The NEPC also agreed that the Act be amended to include provisions to enhance NEPM content, implementation and performance by:

- establishing committees to assist and provide advice to the NEPC on assessing and reporting on the implementation and effectiveness of NEPM; and
- broadening the scope of environmental protection matters for which NEPMs can be made by providing that a NEPM can be made on any environmental matter as determined unanimously by the NEPC.

These amendments to the Act were not implemented and remain relevant to this review.

### **Third Review of the National Environment Protection Council Acts—2012**

The third review of the NEPC was initiated in 2012 and conducted by a working group of officials (the 2012 review team). The 2012 review, including the validity of the recommendations, is discussed in Chapter 6 and a more detailed response to all the recommendations is set out in Appendix B.

## **2. The National Environment Protection Council Acts**

### **National Environment Protection Council**

The NEPC is the group of ministers, generally ministers with responsibility for the environment, appointed under the Act. As required by the Act, the Council has two primary functions:

1. to make National Environment Protection Measures (NEPMs); and
2. to assess and report on the implementation and effectiveness of NEPMs in participating jurisdictions.

The Council is supported by the National Environment Protection Council Committee (the NEPC Committee), which is a group of senior officials (typically the environment agency head) nominated by each jurisdiction. In 2016 the NEPC delegated a number of its administrative powers to the NEPC Committee.

Since 1 July 2014 the NEPC has received operational, administrative and corporate support from a secretariat team within the Australian Government Department of the Environment and Energy. This followed the decision to abolish the NEPC Service Corporation in 2014. Table 1 provides a short outline of the governance history of the NEPC.

**Table 1: National Environment Protection Council Governance History**

<b>Year</b>	<b>Activity</b>
<b>1992</b>	Intergovernmental Agreement on the Environment—Schedule 4 gives effect to establishing the NEPC Act
<b>1994</b>	NEPC Act—date of assent 18 October 1994
<b>1998</b>	NEPMs made—Ambient Air, National Pollutant inventory, Movement of Controlled Waste NEPM
<b>1999</b>	NEPM made—Assessment of Site Contamination, Used Packaging Materials
<b>2001</b>	<b>First review</b> (McMichael Review)  NEPM made—Diesel Vehicle Emissions
<b>2004</b>	NEPM made —Air Toxics
<b>2005</b>	<b>Second review</b> (Ramsay Review)
<b>2011</b>	COAG Environment Protection and Heritage Council replaced by COAG Standing Council on Environment and Water
<b>2012</b>	<b>Third review</b> (2012 review team)  NEPC decides to transition NEPC Service Corporation to within a jurisdiction
<b>2013</b>	Standing Council on Environment and Water abolished
<b>2014</b>	NEPC Service Corporation moved to the Department of the Environment (Cwth)
<b>2016</b>	Some NEPC administrative functions delegated to the NEPC Committee and executive officer
<b>2018</b>	NEPC team moved from Environmental Standards Division to Policy Analysis and Implementation Division, within the Department of the Environment and Energy (Cwth)

## National Environment Protection Measures

NEPMs are a key function of the NEPC Act. As legislative instruments, NEPMs are intended to provide a nationally consistent framework of goals, standards, guidelines and protocols to protect or manage certain environment protection issues. Decisions to create, amend or revoke a NEPM must pass through parliaments in each jurisdiction.

Once the NEPC decides to create a NEPM, decisions about implementation are made within each jurisdiction to meet the agreed objective through jurisdictionally tailored approaches. Jurisdictions are required to report annually on performance against each NEPM.

NEPMs can be made to address a limited number of environment protection issues as defined in s.14(1) of the NEPC Act. Section 14(1) of the Act, which directly reflects Schedule 4 of the IGAE, lists the following environment protection issues:

- (a) ambient air quality;
- (b) ambient marine, estuarine and fresh water quality;
- (c) 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);
- (d) general guidelines for the assessment of site contamination;
- (e) environmental impacts associated with hazardous wastes;
- (f) the reuse and recycling of used materials; and
- (g) motor vehicle noise and emissions (with some exceptions).

Since the commencement of the NEPC Act seven NEPMs have been made, these are outlined in Table 2.

Table 2: NEPMs and their mechanisms

Relevant Dates	Purpose of the NEPM	Primary Function
<b>National Environment Protection (Air Toxics) Measure</b>		
<b>Commencement:</b> 20 December 2004	Improve the information base on toxic air pollutants (such as benzene) in order to develop standards to manage these air pollutants at a later point. No standards are required.	Protocol for government
<b>Variation:</b> 16 October 2011 following the mid-term review		
<b>Last Review:</b> mid-term in 2009		
<b>Next Review:</b> No further review required*		
<b>National Environment Protection (Ambient Air Quality) Measure</b>		
<b>Commencement:</b> 8 July 1998	A framework for monitoring and reporting on air quality, including the presence of pollutants such as carbon monoxide, sulfur dioxide, and particulates to adequately protect human health and well being.	Standards for government
<b>Variations:</b> September 2003 (particles only)		
3 February 2016 (particles only)		
<b>Reviews:</b> December 2000 (particles only); Second review, initiated in 2005, is currently underway		
<b>Next Review:</b> No review requirement*		
<b>National Environment Protection (Diesel Vehicle Emissions) Measure</b>		
<b>Commencement:</b> 18 July 2001	Reduce pollution from diesel vehicles through suggesting different program initiatives.	Guidelines for government
<b>Variation:</b> 5 June 2009		
<b>Last Review:</b> June 2006–May 2009		
<b>Next Review:</b> 2019 (every 5 years, noting that the 2014 review did not take place)		



Relevant Dates	Purpose of the NEPM	Primary Function
<b>National Environment Protection (Movement of Controlled Waste between States and Territories) Measure)</b>		
<b>Commencement:</b> 8 July 1998	Ensure waste to be moved between states and territories is properly identified, transported and handled.	Protocol for government and industry
<b>Variations:</b> 30 Nov 2010 (minor); 1 Dec 2012 (also minor to fix administrative errors in the 2010 NEPM)		
<b>Reviews:</b> May 2003-Dec 2004; May 2009 – Aug 2012		
<b>Next Review:</b> 2019 (every 10 years)		
<b>National Environment Protection (Used Packaging Materials) Measure</b>		
<b>Commencement:</b> v 1 July 1999; v 2 15 July 2005	To minimise the environmental impacts of packaging materials through requiring certain companies to improve design (optimising packaging to use resources more efficiently), recycling (efficiently collecting and recycling packaging) and product stewardship (demonstrating commitment by industry). Establishes a co-regulatory industry body—theAustralianPackaging Covenant Organisation.	Guidelines, supported by a peak industry body
<b>Variations:</b> Sept 2005; June 2010 (minor)		
<b>Reviews:</b> Dec 2002–Apr 2004; Apr-Nov 2008; 2010, 2015 (separate packaging review process instead of statutory review)		
<b>Next Review:</b> 2020 (every 5 years)		

Relevant Dates	Purpose of the NEPM	Primary Function
<b>National Environment Protection (Assessment of Site Contamination) Measure</b>		
<b>Commencement:</b> 22 December 1999	An approach to the assessment of site contamination. It provides clear authoritative guidance to practitioners in this field.	Protocol for government and industry
<b>Variation:</b> 16 May 2013		
<b>Last Review:</b> December 2004–April 2013		
<b>Next Review:</b> 2023 (10 years)		
<b>National Environment Protection (National Pollutant Inventory) Measure</b>		
<b>Commencement:</b> March /July 1998	Jurisdictions collect information from industry to provide the community, industry and government with free information about substance emissions in Australia. It has emission estimates for 93 toxic substances and the source and location of these emissions.	Protocol for government and industry
<b>Variations:</b> June 2007 (to include GHG), April 2008 (to remove GHG)		
<b>Reviews:</b> Dec 2004–July 2005, second review initiated in 2016		
<b>Next Review Due:</b> 2022 (every 5 years)		

\* where no further review is required, reviews are to be carried out within ten years of the tabling of the last review; or where there has been an amendment to a NEPM, within 10 years of commencement of the amendment.

### 3. Operation of the NEPC Act and the Acts of participating jurisdictions

#### The NEPC Act and National Environment Protection Measures

##### Appropriateness of the NEPC Act and National Environment Protection Measures

Before exploring the efficiency and effectiveness of NEPMs, this review first asked whether the NEPC Act and in particular the use of NEPMs are appropriate for meeting the Object of the Act, that is: Do the NEPC Act and NEPMs remain a reasonable way of proceeding in this policy area? The review also asked whether alternative mechanisms might be more appropriate, such as progressing matters through informal forums or other Commonwealth level legislation.

A number of themes emerged during the consultations regarding the appropriateness of the NEPC Act, in particular:

- national environmental protection improvements are unlikely to be achieved without national agreements underpinned by legislation, such as the NEPC Act;
- successful delivery of the Object of the NEPC Act is underpinned by NEPMs;
- national level statutory instruments are important for providing clarity and certainty to industry and community, particularly where an industry or community group operates in more than one jurisdiction;
- statutory agreements are critical to preventing the inter-governmentally agreed terms being eroded over time;
- nationally agreed instruments are also important for jurisdictions, by providing an authority to implement;
- jurisdictional flexibility in implementation remains a strength of the NEPM framework, as it allows for regional environmental factors and the different structures and resourcing of jurisdictions; and
- the NEPM framework provides for different approaches, such as guidelines, protocols and standards, and this flexibility allows for the development of instruments appropriate to addressing the problem.

While the consultations confirmed the appropriateness of NEPMs and the need for the NEPC Act, feedback on the operation of the Act and the NEPMs was mixed. The consultations found that the efficiency and effectiveness of the NEPC Act, and the application of NEPMs varied widely, this is discussed further below.

**Finding:** there remains a need for a legislated mechanism to provide nationally consistent environment protections on issues managed at the jurisdiction level. In this regard, the intent of the NEPC Act, including NEPMs, remains appropriate.

## Efficiency of the NEPC Act and National Environment Protection Measures

Exploring the efficiency of the NEPC Act, is most appropriately considered through the implementation of NEPMs. In assessing the effectiveness of the NEPC Act, this review asked whether NEPMs are efficient for meeting the Object of the Act, that is: Are NEPMs cost effective policy instruments? The review also considered whether alternative mechanisms might be more appropriate, such as progressing matters through other Commonwealth level legislation or informal agreements.

A number of themes emerged during the consultations regarding the efficiency of the NEPC Act, in particular:

- while NEPMs that set clear standards, such as the Ambient Air Quality NEPM, are effective, the process for amending and consulting on NEPMs is not;
- the consultation and research required to establish, vary or revoke NEPMs is slow and is unnecessarily impacting the efficiency of NEPMs;
- as a result of this slowness, NEPM guidelines, protocols and standards become and remain out of date for extensive periods;
- out of date NEPMs can be an unnecessary cost to industry while offering limited environment protection;
- the impact of the prescriptive consultation requirements of the Act has been amplified by the misunderstood practice of decisions only being made by ministers during face-to-face meetings; and
- variations in recording formats between jurisdictions for some NEPMs, for example the recording requirements for the Movement of Controlled Waste, are highly inefficient for inter-jurisdictional comparisons and for industry members operating across jurisdictions.

The consultations identified a number of inefficiencies in the NEPC Act, its administrative practices and in some NEPMs. The independent reviewer, having considered the consultation materials as well as the annual reporting and NEPM reporting material, supports this view, particularly in relation to established administrative practices, a number of which are inefficient, but continue to be undertaken without revision.

The consultations also confirmed that changes to the NEPC Act and the administration of the Act, most importantly around decision making and consultation requirements, would substantially improve the efficiency of the Act, including by encouraging the use of the NEPC Act as the tool of choice for addressing all national environment protection issues.

**Finding:** the NEPC Act and its dictated administrative practices are inefficient and there are significant delays or avoidance issues associated with the operation of the Act. Redrafting or amending the NEPC Act would overcome these issues and make NEPMs the policy tool of choice in addressing national environment protection issues.

## Case study one: PFAS National Environment Management Plan

The Assessment of Site Contamination NEPM was consistently reported to be effective. However, the use of alternative mechanisms, such as the development of the per- and poly-fluoroalkyl substances National Environmental Management Plan (PFAS NEMP) demonstrates that the NEPM instrument in its current framework is not an effective or efficient tool for responding to emerging issues. The development of the PFAS NEMP is an example of the onerous NEPC framework not being able to quickly respond to an emerging issue.

Despite being lengthy and detailed compared to other NEPMs, the Assessment of Site Contamination NEPM and its schedules provide guidance and certainty to industry and communities on processes and actions taken to assess sites where contamination has occurred. The legislation and guidance outline the steps to take, but do not pre-judge an outcome. This empowers local, state and territory decision makers to conduct remediation activities appropriate to local environmental factors such as land use and population.

The PFAS NEMP was developed outside of the NEPM framework by the Heads of EPA Australia and New Zealand (HEPA), when the NEPM was considered limited in its scope (as it does not cover site remediation) and too time consuming to change. The hazards PFAS posed to the public meant that national guidance needed to be developed and released quickly, and a National Environmental Management Plan developed by environmental regulators and agreed by environment ministers was an effective way to meet this need.

Rigorous national guidance like the Assessment of Site Contamination NEPM, provides a consistent approach to the assessment of site contamination and human health risk, and is not intended to provide guidance on remediation or regulation which is best done at a jurisdictional level. Where alternative mechanisms were used, such as plans to address PFAS contamination developed by HEPA, this was a failing in the framework of the NEPC Act itself rather than NEPMs as an instrument.

## Effectiveness of the NEPC Act and National Environment Protection Measures

Exploring the effectiveness of the NEPC Act is most appropriately considered through the implementation of NEPMs. In assessing the effectiveness of the NEPC Act, this review asked whether NEPMs are effective for meeting the Object of the Act, that is: Can NEPMs get the job done? The review also considered whether alternative mechanisms might be more appropriate, such as progressing matters through informal forums, policy agreements agreed by all Australian jurisdictions, or other Commonwealth-level legislation.

The following themes emerged consistently during the consultations regarding the effectiveness of the NEPC Act:

- the effectiveness of the existing seven NEPMs is highly variable;
- some NEPMs appear to set overarching policy frameworks and some are more prescriptive about national standards, but this difference, along with how NEPMs could be enforced, is not clear;
- NEPMs that set clear protocols or standards, such as the Ambient Air Quality NEPM and the Assessment of Contaminated Sites NEPM, are reported as being highly effective;
- NEPMs that are unclear in relation to their public value, such as Diesel Vehicle Emissions and Air Toxics NEPMs, are reported as not effective;
- NEPMs that provide voluntary or self-assessment to determine the level or requirement, such as the Used Packaging Covenant underpinned by the Used Packing Material NEPM, were reported as being exploited by 'free-riders' and having limited effectiveness (see: Used packaging materials NEPM case study below);
- uptake in relation to jurisdictions implementing NEPMs, even after agreement at NEPC, is variable and impacts the credibility of the regulatory framework;
- differences in NEPM uptake between jurisdictions also impacts the credibility of the regulatory framework, especially when there is an increasing number of inter-jurisdictional businesses operating;
- the limitations on the matters for which NEPMs can be made (s.14.1) cause the NEPC Act to be ineffective at addressing new and/or emerging national environment protection issues;
- the consultation and research requirements to establish, vary or revoke NEPMs is overly prescriptive, is not risk-based, does not reflect current best practice guidance and results in either slow or no action; and
- out of date NEPMs do not provide effective environment protection.

The consultations identified ineffectiveness in the NEPC Act, its administration, and in some NEPMs. The independent reviewer, having considered the consultation materials as well as the annual reporting and NEPM reporting material, supports this view.

The consultations also confirmed that if the Act's inefficiencies regarding decision making processes and consultation requirements are amended and the ineffectiveness associated with the limited Object (s.3) and scope of the Act (s.14.1) are corrected, the NEPC Act would be the appropriate single repository for addressing national environment protection issues.

**Finding:** the NEPC Act and its current administrative practices are ineffective and there are significant delays or avoidance practices associated with the operation of the Act which compound the limited Object (s.3) and scope (s.14.1). Redrafting or amending the Act would overcome these issues and confirm its role in addressing national environment protection issues.

### Case study two: Used packaging materials NEPM

During the consultation phase of the review, a number of jurisdictions, the Australian Packaging Covenant Organisation (APCO), and some non-government organisations raised concerns regarding the effectiveness of guidance-based NEPMs, such as the Used Packaging Materials NEPM. The main concern was the limited compliance capacity and as a consequence the NEPM being open to free-riding by some brand owners. Free-riders benefit from the NEPC endorsed and industry led regulation associated with the National Packaging Covenant, while not formally joining and paying for the benefit. In this case, the choice of not complying is in part driven by a lack of enforceability, and in the view of the independent reviewer, is based on the lack of a credible regulatory framework.

The NEPM supports and complements the voluntary strategies in the Covenant, ensuring that Signatories to the Covenant are not unfairly disadvantaged in the market place. In providing the regulatory underpinning for the Covenant, the NEPM includes guidance on the scope of the Covenant and specifies Signatory commitments.

It also provides guidance on compliance measures for brand owners who are not Signatories to the Covenant or fail to comply with the requirements of the Covenant. This provides a regulatory safety net for those businesses participating in the Covenant in preventing eligible businesses in the packaging supply chain that choose not to participate in the Covenant from gaining a competitive advantage as free-riders.

A NEPM giving national guidance on packaging is both appropriate and efficient for targeting the source of some waste, and rewarding good industry leadership with reduced regulation. However, where the NEPM is not being seen as effective, there needs to be a credible pathway for regulatory escalation such as the introduction of stronger requirements. Having an escalating level of regulation when NEPMs are not meeting results may encourage free-riders to comply to avoid heavier regulation. The proposed new NEPC framework, if implemented correctly, would provide a clear process for escalation to support APCO activities, and the effectiveness of the NEPM.

## Summary of appropriateness, efficiency and effectiveness

Previous reviews, including the 2012 review by the working group of officials, found that the operation of the NEPC Act is compromised by the prescriptive consultation requirements set out in ss.16-20. During consultation for the 2019 review there was significant commentary regarding the amount of time required to undertake statutory consultation processes.

For a measure to be established, varied or revoked it currently takes at least two years. The two factors that most influence this timing are the statutory consultation requirements and the six to twelve month interval between NEPC meetings. The establishment or variation of a full NEPM may take longer given the time needed to write the measure and develop regulatory impact statements.

The independent reviewer acknowledges the frustrations caused by the prescriptive consultation requirements and the need for change to the relevant sections of the Act. In making this observation the independent reviewer notes that consultation during the making, varying or revoking of a NEPM must remain a foundation requirement. The independent reviewer supports modernising the consultation framework in line with regulatory risk frameworks and the Office of Best Practice Regulation's Guidance Note on Best Practice Consultation issued in February 2016.

The restrictive requirements set out in Part 4 of the NEPC Act, that is decisions must be taken during a 'meeting', prohibits 'out of session' decisions. Out of session decisions could play a critical role in establishing, varying or revoking a NEPM in a timely manner and ensuring that relevant human health and/or environmental risks are addressed within community and industry accepted timeframes.

The consultation requirement, in combination with other administrative arrangements prescribed under the NEPC Act, has resulted in issues of national environment protection being addressed outside of the NEPC Act. The convenience of avoiding the NEPC Act has seen issues addressed using both statutory and non-statutory approaches, including using the *Product Stewardship Act 2011*, *Water Efficiency Labelling and Standards Act 2005* and road transport acts, as well as non-statutory guidance material including the Per- and poly-fluoroalkyl substances National Environmental Management Plan, see: the PFAS Case Study in Chapter 3.

Avoiding the NEPC Act can also mean reduced consultation with stakeholders. In some instances, such as the making of a guideline, consultation may not be required at all. The onerous and lengthy NEPC processes mean NEPMs are not being made when they would otherwise be an effective solution.

On balance the independent reviewer considers that removing the prescriptive consultation requirements set out in the NEPC Act and using contemporary best practice consultation,



for example Office of Best Practice Regulation's Guidance Note-Best Practice Consultation (February 2016), is appropriate. It is intended that better practices will encourage the use of the NEPC Act to be the preferred tool for addressing issues of national environment protection.

Despite the inherently problematic statutory framework, as outlined above, there remains a clear and important need for a NEPC Act and its associated NEPMs. A NEPC Act, with an expanded scope, should be the preferred mechanism for addressing national environment protection issues. However, even with legislative amendment to the Act, NEPMs will not be appropriate, efficient, or effective unless there is improved clarity on their application through a new NEPM framework.

A new NEPC framework is set out in Chapter 8. The framework would provide NEPC with clarity and better place it to respond to current and emerging environmental protection issues in a timely, consistent and outcome focussed manner.

**Finding:** the NEPC Act and its current administrative practices are problematic, there are significant delays or avoidance associated with the operation of the Act. Changes to the administration of the Act and consultation requirements will encourage the use of the NEPC Act as the preferred tool for addressing national environment protection issues.

A NEPC Act, including NEPMs, should be retained as the mechanism for addressing national environment protection issues, however the Act requires significant amendment to improve its effectiveness. Chapter 8 of this review proposes a new NEPC framework that allows for NEPMs to be created in a timely, consistent and outcome focussed manner, while retaining aspects of jurisdictional flexibility.

The NEPC Act is well placed to address environmental protection issues in the context of Australia's system of federation, where states and territories have responsibility for many environmental issues. NEPMs have the potential to be the tool of choice for all jurisdictions to address environmental protection issues.

### **Recommendations Chapter 3: The NEPC Act and National Environment Protection Measures**

**Recommendation 1:** A NEPC Act with the ability to make NEPMs should be maintained in legislation.

**Recommendation 2:** The NEPC Act should be repealed or amended in order to fully adopt the framework described in Chapter 8.

**Recommendation 3:** The consultation requirements set out in s.16-20 of the NEPC Act should be repealed and the nature and extent of the amended provisions be responsive to regulatory risk frameworks and comply with the OBPR's Guidance Note - Best Practice Consultation (February 2016).

## 4. Operation of the NEPC and secretariat

### National Environment Protection Council

Since the 2012 review, the NEPC has typically met once or twice each year. NEPC meetings have been held in conjunction with the Meeting of Environment Ministers.

This review considers that further efficiencies can be achieved by implementing recommendations from the 2012 review, specifically that the NEPC be given more flexibility in determining its operating and meeting procedures, including that decisions can be made out-of-session and via electronic means. It is also recommended that where a jurisdiction has a single minister with responsibility for the environment portfolio, that minister is taken to be appointed to the NEPC, rather than requiring a nomination from that jurisdiction's first minister as is currently required under the NEPC Act.

A common critique from states and territories is that NEPC meetings are infrequent and only arranged at the discretion of the Chair. Jurisdictions also commented that the lack of a clear forward work plan reduced the NEPC's effectiveness and accountability in driving change over the longer term. It was also recognised that changing the meeting frequency of the NEPC is unlikely. The independent reviewer considers that subject to the implementation of the administrative governance and statutory governance changes recommended in this review, the current NEPC meeting frequency of twice per year is appropriate.

However, to assist in improving the administrative governance of NEPC it is important that NEPC meetings be scheduled in a more formal and regular manner and that the secretariat develop a forward work plan to be updated and agreed by the Council at each meeting. The forward plan would be reported against in the Commonwealth Department of Environment and Energy's annual report.

In recognition of the complexity that the multi-jurisdictional governance arrangements of the NEPC Act creates, further capacity to improve the statutory governance through delegating additional functions to the NEPC Committee would enhance the overall operations, including timely decision making. This includes removing the prohibition on the delegation of ss.14 and 20 of the NEPC Act at s.61.

**Findings:** the operation of the NEPC would benefit from having a three year forward work plan, greater delegation powers regarding ss.14 and 20, and the ability to make out of session decisions.

## Annual Reporting of NEPC and National Environment Protection Measures

The effectiveness of the NEPC Act and its NEPMs in the long term will require better monitoring and reporting on both the Act and the operation of the NEPMs. A key tool for NEPC decision makers is the availability of information, particularly in relation to when measures in the form of protocols and standards set out in NEPMs have been exceeded. Lack of effective reporting structures means there is a lack of accountability and oversight, and there may be no ability to track progress and identify trends within the NEPMs and the impacts they have on environmental outcomes.

### Annual reporting on the Act

The Act requires annual reports on NEPC and NEPMs to be tabled in the parliaments of each jurisdiction. The annual report is coordinated by the NEPC secretariat with input provided by each jurisdiction. In practice, the annual reports reflect information more than 12 months old by the time they are released publicly. For many NEPMs the reporting by jurisdictions does not change from year to year, highlighting the potential redundancy of those NEPMs. No evidence was provided during the review that the reporting material is being utilised to inform public policy development.

In line with the 2012 review, it is sound to have a requirement to report to parliament on the progress of legislation meeting its Object. However, reporting would be better aligned with existing reporting processes that are also tabled in the jurisdictional parliaments, including through the annual reports of relevant agencies. This would meet the requirement under s.24 of the Act without the significant time and coordination involved in developing a standalone annual report.

### NEPM reporting

As noted in the 2012 review, the NEPC Act should be less prescriptive regarding reporting on NEPMs. This is supported in this review on the basis that NEPM reporting should be outcome focussed and inform operational decision making in real or near real time and contributes to the evidence base for medium to longer-term public policy development. Beyond each NEPM's individual statutory review requirements (see: Table 2: NEPMs and their mechanisms), there needs to be an individually tailored reporting mechanism that is more flexible, responsive and useful for community, industry and government to understand the progress towards each NEPM goal.

The independent reviewer considers that future NEPM reporting should be modernised to be timely, accessible and easy to understand. This form of reporting would add value for all interested sectors, including government as operational decision takers and public policy developers, for communities wanting to understand environmental conditions and influence operational decisions and public policy development, and industry which seeks guidance on responding to environmental concerns appropriately.

While recommending change to the annual NEPM reporting requirements, there remains a need for jurisdictions to report information either in real time (or near real time) or annually, in the agreed data collection and holding standard. Jurisdictional reporting material needs to be available for aggregation to give a national understanding when required and be transparently and readily available to retain community and industry confidence in the NEPM.

NEPM reporting should also be in a consistent format that is easy to aggregate at a national level to ensure the Commonwealth is able to provide international data as required by international conventions to which Australia is a party.

**Finding:** NEPC Act reporting requirements are onerous and add limited, if any, public value. Government, community and industry would be better served by reporting on NEPM progress through existing mechanisms which include 'real time' online reporting and jurisdictional annual reports.

## Secretariat

Since 1 July 2014 the NEPC has received operational, administrative and corporate support from a secretariat within the Australian Government Department of the Environment and Energy (the Department). This followed decisions to abolish the Standing Council on the Environment and Water in 2013 and the NEPC Service Corporation in 2014. The secretariat is overseen by the NEPC Executive Officer (established by the NEPC Act) and operates within the Commonwealth's financial governance framework.

During this review the NEPC jurisdictions acknowledged that housing the secretariat within a Commonwealth department remained more cost effective than through a specifically established service corporation and that there were benefits from using the Commonwealth's existing financial frameworks. However, jurisdictions also reported that it can be difficult for their line areas to identify where and how to contact the NEPC secretariat, who to seek advice from and where to provide reports. These issues are made more complicated with Commonwealth contact officers for specific NEPMs being diffusely located across the Commonwealth department. Jurisdictions also noted that progressing projects within the Commonwealth's financial framework has in some instances posed an unnecessary additional

administrative burden.

Following the transfer of the NEPC secretariat into the Department on 1 July 2014, any work to review or vary NEPMs relies on jurisdictions to self-nominate to lead on this work. While this is an appropriate administrative practice in a multi-jurisdictional context, jurisdictions noted that there remains an ongoing need for central strategic coordination of this work.

The management of the NEPMs within the Commonwealth department is dispersed among line areas which is likely to lead to a gap in coordinating the policy and strategic intent of the NEPC Act. This is at odds with the states and territories where policy and strategy leadership as distinct from NEPM implementation is clear. It was suggested during the review that limited Commonwealth oversight may be contributing to implementation practices differing between NEPMs. To address this, the Department of the Environment and Energy should consider where coordination of NEPC Act strategy and policy is located. The role of the NEPC team should be broadened to include overall strategy and policy leadership, alongside the secretariat functions.

To address the challenges above, jurisdictions support the secretariat preparing and publishing a service charter that defines:

- the role of the secretariat including key contacts within the secretariat;
- the division of roles and responsibilities between the secretariat and NEPC jurisdictions;
- division of policy leadership between the secretariat and working groups formed under the NEPC Committee and/or lead policy jurisdictions;
- guidance on how jurisdictions can use the NEPC Special Account, consistent with relevant financial frameworks;
- guidance on the process for establishing and varying NEPMs;
- the secretariat's role in strategic leadership and adherence to the framework; and
- the secretariat's role of maintaining and progressing a forward work plan for the NEPC.

**Finding:** while the establishment of the secretariat within the Commonwealth has been accepted amongst jurisdictions, there was a lack of clarity regarding its roles and responsibilities. There remains a need for the centralised secretariat function to coordinate and drive strategic policy with regard to NEPMs.

## NEPC Special account

The NEPC Act establishes the National Environment Protection Council Special Account (the NEPC Special Account) which is used to collectively fund projects agreed to by NEPC or the NEPC Committee, as well as to make variations to NEPMs and to fund secretariat operations. The Special Account is administered consistent with Commonwealth financial governance frameworks, and annual contributions are made by all jurisdictions using an agreed formula.

This review received overwhelming feedback from jurisdictions that the NEPC Special Account is critical to funding collaborative national action to pursue the objects of the NEPC Act. The NEPC Special Account provides an efficient means for collating resources to deliver projects that would not otherwise occur and avoids the need for contributions to be negotiated on a case-by-case basis. The NEPC Special Account also allows jurisdictions to share the benefits of other jurisdictions' leadership on particular issues. For example, where one jurisdiction takes the lead on a policy issue, the special account allows other jurisdictions to support that work through relatively modest financial contributions (at the individual jurisdiction level) and benefit from the lead jurisdiction's knowledge, experience and project outputs.

**Finding:** The existing NEPC Special Account sets a constructive tone for national collaboration between jurisdictions and is a critical contributor to delivering the Object of the NEPC Act.

### Recommendations Chapter 4: The National Environment Protection Council and Secretariat

**Recommendation 4:** The NEPC Committee should establish a three year rolling work plan that is reviewed annually and reported against in the Commonwealth Department of Environment and Energy's annual report.

**Recommendation 5:** The NEPC Act should be amended to allow NEPC to delegate to the NEPC Committee the ability to create, vary and revoke NEPMs.

**Recommendation 6:** NEPC Act reporting requirements should be modernised to be timely, accessible and easy to understand. Reporting should be delivered through existing mechanisms which include 'real time' online reporting and jurisdictional annual reports.

**Recommendation 7:** The secretariat should prepare and distribute to jurisdictions a service charter that defines the roles and responsibilities of the secretariat and participating jurisdictions.

**Recommendation 8:** That provision for a Special Account be retained given the operation of the special account has enabled practical, cost effective, collaboration between jurisdictions that would otherwise have not occurred.

## 5. Extent to which the object of the Act has been achieved

The independent reviewer has considered the outcomes of the consultation conducted with Commonwealth, state and territory government officials, industry representatives and non-government organisations, as well as the findings and recommendations of the three previous reviews.

The extent to which the Object of the Act has been achieved in the three previous reviews is summarised below:

- **First review:** McMichael (2001) found it was not possible to assess the extent to which the objects had been achieved, because not enough NEPMs had been in operation long enough to be able to measure their effects on either the equivalence of environmental protection, or on the extent to which they have succeeded in stopping the distortion of business decisions or market fragmentation. However, the 2001 review found that it may have been timely to review the role and objects of the Council to give it a broader mandate, so that it may deal more effectively with nationally significant environmental pollution issues in a manner consistent with contemporary best-practice environmental management.
- **Second review:** Ramsay (2006) concluded that most NEPMs were making progress against their individual goals and the Object of the Act, delivering benefits in terms of equivalent protection from pollution, non-distortion of business decisions and non-fragmentation of markets. The 2006 review also found the delivery of benefits from NEPMs is sometimes obscured by their form, noting it may not be immediately clear how NEPMs about data collection and/or dissemination deliver actual environmental outcomes. Ramsay also noted that the benefits to government, industry and community awareness and decision-making of better environmental information should not be underestimated.
- **Third review:** Senior Officers (2012) found that consideration should be given to amending the Act to more directly state its purpose, rather than have the Object of the Act dependent on the establishment of the NEPC. The third review goes on to say the Object of the Act should be amended to:
  - recognise the purpose of protection of the Australian community and the environment from harm; and
  - better reflect the Council of Australian Governments' objectives of a seamless and harmonised national economy.

## Object 1—Enjoying the benefit of equivalent protection

In relation to Object 3(a), that is “people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia”, while progress is occurring in some NEPMs, this review found that it is difficult to determine that the Object is being met given the lack of responsiveness of the current NEPM framework and its varying application. During jurisdictional consultation it was apparent that there are varying applications of ‘equivalent protection’, not only across jurisdictions but in some instances within jurisdictions.

In understanding the Object of enjoying the benefit of equivalent protection, there is an iterative relationship between the Object and the operation and benefits derived by the individual NEPMs, which makes determining the extent to which the equivalent protection object has been achieved difficult. While this finding is consistent with previous reviews, there was evidence presented during this review that a number of NEPMs are making progress against their individual goals and desired environmental outcomes.

A clearer and more realistic objective of the NEPC Act, delivered within a new framework, would be to remove the “equivalent” test and set a range of both measurable and aspirational standards that arguably act as floors or ceilings.

For example, the Ambient Air Quality NEPM defines standards below which a health or general enjoyment risk exists due to poorer quality of air. In this regard the Air Quality NEPM acts as a floor by defining a level that the quality of air should not fall below. Notwithstanding the importance of setting an air quality standard to address the impact of air quality caused by proximity to urban and industrial developments, throughout much of Australia it is appropriate to seek to exceed the minimum standard that has been set in the NEPM. Conversely, the Used Packaging Materials NEPM sets guidance in a less measurable manner and consequently can be applied more aspirationally, which can be viewed as a ceiling.

In reviewing and considering the benefits of the Act it is not logical that national environment protection legislation does not, as an Object, seek to protect the environment at the same time as seeking to protect people. The scope of Object 3(a), regarding what national environment protection leadership is unnecessarily narrow in relation to protecting both the Australian community and the environment from harm. This review supports the 2012 review recommendation that the Object of the Act should be amended to recognise the purpose of protecting both the Australian community and the environment from harm.

**Findings:** The object of enjoying the benefit of equivalent protection is drafted in a narrow manner and is difficult to objectively determine, particularly given jurisdictional and intra-jurisdictional variations regarding ‘equivalent’.



## Object 2—Business community is not distorted, and markets are not fragmented

The independent reviewer in assessing the extent to which the Object set out in s.3b of the NEPC Act has been achieved has considered the outcomes of the consultation conducted with Commonwealth, state and territory government officials, industry representatives and non-government organisations, as well as, the findings and recommendations of the three previous reviews.

The extent to which the Object of the Act has been achieved in the three previous reviews is summarised below:

- **First review:** McMichael (2001) found there are many factors that affect business decisions and noted that no one provided him with any examples of decisions by Australian businesses which appear to have been taken because of differences in environmental requirements between Australian jurisdictions. McMichael went on to conclude that the NEPMs made to date, if applied consistently and effectively over a long period should contribute to equivalent environmental protection throughout Australia and they ought to operate against any market distortions.
- **Second review:** Ramsay (2006) noted that ‘the timing and mode of implementation and enforcement of National Environment Protection Measure requirements remain key issues to the achievement of national consistency’. Implementation issues were highlighted by stakeholders in the consultation on the reviews, and these observations remain relevant. Ramsay concluded that most NEPMs are making progress against their individual goals and the objects of the NEPC Act, including non-distortion of business decisions and non-fragmentation of markets.
- **Third review:** Senior Officers (2012) made little to no observations regarding business community distortion or market fragmentation, however the review did recommend that the Object of the Act be changed to better reflect the Council of Australian Governments’ objectives of a seamless and harmonised national economy.

While a number of issues have been identified regarding NEPM implementation, it is difficult to determine if there is or isn’t business community distortion or market fragmentation resulting from NEPM implementation.

The varying implementation of NEPMs between jurisdictions could create a risk that inconsistency in implementation increases complexity and causes higher costs for businesses that operate in national markets or in two or more jurisdictions. The proposed new framework (see Chapter 8) will improve clarity of roles and help reduce inconsistent implementation.

Most jurisdictions noted that too much flexibility, which is currently the case, is the major risk to causing distortion and fragmentation and undermining credible regulation. An example provided during a number of consultations relates to the Exemptions/Deemed Compliance provision in the Used Packaging Materials NEPM. Under this NEPM, participating jurisdictions can deem industries or industry sectors compliant if an arrangement exists or the industry or industry sector produces equivalent outcomes to those achieved through the Packaging Covenant (see s.11(b) of the Used Packaging Materials NEPM).

Further there was advice during the consultations that a lack of credible regulation had the potential to cause market distortion with businesses operating in the more heavily regulated (both penalties and compliance checks) jurisdictions seeking to move activities to jurisdictions with lower penalties and or reduced compliance monitoring.

In 2008, Council of Australian Government agreed to implement regulatory and competition reforms under the National Partnership Agreement to Deliver a Seamless National Economy. The Seamless National Economy comprised 27 deregulation priorities including *Environmental Assessment and Approval Processes*. The 2013 report card prepared by the COAG Business Advisory Forum Taskforce reported that the *Environmental Assessment and Approval Processes* reform is now operational. A search of the Council of Australian Governments' website (May 2019) and a review of the most recently published Council of Australian Government Report on Performance 2016 (prepared by the Department of Prime Minister and Cabinet), indicates that the Seamless National Economy program has concluded. Nonetheless the principles of a seamless and harmonised national economy alongside the Government's deregulation agenda, remain valid in relation to defining a contemporary object that aims to avoid or minimise distortions impacting the business community and/or market fragmentation.

During the consultation conducted for this review, concerns regarding business community distortion or market fragmentation were not raised and it is difficult to establish, independently of advice to the contrary from the business community or through a detailed targeted review, if business distortion or market fragmentation is occurring.

**Findings:** in the absence of clear evidence it is reasonable to consider that the level of distortion or fragmentation, if present, is low and inconsequential.

## Recommendations Chapter 5: Extent to which the object of the Act has been achieved

**Recommendation 9:** Redraft the Object of the Act to ensure the Australian community and the environment benefit from protection(s) as agreed by the NEPC.

**Recommendation 10:** The Object of the Act should continue to ensure that decisions of the business community are not distorted and markets are not fragmented.

## 6. Review of the 2012 recommendations

The third review of the National Environment Protection Council Acts (2012) was conducted by a working group of officials and overseen by the NEPC Committee. The 2012 recommendations can be summarised as follows:

- NEPMs are a valuable tool, however there are inefficiencies that can only be addressed through legislative change, including:
  - the making, reviewing and revoking of National Environment Protection Measures (NEPMs), i.e. removing prescriptions around public consultation and development of impact statements while retaining the requirement for consultation;
  - reporting on the implementation and effectiveness of NEPMs (Annual Report) should be streamlined, eliminate duplication, and should be done within departments and/or agencies, rather than being tabled in Parliament in every jurisdiction; and
  - the operation of NEPC, i.e. enable NEPC to meet and make decisions out of session.
- the objects of the NEPC Act should be amended to more directly state the purpose of the Act, focusing on the establishment and operation of NEPMs rather than NEPC;
- a contemporary flexible model for NEPMs should be developed to enable rapid update as new information becomes available; and
- the scope of the Act should be amended to allow NEPC to make a NEPM on any environmental protection matter.

The terms of reference for this review required: “A review of the recommendations from the 2012 review of the NEPC Act that have not yet been implemented, including whether those recommendations remain valid and options for implementation.”

A summary of the independent reviewer’s consideration of the 2012 recommendations is included below and an assessment of the 2012 recommendations is provided in Appendix B.

### Recommendations not yet implemented

In 2013 the NEPC ministers unanimously agreed that all recommendations from the 2012 review of the NEPC Act should be implemented. The legislative changes required to implement the recommendations did not occur and the recommendations have not yet been implemented.

The independent reviewer considers that the likely reasons for legislative change not occurring include the abolition of the COAG Standing Council on Environment and Water and machinery of government changes occurring at various times, which jointly contribute to a lack of appetite for legislative change. These factors remain a risk concerning the implementation of the recommendations in this review.

## Validity of recommendations not yet implemented

This review concludes that while most of the 2012 recommendations remain valid, partially valid or valid in principle they require alignment with the proposed NEPC framework and contemporary statutory administrative practices.

As outlined in Appendix B the independent reviewer partially supports the recommendation at 4.4 'Broadening the scope of the toolkit for national action'. The 2012 recommendation states:

*"The scope of the National Environment Protection Council Acts should be amended to allow the National Environment Protection Council to make a National Environment Protection Measure on any environmental protection matter as determined unanimously by the National Environment Protection Council."*

This review agrees that s.14(1), which is where the NEPC makes a NEPM, should be amended to provide greater flexibility, including being less prescriptive. However, the drafting of the 2012 recommendation is too open ended and does not provide sufficient context in relation to other statutes that give effect to the IGAE, most notably the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). In the view of the independent reviewer, the NEPC should have the ability to establish a NEPM for any 'National Environment Protection issue', such as waste, pollutant or other material or substance that has, will or is likely to enter the environment and pose a potential risk to human health and/or cause environmental harm.

The independent reviewer considers that it is not the role of the NEPC to develop a suite of National Environment Protection issues that overlap with the objects of the EPBC Act and that Act's role in addressing 'matters of National Environmental Significance' (mNES).

During the consultations for this review, advice was provided that NEPMs should be able to address 'any environmental protection matter', including land clearing and climate change. The independent reviewer considers these matters are nationally significant and require inter-jurisdictional co-operation and leadership, and notes that they fall outside of the scope of the existing NEPC Act. Concerns raised during this review regarding nationally significant environmental issues which currently fall outside of both the NEPC Act and EPBC Act, such as land clearing and climate change, would be more appropriately considered during the next Independent Review of the EPBC Act, which is due to commence by October 2019. Following the EPBC Act review, it would be open to government to determine which of the two acts is best placed to deal with emerging nationally significant environmental issues.

It is the independent reviewer's consideration that the ability to make a NEPM on any environmental protection issue should not require unanimity, but be determined consistent with the existing voting requirement at s.28 of the NEPC Act, where "a decision of the Council must be supported by the votes of at least two-thirds of the members, whether present or not".

This review also found there has been uncertainty regarding the meeting arrangements for the NEPC, which is reflected in the 2012 recommendation at 7.1(b) 'Efficiency of National Environment Protection Council'. Recommendation 7.1(b) states: "The Act should enable the National Environment Protection Council, and committees of the council, to meet and make decisions out of session, including by electronic means such as email, fax, phone or video." This review considers the NEPC Act currently allows for meeting decisions to be made by phone or video-conferencing. Both of these mechanisms have been under-utilised which has added to the inefficiency of the Act's operation. Amending the Act to provide for out of session decision making remains valid.

**Finding:** this review concludes that most of the 2012 recommendations remain valid and that the 2012 review recommendations be implemented consistent with Chapter 8 of this review and the '2019 validity' findings as set out in Appendix B.

## Recommendations Chapter 6: Review of the 2012 recommendations

**Recommendation 11:** That s.14 of the NEPC Act be amended to establish that NEPC can make NEPMs for any 'National Environment Protection issue', such as waste, pollutant or other material or substance that has, will or is likely to enter the environment and pose a potential risk to human health and/or cause environmental harm.

**Recommendation 12:** Implement the 2012 recommendations assessed as 'Remains valid' in Appendix B.

**Recommendation 13:** Implement the 2012 recommendations assessed as 'Partially valid' or 'Valid in principle' as described under the column '2019 validity' in Appendix B.

## 7. Administrative efficiencies within the NEPC Act

Legislative processes under the NEPC Act (for example, making, varying or revoking NEPMS) are prolonged, especially when decisions regarding regulation need clearance through each jurisdiction's ministerial and cabinet processes before being presented to the NEPC for decision. This rigour is inherent in statutory agreements between government jurisdictions, but as discussed in Chapter 3 and previous reviews there are some overly prescriptive elements of the NEPC Act. This chapter explores whether administrative efficiencies could be found within the act without amending the Act and subsequently the mirror legislation in each jurisdiction.

Following the McMichael review in 2001, the NEPC Act was amended and introduced the ability to undertake minor variations to a measure, s.22A-C. The intent of the amendment was to prevent long delays for simple amendments. Under the new provisions NEPC can make unanimous decisions regarding minor variations where there is not "significant change in the effect" of the NEPM. The amendment also includes, given there is not a significant change in the effect of the NEPM, a reduced consultation requirement. However, there has been a lack of use of the amended provision to the NEPC Act, which in at least part is attributed to the lack of definition of what a minor variation is or isn't.

A number of jurisdictions raised issues regarding uncertainty in the application of s.22A-C during this review. The independent reviewer considers that administrative efficiencies could be gained if a policy statement, by the NEPC, regarding when s.22A-C can be applied was released. Guidance material of this type should also include advice regarding what NEPC considers to not be a minor variation and when s.22A-C is not to apply.

In 2016, to help streamline the NEPC Act's administration, the Council agreed to delegate a number of its administrative functions to the NEPC Committee. During the consultations for this review the NEPC jurisdictions report the delegations were welcome. However, it is difficult to determine, based on jurisdictional consultations and reviews of annual reports, that the additional delegations have in fact resulted in more efficient decision making. The independent reviewer considers that if there has been a benefit in relation to the administration of the NEPC Act from the delegations, it is relatively inconsequential.

The independent reviewer considers that a critical reason for the limited impact of the new delegations is because the 2016 decision could not contemplate delegations that would improve the delivery of NEPMs. In this regard s.61 of the NEPC Act expressly prohibits delegation of ss.14 and 20—the sections giving the power to decide to make, vary and revoke NEPMs.

Significant administrative efficiencies could be achieved by delegating additional NEPC functions to the NEPC Committee, including under particular circumstances delegation of ss.14 and 20. The inability to delegate some decision making under ss.14 and 20 to the NEPC Committee, unnecessarily restricts the timeliness in which a NEPM can be made, varied or revoked. In addition, such a delegation would allow the NEPC Act to be more responsive to new and/or emerging matters.

The independent reviewer strongly endorses the development of a comprehensive set of delegations so that the NEPC Act can be administered with more responsiveness, particularly in relation to non-controversial matters that do warrant consideration by ministers. Recognising there may be concern from ministers, industry and non-government organisations regarding the potential for misapplication of a delegation it would be open to the NEPC, in drafting the delegation, to allow a single jurisdiction the right to veto the use of the delegation in relation to ss.14 and 20 and have the matter referred to the full Council. Such a provision would mitigate the risk of a delegation being misused or a dissenting jurisdiction being ignored. Where industry and non-government organisations have concerns they could make representation to one or more jurisdictions and seek a full Council decision.

In the event of the NEPC Act not being amended, administrative efficiencies could be made by providing in principle written support out of session for a statutory decision under ss.14 or 20. The combination of a forward work plan (see Chapter 3), and written support would provide all jurisdictions with confidence that NEPM related work can be progressed and ratified by ministers at a subsequent meeting, rather than awaiting a meeting before commencing work. This practice would allow work to progress and be implemented immediately after the formal decision is made in the meeting. The independent reviewer was advised that this practice has not been pursued due to the lack of a forward work plan.

The current lack of responsiveness within the NEPC Act has resulted in other non-statutory approaches being adopted, for example the development of the PFAS National Environmental Management Plan (see case study 1). In addition, being able to address in a timely manner redundant NEPMs, for example the Diesel Vehicle Emissions NEPM, would enhance the credibility of the Act and its national environment protection function.

In the absence of a responsive statutory framework there have been a number of alternative governance arrangements utilised. For example, during the consultations it was suggested that the Heads of EPA Australia and New Zealand (HEPA) has evolved to deliver what NEPC and the NEPC Committee have not been able to deliver given the restrictive statutory requirements of the Act.

**Finding:** There have been attempts to make the NEPC Act more administratively efficient since 2001 with the inclusion of the minor variation provisions and in recent years through increased delegations. While the changes are welcome they have had limited impact.

## **Recommendations Chapter 7: Administrative efficiencies within the NEPC Act**

**Recommendation 14:** that NEPC develops a publicly available policy statement regarding when s.22A-C (minor variations) can be applied.

## 8. A new framework for implementing NEPMs

Having acknowledged in Chapter 3 of this review the appropriateness of the NEPC Act as well as the need to achieve the Object of the Act more efficiently and effectively, the proposed new framework described in Fig 1 below sets out a policy framework that is:

- **equitable:** by applying the likely consequences fairly;
- **workable:** through the use of simple and robust instruments that can be implemented;
- **suitable:** by not conflicting with existing processes or policies; and
- **scalable:** through the chosen combination of policy instruments adapting to changing circumstances, or being expanded and contracted efficiently.

The new framework addresses many of the issues and concerns raised during the course of this review. If followed, the new framework will ensure tasks are delegated to officials appropriately and will drastically reduce the time required, and administrative burden, to create, vary or revoke NEPMs. The framework will also streamline processes and allow NEPMs to be more flexible and adaptive, by moving easily between categories across the spectrum of regulation.

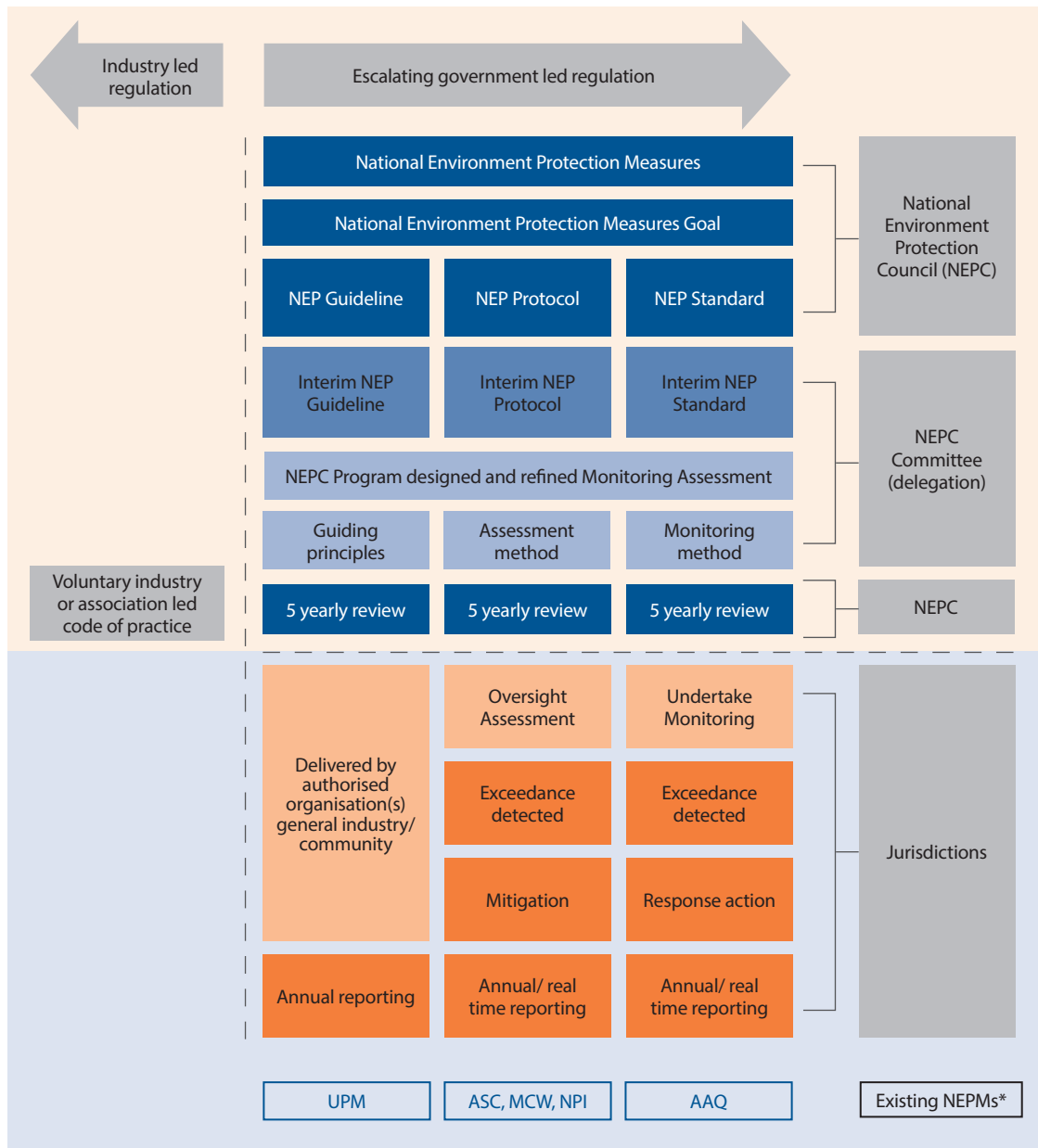
The new NEPC framework has been developed around five principles:

1. **light touch** regulation with escalation as necessary;
2. **earned trust** will be rewarded with lighter, more flexible regulatory options;
3. **continuous monitoring** to ensure a NEPM is fit for purpose;
4. **efficiency** for businesses operating across jurisdictions; and
5. **flexibility**, allowing individual NEPMs to be tailored to specific environmental issues while continuing to meet the Object of the Act.



**Fig 1. National Environment Protection Council Act—new framework**

The features of the new framework are outlined below.



\*Five of the existing NEPMs have been nominally allocated to their primary category. UPM = Used Packaging Materials, ASC = Assessment of Site Contamination, MCW = Movement of Controlled Waste between States and Territories, NPI = National Pollutant Inventory, AAQ = Ambient Air Quality.

## NEPM categories

Under the new framework the three categories of NEPMs are guidelines, protocols and standards, see Table 3 below for definitions. Under the current administrative practices some NEPMs mix the provision of guiding material with protocols and/or standards and the overall program design of some NEPMs is confusing, for more detail see below: 'Program design'. The new framework is based on being clear if the policy intent of the NEPM is to support industry/association led guidance or to set protocols for assessing the risks associated with an issue, or to determine the quantifiable standard for monitoring purposes.

If a NEPM is not achieving the intended goal, the NEPC can determine whether redrafting the NEPM into a different category is appropriate. For example if a guideline is not achieving its goal due to a lack of industry support, it could be developed into a protocol or standard and as a result the NEPM would have stronger compliance requirements, for more detail see below: 'Credible regulation'.

**Table 3: Categories of NEPMs**

<b>Guidelines</b>	<ul style="list-style-type: none"><li>• Guiding principles for governments, organisations authorised by governments (for example, APCO) or industry.</li><li>• Guidelines define an outcome and expected behaviours of governments and industry.</li></ul>
<b>Protocols</b>	<ul style="list-style-type: none"><li>• Strict processes that industry must follow, for example a method of assessment to determine when mitigation/remediation is required.</li><li>• Governments have oversight of the assessment methods and results.</li><li>• If an exceedance is detected, governments choose the appropriate response for their jurisdiction and the particular action.</li></ul>
<b>Standards</b>	<ul style="list-style-type: none"><li>• A quantifiable level determined where exceedance requires regulated response.</li><li>• Strict standards that cannot be exceeded are agreed.</li><li>• Governments are involved in monitoring, reporting and enforcing the standards.</li></ul>

## Credible regulation

The new NEPC framework provides a credible threat of regulatory escalation by clearly articulating expectations required of governments and industry, in the form of guidelines, protocols and standards. Under the new framework, a guideline would be subject to a low level of government regulation, including minimal enforcement. In the event that the guideline is failing to achieve its goal, which may include being misused by free-riders, the guideline NEPM could be replaced by a protocol or standard. This escalation mechanism allows governments to deliver credible regulation, through encouraging industry to lead delivery of regulatory outcomes while retaining the ability for further government regulatory intervention through escalating a NEPM to a protocol or standard. Under the new framework requisite compliance penalties would be aligned to protocol and standard NEPMs. Compliance penalties are unlikely to be needed for guideline NEPMs given the credible regulatory risk of the guideline being repealed and replaced by protocol or standard.

Investigations into non-compliance and compliance penalties would be the responsibility of jurisdictions, including determining if non-compliance requires an enforcement action. For example jurisdictions undertaking hazard reduction burning are likely to cause exceedances of the standards set in an Ambient Air Quality NEPM. It is also probable that such exceedances are appropriate to ensure harm to life and property is minimised from wildfire, in this circumstance non-compliance is clearly acceptable and would not require an enforcement action.

In addition, the new framework clarifies the role of the NEPC and the role of the jurisdictions. Under the framework jurisdictions would retain the role of setting programs to ensure all parties comply with the requirements of a protocol and standard, including conducting compliance programs and setting penalties for non-compliance. For more detail on the role of jurisdictions, see below: 'Jurisdictional clarity'.

## Interim NEPMs

Legislation processes can be long in nature, especially when decisions regarding regulation are required to pass through each jurisdiction's ministerial and cabinet processes. This impacts NEPC's ability to address emerging national environment protection issues in a timely manner. To address this issue the new framework proposes the development of 'interim measures'. Interim NEPMs are intended to be precautionary in nature, to allow for more consultation and research to better inform if the NEPM is required and if so the program design of the NEPM.

Under this approach, an 'interim guidance NEPM' could be established where there is an emerging risk, but not enough evidence to regulate, such as PFAS contamination. The new framework allows NEPC or the NEPC Committee to rapidly create or vary NEPMs in response to

emerging national environment protection issues. In addition, interim NEPMs should be created utilising fewer steps than are currently required to create NEPMs and in some instances without the direct involvement of ministers at what are essentially administrative steps (for example, consultation and public notifications).

It's proposed that after two years all interim NEPMs would sunset, unless extended for two years by a decision of the NEPC, or be finalised into a NEPM.

## Jurisdictional clarity

The new framework sets out the role of the NEPC, NEPC Committee and the jurisdictions. During the consultation for this review it was apparent that there is confusion regarding the roles of the NEPC, the Commonwealth given its secretariat role, and the role of state and territories.

The confusion was raised at officer level in a number of jurisdictions and does not reflect that the NEPC Act, including the NEPC, was established co-operatively with states and territories and that NEPC is not controlled by the Commonwealth. The membership (s.9) and voting at meetings (s.28) arrangements are clear in this regard. The new framework does not propose changing these arrangements, but as with the 2012 review accepts that the appointment of members should be simplified.

One particular concern raised during the consultations was that NEPMs are not enforced by the Commonwealth. This is not a current role of the Commonwealth and nor does this review propose this. However, it is proposed that the NEPC secretariat maintains a publicly available register, on NEPC secretariat website, of the NEPMs agreed by the NEPC. For each NEPM the register would note if jurisdictions have fully implemented, partially implemented or not implemented or that the NEPM is not applicable in the jurisdiction.

Under the new framework it is the role of the NEPC to determine if a NEPM is needed, what the goal of the NEPM is, and the type of NEPM required. The NEPC Committee would undertake the program design to deliver the NEPM and would have a delegated responsibility regarding interim NEPMs.

Once a NEPM is made the jurisdictions, which includes the Commonwealth, are responsible for the implementation phase of the protocols and standards in their jurisdiction, including annual or real time reporting and conducting compliance programs. In relation to ensuring compliance this review notes that jurisdictions are likely to give effect to a NEPM through other laws, for example through a planning assessment and/or approval. In this regard compliance through appropriate existing legislation is likely to be more effective than through a jurisdiction's NEPC Act. Fig 2: The process for developing a NEPM under the new framework, further describes the roles.

## Program design

One of the key accountabilities in the new framework is the delegation of the program design to the NEPC Committee. Under the new framework, once the goal and type of the NEPM have been determined by the NEPC, the options for implementing the guideline, protocol and standard would be developed by the NEPC Committee during the program design phase. The program design will specify how the program will meet the requirements set by the NEPC as well as set the standards in a form that provides a suitable basis for subsequent implementation.

Consultation would be conducted in accordance with best regulatory practice during the program design, to ensure transparency and to avoid unintended consequences arising during implementation.

The program design would also establish the key performance indicators, monitoring and reporting requirements and evaluation criteria for the NEPM. As is currently the practice, the NEPC Committee when undertaking the program design phase would draw on the knowledge of agency staff and other experts, including from outside of government.

## Changes required for the new framework to succeed

In establishing a new framework based on the features outlined in this chapter, there are a number of administrative amendments required to ensure the new framework's efficiency and effectiveness. While a number of statutory amendments and administrative changes are noted in other parts of this review, including in Chapter 6, critical amendments and administrative changes include:

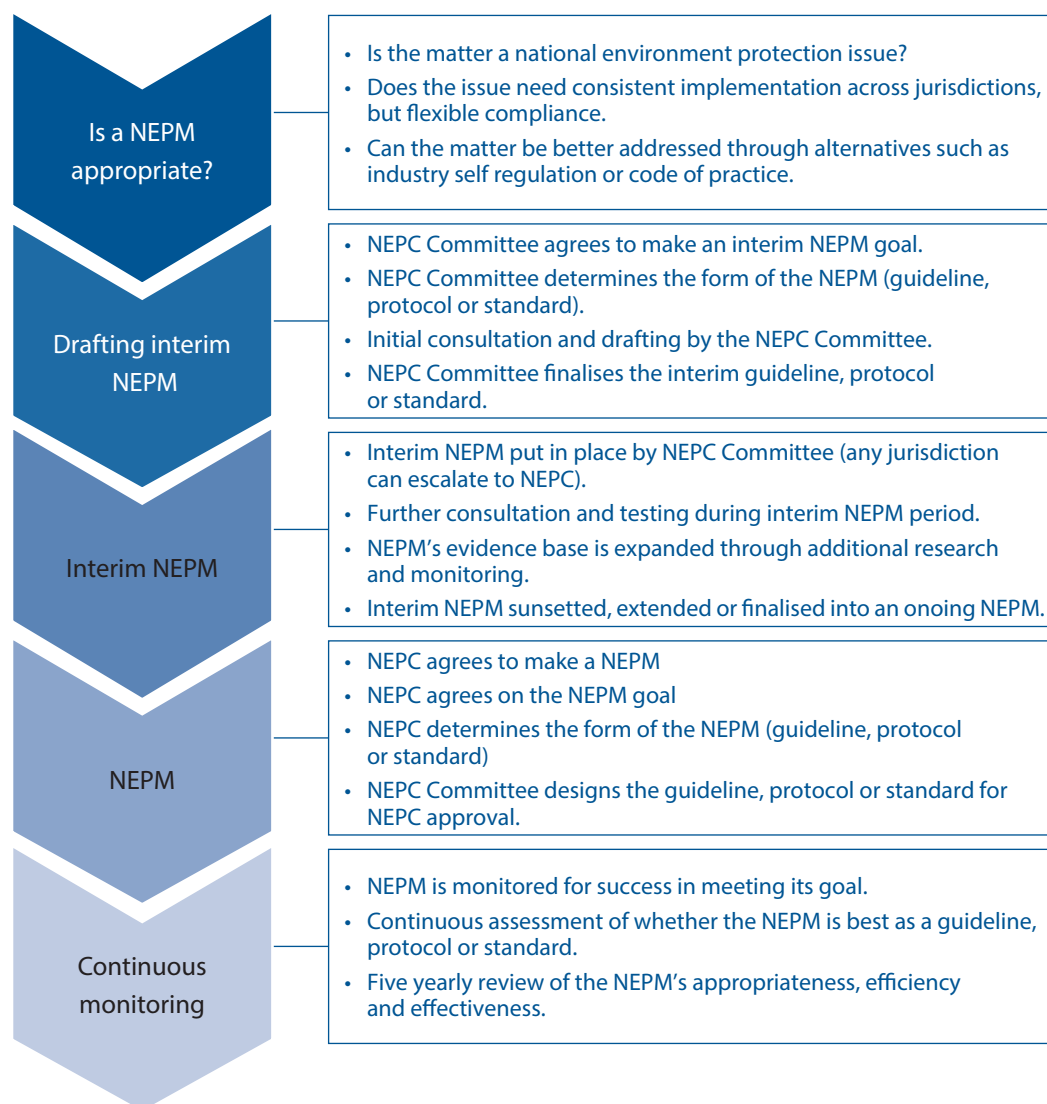
- ability to delegate making (ss.14), varying and revoking (s.20) measures to the NEPC Committee (s.61);
- modernising consultation practices (ss.15–20);
- redefining the Object of the Act to be inclusive of the environment, Australian community and ensuring that decisions of the business community are not distorted and markets are not fragmented (s.3);
- redefining the scope of the Act to include National Environment Protection issues generally (s.14);
- allowing for out of session decision making (ss.25–28);
- setting guidance regarding what minor variations are (and are not) (s22A–C);
- establishing new monitoring and reporting requirements (ss23–24);
- simplifying revocation provisions (s.20); and
- clearly defining the role of the NEPC secretariat.

## Transitioning existing NEPMs

This review sought feedback from jurisdictions on the proposed new framework in which jurisdictions queried what impact the new framework would have on the existing NEPMs. As outlined in Chapter 3 of this review, the existing NEPMs are variable in their effectiveness.

It is recommended that the existing NEPMs be retained for a transitional period of up to five years at which time the NEPMs in their current form sunset. While the sunset period has been recommended at five years it is expected that the NEPMs would transition into the new framework as soon as possible.

**Fig 2: The process for developing a new NEPM under the new framework**



## Recommendations Chapter 8: A new framework for implementing NEPMs

**Recommendation 15:** Implement the framework as described in Figures 1 and 2 consistent with the features outlined in Chapter 8.

**Recommendation 16:** NEPC secretariat maintains a publicly available register of the NEPMs agreed by the NEPC, which notes if jurisdictions have fully implemented, partially implemented or not implemented NEPMs or that the NEPM is not applicable in the jurisdiction.

## Conclusion


This review finds a strong need for a NEPC Act to remain in place. A NEPC Act, including NEPMs should be retained as the mechanism for providing nationally consistent environment protections, which consider jurisdictional and regional factors in their implementation. But the Act requires amendment to improve its effectiveness. The Act and its dictated administrative practices are inefficient and discourage regulators from using NEPMs.

The review recommends amendments to the Act to:

- clarify the Object of the Act;
- broaden the scope of NEPMs;
- modernise consultation requirements;
- modernise reporting requirements;
- create the ability to make out of sessions decisions; and
- remove the prohibition on the delegation of making and varying NEPMs.

In the event that legislative changes cannot be made, a number of the policy intents of the new NEPM framework can be delivered, however, their implementation will be less efficient and effective than if pursued through legislative amendments.

The review recommends a new framework for designing, implementing and monitoring NEPMs, as well as a range of amendments to streamline and modernise the Act. Under the framework current and future NEPMs would sit within one of three categories: guidance, protocols, and standards. The use of the three categories is designed to provide clarity regarding how the goal of the NEPM will be achieved. The framework also creates a credible threat of escalated regulatory action, thereby being more likely to prompt positive industry-led action without the burden of government regulation.



The review also considered the recommendations of the 2012 statutory review of the NEPC Act. Most of the 2012 recommendations remain valid, including broadening the scope of NEPMs. The recommendations should be implemented consistent with Chapter 8 of this review and the assessment set out in Appendix B.

In terms of administrative (i.e. non-legislative) change, the review found the administration is generally running as efficiently as the legislation allows. The review finds the role of the NEPC secretariat should be strengthened to include greater focus on strategic and policy issues, and clarified through the preparation of a service charter. A three year work plan should be prepared, maintained and monitored by the secretariat, with regular progress reporting to NEPC.

The review also found that the Act's reporting requirements are outdated and add little public value. Reporting should be modernised to reflect current community expectations, such as real time online reporting.

The recommended amendments to the Act can substantially resolve the issues identified in this review and adopting the new framework will help make NEPMs the policy tool of choice in addressing national environment protection issues.



# Appendix A

## Terms of Reference for the Fourth Review



### **Review of the National Environment Protection Council Act 1994 (Cth) Terms of Reference, December 2018**

#### Introduction

The *National Environment Protection Council Act 1994* (Cth) and corresponding legislation in each State and Territory (the NEPC Act) aims to ensure that, by means of the establishment and operation of the National Environment Protection Council (the Council):

- people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia; and
- decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.

The Council must cause a review of the operation of the NEPC Act and the extent to which the object of the NEPC Act has been achieved. The Council has previously reviewed the NEPC Act in 2001 (the Mc Michael Review), in 2006 (the Ramsey Review), and most recently in 2012, undertaken by an official's working group.

#### Governance

The review of the NEPC Act will be a desktop format (with some stakeholder liaison as required), undertaken by an independent reviewer with experience in environmental policy and government administration matters. The review will be overseen by the NEPC Committee and supported by a Working Group to be set up between the Commonwealth and the States and Territories. The NEPC Executive Officer and NEPC Business Services Team will assist the review.

#### Scope

Following consultation with the states and territories in early 2018, it is proposed that the fourth review of the NEPC Act examine and report on the following draft terms of reference:

1. A review of the operation of the NEPC Act as required by section 64(1)(a).
2. An assessment of the extent to which the object set out in section 3 of the NEPC Act has been achieved, as required by section 64(1)(b).
3. A review of the recommendations from the 2012 review of the NEPC Act that have not yet been implemented, including whether those recommendations remain valid and options for implementation.
4. An assessment of the opportunities for making administrative efficiencies to the NEPC Act, in lieu of legislative amendments.

#### Timing

Following the Council's agreement to cause the review of the Act, pursuant to section 64, the review will commence in the first half of 2019.

# Appendix B

## Stocktake of 2012 recommendations

Number	Chapter	Recommendation	2019 validity
3.7	Council of Australian Governments' reforms	a. Consider amendments that give effect to adopting the Council of Australian Governments' decision to remove any reference to the National Environment Protection Council in the Act and replace it with references to Ministers with responsibility for environment protection.	<b>Valid in principle</b> , noting as per the recommendations in Chapter 8 of this review, the NEPC Act be replaced by a new Act or as part of a new Act.
		b. The Acts should retain a process for developing National Environment Protection Measures and potentially other future national decisions.	<b>Partially valid</b> , retaining NEPMs received strong jurisdictional and stakeholder support during the 2019 review.  The section of the recommendation noting "... and potentially other future national decisions" is not valid generally (and specifically in the context of other national environmental legislation).
4	Effectiveness of the National Environment Protection Measures system	National Environment Protection Measures are an important tool for national action for environmental protection and should be retained.	<b>Remains valid</b> , the principle of retaining NEPMs received strong jurisdictional and stakeholder support during the 2019 review.
4.1	Objects of the National Environment Protection Council Acts	a. Consideration should be given to amending the Act to more directly state the purpose of the Act rather than have the Object of the Act dependent on the establishment of the National Environment Protection Council.	<b>Remains valid</b> , see Chapter 5 of this review.
		b. The Objects of the Act should be amended to: recognise the purpose of protection of the Australian community and the environment from harm.	<b>Remains valid</b> , see Chapter 5 of this review.
		c. Better reflect the Council of Australian Governments' objectives of a seamless and harmonised national economy.	<b>Valid in principle</b> , see Chapter 5 of this review.

Number	Chapter	Recommendation	2019 validity
4.4	Broadening the scope of the toolkit for national action	<p>a. The scope of the National Environment Protection Council Acts should be amended to allow the National Environment Protection Council to make a National Environment Protection Measure on any environmental protection matter as determined unanimously by the National Environment Protection Council.</p>	<p><b>Partially valid</b>, the recommendation remains valid in relation to the NEPC having the ability to make a National Environment Protection Measure on any National Environment Protection issue but not matters of National Environmental Significance, see Chapter 6.</p> <p>In addition, the ability to make a National Environment Protection Measure on any environmental protection matter should not require unanimity, but be determined consistent with the existing voting requirement at s.28, where “a decision of the Council must be supported by the votes of at least two-thirds of the members, whether present or not”.</p>
		<p>b. Any proposal to amend the National Environment Protection Council Acts should investigate broadening the scope of the National Environment Protection Council Act and establishing a framework for national decisions implemented through jurisdictions and enable the setting of environmental performance standards for products and equipment. The preferred approach should be determined following detailed consideration of the specific needs of any scheme.</p>	<p><b>Remains valid.</b></p>
		<p>c. As the Standing Council on Environment and Water considers the National Plan for Clean Air, the Council of Australian Governments’ Chemical Reform Program and other priorities, consideration should be given to adopting a framework approach in any legislative proposals to maximise the utility of the toolkit available for national action. Such proposals should include consideration of amendment of the National Environment Protection Council Acts, as well as alternative legislative approaches.</p>	<p><b>Valid in principle</b>, however priority should be given to addressing the constraint in the NEPC Act and not to establishing or utilising frameworks that encourage avoidance of the NEPM framework.</p>

Number	Chapter	Recommendation	2019 validity
4.5	Implementation of National Environment Protection Measures	a. The National Environment Protection Council should determine the most appropriate approach to support consistent implementation of each National Environment Protection Measure, focusing on areas where consistent implementation can strengthen environmental outcomes and reduce business costs.	<b>Remains valid.</b>
		b. Where greater consistency in implementation is of benefit, particularly when inconsistent implementation has a negative impact on business, it is recommended that jurisdictions: <ul style="list-style-type: none"> <li>– work together to pursue opportunities to improve and harmonise implementation of National Environment Protection Measures, including improved regulatory practice</li> <li>– ensure timely translation of National Environment Protection Measure requirements into jurisdictional instruments.</li> </ul>	<b>Remains valid.</b>
5.1	Nature and form of National Environment Protection Measures	A contemporary model for National Environment Protection Measures should be developed that focuses on outcomes and allows for flexibility to enable rapid updates as new information becomes available.	<b>Remains valid</b> , noting a proposed new NEPM framework, including providing for interim guidance, protocols and measures, is outlined in Chapter 8 of this review.
		Any new model should ensure National Environment Protection Measures contain a clear outcome statement with goals, key performance indicators, standards and/or high-level protocols.	<b>Valid in principle</b> , noting the proposed new NEPM framework (inclusive of guidelines, protocols and measures), as outlined in Chapter 8 of this review, recognises the differing needs regarding goals, key performance indicators, standards and/or high-level protocols.
		Technical monitoring and reporting processes should be included in separate subordinate instruments that can be readily amended or updated when required, while still providing certainty for business. Formal regulation impact statements or Office of Best Practice Regulation mechanisms may not be required where there is no significant business impact.	<b>Remains valid.</b>

Number	Chapter	Recommendation	2019 validity
5.2	Efficiency of National Environment Protection Measures processes and streamlining consultation processes	The National Environment Protection Council Act should be amended to remove prescriptions around public consultation and development of impact statements, while retaining the requirement for consultation. Further:	<b>Remains valid.</b>
		<ul style="list-style-type: none"> <li>the nature and extent of consultation should be determined by the National Environment Protection Council and Council of Australian Governments specified consultation processes, relevant legislation such as the Commonwealth Legislative Instruments Act 2003 and any other requirements for consultation as may be in effect from time to time</li> </ul>	<b>Remains valid</b> , noting the nature and extent of consultation should also be responsive to the regulatory risk framework and comply with the OBPR's Guidance Note - Best Practice Consultation (February 2016) as set out in recommendation 2 of this review.
		<ul style="list-style-type: none"> <li>the National Environment Protection Council should retain the ability to introduce any additional consultation mechanisms and impact statements as it sees fit</li> </ul>	<b>Remains valid.</b>
		<ul style="list-style-type: none"> <li>consideration should be given to a streamlined National Environment Protection Measure revocation process or a specific sunset period.</li> </ul>	Remains valid, noting the use and length of sunset periods require determination on a case by case basis.

Number	Chapter	Recommendation	2019 validity
5.4	Making, amending and revoking National Environment Protection Measures	When making or reviewing a National Environment Protection Measure, the National Environment Protection Council should consider including the following:	
		<ul style="list-style-type: none"> <li>a sunset clause for National Environment Protection Measures that by their nature have a limited operational life</li> </ul>	<b>Remains valid</b> , noting amending the Act to also allow for the interim NEPMs, that is a short term NEPM of up to two years with one extension of up to two years, would complement the sunset clause provision. See recommendation Chapter 8 of this review.
		<ul style="list-style-type: none"> <li>a requirement for review within a specified period where the nature of the National Environment Protection Measure is such that, subject to assessment of its effectiveness and efficiency, the National Environment Protection Measure should be ongoing. In this case the National Environment Protection Measure should specify that it will be reviewed within 10 years</li> </ul>	<b>Remains valid</b> , noting the appropriateness of an ongoing NEPM must be assessed in addition to its effectiveness and efficiency.
		<ul style="list-style-type: none"> <li>review of National Environment Protection Measures should focus on policy and implementation as well as the detailed scientific methodology—with the aim of determining the ongoing need for each National Environment Protection Measure and moving towards a better and more responsive framework.</li> </ul>	<b>Valid in principle</b> , noting that NEPM's should be established within the framework set out in Chapter 8 of this review.
		<ul style="list-style-type: none"> <li>National Environment Protection Measures should be revoked if no longer necessary and the National Environment Protection Council Act should be amended to allow for a streamlined process to revoke National Environment Protection Measures, making provision for flexibility on the method of public consultation</li> </ul>	<b>Remains valid.</b>
		<ul style="list-style-type: none"> <li>consideration should be given to the ongoing costs and benefits of the Air Toxics National Environment Protection Measure and the Diesel Vehicle Emissions National Environment Protection Measure, and the National Environment Protection Council should be advised on the desirability and timing of review and variation of the National Environment Protection Measures or their formal revocation under section 20 of the National Environment Protection Council Act.</li> </ul>	<b>Remains valid</b> , in relation to both the principle of the recommendation and the actions to review and potentially revoke the Air Toxics NEPM and the Diesel Vehicle Emissions NEPM.

Number	Chapter	Recommendation	2019 validity
6.1	National Environment Protection Council Annual Report	Remove requirement for preparation and tabling of an annual report in every jurisdiction on implementation of National Environment Protection Measures.	<b>Partially valid</b> , noting that jurisdictional reporting requirements, as set out in s.24 of the Act, should be included where appropriate in Agency annual reports.
6.3	Reporting on individual National Environment Protection Measures	a. National Environment Protection Measures should explicitly address the need for reporting with the aim of ensuring relevant information is made available in readily accessible forms, particularly by utilising the web, for the purpose of informing the community and business sectors and for use by government in policy and decision making.	<p><b>Valid in principle</b>, noting that recommendations 6.3 a)-e) are of a prescriptive nature and may not be responsive to the recommended changes of the NEPM framework set out in chapter 8 of this review.</p> <p>This review recommends that future NEPM reporting should be modernised to be timely, accessible and easy to understand. This form of reporting on NEPMs would add value for government, community and industry.</p> <p>This review recommends that NEPM reporting should not duplicate existing reporting such as 'real time' air quality reporting.</p>
		b. Future reviews of National Environment Protection Measures should carefully consider the reporting requirements specific to each National Environment Protection Measure to ensure that effort is focused on producing useable, valuable and targeted information in a cost-effective manner.	<b>Remains valid.</b>
		c. Consideration should be given to developing/refining key performance indicators for National Environment Protection Measures implementation and effectiveness.	<b>Valid in principle</b> , noting that NEPMs should be established within the framework set out in Chapter 8 of this review.
		d. Jurisdictions should continue to report annually on data arising out of National Environment Protection Measures; however, this could be done separately via jurisdictional websites or similar means, rather than in the form of tabled annual reports.	<b>Remains valid.</b>
		e. Reporting on the effectiveness of National Environment Protection Measures should be conducted as part of a National Environment Protection Measure review process (Refer to Part 5).	<b>Remains valid.</b>

Number	Chapter	Recommendation	2019 validity
7.1	Efficiency of National Environment Protection Council	a. The National Environment Protection Council should have more flexibility in determining its operating and meeting procedures.	<b>Remains valid</b> insofar as modernising meeting procedures as outlined in recommendation 7.1b.
		b. The Act should enable the National Environment Protection Council, and committees of the council, to meet and make decisions out of session, including by electronic means such as email, fax, phone or video.	<b>Partially valid</b> , the Act currently allows meeting decisions to be made by phone or video-conferencing although both have been underutilised which has added to the inefficiency of the Act's operation. Amending the Act to provide for out of session decision making remains valid.
7.3	Efficiency of National Environment Protection Council Service Corporation	a. The review notes that the National Environment Protection Council has moved to abolish the National Environment Protection Council Service Corporation and	<b>Noted.</b>
		b. replace it with a flexible and fit-for-purpose secretariat within the financial framework of a host jurisdiction.	<b>Remains valid</b> , noting the need for ongoing clarity and consistency of service through the publishing of a service charter by the NEPC Secretariat, set out in Chapter 4 of this review.
		c. Subject to the decision to abolish the National Environment Protection Council Service Corporation, financial reporting on National Environment Protection Measure expenditure will be via annual reporting by the host jurisdiction on a special account established for the purpose of, inter alia, establishing and managing National Environment Protection Measures and covering the operating costs of the secretariat.	<b>Remains valid.</b>



# Appendix C

## Stakeholders consulted during the review

Stakeholder type	Stakeholders
<b>ACT Government</b>	Environmental strategic policy, Environment Planning and Sustainable Development Directorate Justice and Community Safety Directorate Environmental Protection Authority Access Canberra, Chief Ministers and Economic Development Directorate ACT NoWaste, Transport Canberra and City Services Directorate Health Protection Services, ACT Health Directorate
<b>New South Wales Government</b>	New South Wales Environmental Protection Authority
<b>Commonwealth NEPM Administrators</b>	Ambient Air Quality team (Diesel and Air toxics) National Pollutant Inventory team (NPI) Product Stewardship team (Used Packaging) National Waste Report team (Movement of Controlled Waste) Chemicals Management Branch (Assessment of Site Contamination)
<b>Tasmanian Government</b>	EPA Tasmania
<b>Western Australia Government</b>	Department of Water and Environmental Regulation
<b>South Australia Government</b>	Environmental Protection Authority Department of Energy and Mining Department of Planning, Transport and Infrastructure Department of Health Office of Parliamentary Counsel Department for Premier and Cabinet
<b>Northern Territory Government</b>	Environment Division

Stakeholder type	Stakeholders
<b>Queensland Government</b>	Department of Environment and Science: Policy and legislation, Air, Used packaging, Waste Operations, ESR (Movement of Controlled Waste) Department of Transport and Roads
<b>Victorian Government</b>	Environmental Protection Authority: HEPA Secretariat, air quality policy and monitoring, waste regulation  Department of Health and Social Services  Department of Environment Land and Water  Department of Transport
<b>Non-Government</b>	CRCCare  National Waste and Recycling Council  Australian Packaging Covenant Organisation  Cova Thinking  GHD  Environmental Defenders Office: Tasmania, NSW, ACT  Minerals Council of Australia  Australian Local Government Association



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# National Environment Protection Council Response to the Report of the Fourth Review of the National Environment Protection Council Acts (Commonwealth, State and Territory)

April 2021

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#### **Cataloguing data**

This publication (and any material sourced from it) should be attributed as: Department of Agriculture, Water and the Environment 2021, *National Environment Protection Council Response to the Report of the Fourth Review of the National Environment Protection Council Acts (Commonwealth, State and Territory)*, Canberra, April. CC BY 4.0.

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# Introduction

This is the National Environment Protection Council's response to the *Report of the Fourth Review of the National Environment Protection Council Acts (Commonwealth, state and territory)* (the review). The review was initiated by the National Environment Protection Council on 7 December 2018 to give effect to the requirement under section 64 of the Commonwealth *National Environment Protection Council Act 1994* (the Act), and mirrored in the National Environment Protection Council Acts of all states and territories for five yearly reviews of the operation of the Acts, and the extent to which the objects of the National Environment Protection Council Acts have been achieved.

## Terms of reference

The National Environment Protection Council determined that the review should examine and report according to the following specific terms of reference:

1. A review of the operation of the Act as required by section 64(1)(a).
2. An assessment of the extent to which the object set out in section 3 of the Act has been achieved, as required by section 64(1)(b).
3. A review of the recommendations from the 2012 review of the Act that have not yet been implemented, including whether those recommendations remain valid and options for implementation.
4. An assessment of the opportunities for making administrative efficiencies to the Act, in lieu of legislative amendments.

The review covered the operation of the Act for the period 1 April 2012 to 31 March 2017. It was undertaken by an independent reviewer, Associate Professor Terry Bailey, supported by staff from the Commonwealth-State Relations section within the former Australian Government Department of the Environment and Energy (the Department) and a working group comprised of officials from each jurisdiction. The review considered existing documents and publications in relation to the National Environment Protection Council including the legislation, three previous independent reviews and National Environment Protection Council annual reports.

Consultation occurred with a range of stakeholders including Commonwealth, state and territory officials responsible for managing and implementing National Environment Protection Measures (NEPMs), the Australian Local Government Association, targeted industry groups, targeted non-government organisations, and the organisations established under the Act and its subsidiary NEPMs (such as the Australian Packaging Covenant Organisation).



## Outcomes

The review was completed and forwarded to the National Environment Protection Council Committee (NEPC Committee) in July 2019. The review found a strong need for the Act which encourages cross-jurisdictional cooperation but made sixteen recommendations to modernise and improve the efficiency and effectiveness of the Act. The review also examined the remaining recommendations from the 2012 NEPC Act Review.

The NEPC Committee formally considered the response to the review in October 2019. A number of recommendations were not fully accepted and a process of consultation was undertaken with the Department's legal area, the Office of Best Practice Regulation, the independent reviewer and state and territory officials to refine the response from the National Environment Protection Council. The revised response supports implementing the key principles outlined in the NEPM framework but does not adopt interim NEPMS.

## Review of Council of Australian Governments (COAG) and Ministerial Forums

In June 2020, the National Cabinet, an intergovernmental forum composed of the Prime Minister and the State and Territory Premiers and Chief Ministers, agreed to review former ministerial forums and government councils including the National Environment Protection Council. The Review of Council of Australian Governments (COAG) and Ministerial Forums (the Conran Review) was released in October 2020 and the 33 recommendations were agreed by the National Cabinet.

The Conran Review rationalised the number of ministerial councils and forums and recommended a more efficient and less bureaucratic approach. The Conran Review recommended that the National Environment Protection Council be disbanded and issues be managed by environment ministers which reflects current practice as the National Environment Protection Council is comprised of the environment ministers.

It also recommended that while regulatory functions remain the responsibility of relevant ministers, that these functions should be conducted out-of-session wherever possible and that routine, non-controversial or technical matters should be delegated to senior officials or progressed out-of-session.

The NEPC Act Review and the Conran Review have the same intentions of improving efficiency by delegating routine matters to senior officials and conducting more business out-of-session, and enhancing governments' responsiveness to emerging issues. Because the recommendations of the two reviews are complimentary, the legislative and non-legislative changes to the operations of the National Environment Protection Council can be progressed together through a cooperative approach with the states and territories.

# Recommendations and response

## Recommendation 1

- A NEPC Act with the ability to make NEPMs should be maintained in legislation.

### Response

The National Environment Protection Council **support** this recommendation. Jurisdictions acknowledge the need for an Act that ensures consistent environmental protection, and in doing so reduces the regulatory burden on businesses and community.

## Recommendation 2

- The NEPC Act should be repealed or amended in order to fully adopt the framework described in Chapter 8.

### Response

The National Environment Protection Council **agree in part** to this recommendation. Legislative changes to either repeal and replace the Act or amend the Act are required to improve the operation of the Act. Repealing the Act is likely not necessary. The review's recommendations can be implemented with minor Act amendments. Details on adopting parts of the NEPC framework are described in the response to recommendation 15.

## Recommendation 3

- The consultation requirements set out in s.16–20 of the NEPC Act should be repealed and the nature and extent of the amended provisions be responsive to regulatory risk frameworks and comply with the OBPR's Guidance Note – Best Practice Consultation (February 2016).

### Response

The National Environment Protection Council **agree in principle** to this recommendation.

The environment ministers agree to pursue amendments to s.16–20 to reflect current best practice public consultation guidance and regulatory risk frameworks. The requirement for public consultation will be maintained.

Any legislative amendments will be subject to appropriate consultation and relevant approvals by each jurisdiction.

The Office of Best Practice Regulation (OBPR) guidance note will be considered where appropriate. Consultation requirements will be amended to ensure clearer and less burdensome consultation requirements for industry and communities.

## Recommendation 4

- The NEPC Committee should establish a three year rolling work plan that is reviewed annually and reported against in the Commonwealth Department of Environment and Energy's Annual Report, and be linked to the NEPC website.

### Response

The National Environment Protection Council **agree** to this recommendation. The forward work plan will promote accountability and transparency. No legislative change is required to implement this recommendation.

## Recommendation 5

- The NEPC Act should be amended to allow NEPC to delegate to the NEPC Committee the ability to create, vary and revoke NEPMs.

### Response

The National Environment Protection Council **agree** to this recommendation. The National Environment Protection Council believes Ministers should have the ability to delegate any functions to the NEPC Committee. Each member of the NEPC Committee will have the ability to escalate decisions to the National Environment Protection Council if they consider it appropriate.

The National Environment Protection Council notes that a separate delegation instrument is required to delegate any function to the NEPC Committee. The National Environment Protection Council will be able to decide what functions to delegate following amendment to the NEPC Act.

Any legislative amendments will be subject to appropriate consultation and relevant approvals by each jurisdiction.

## Recommendation 6

- NEPC Act reporting requirements should be modernised to be timely, accessible and easy to understand. Reporting should be delivered through existing mechanisms which include 'real time' online reporting and jurisdictional annual reports.

### Response

The National Environment Protection Council **agree** to this recommendation.

The National Environment Protection Council notes there are significant opportunities to modernise NEPC reporting to improve its timeliness and relevance to the public. The NEPC Committee will develop a detailed reporting plan, but the NEPC Committee proposes to continue to produce an annual online report published on the NEPC website and not tabled in Parliaments. The annual report will be simplified and provide more relevant information such as longitudinal trends. The NEPC website will be updated to provide links and integration with jurisdictions' reporting websites, which often include real time online reporting.

Any legislative amendments will be subject to appropriate consultation and relevant approvals by each jurisdiction.

## Recommendation 7

- The secretariat should prepare and distribute to jurisdictions a service charter that defines the roles and responsibilities of the secretariat and participating jurisdictions.

### Response

The National Environment Protection Council **agree** with this recommendation. No legislative change is required to implement this recommendation.

## Recommendation 8

- Provision for a Special Account be retained given the operation of the special account has enabled practical, cost effective, collaboration between jurisdictions that would otherwise have not occurred.

### Response

The National Environment Protection Council **agree** with this recommendation.

The National Environment Protection Council notes that the Special Account provides practical, cost effective, collaboration between jurisdictions that may otherwise not occur.

The Commonwealth Government will investigate approaches that will streamline and simplify administration, grants and spending from the special account and make legislation changes where necessary to ensure the special account delivers the policy intention, including where state and territory governments are leading projects.

## Recommendation 9

- Redraft the Object of the Act to ensure the Australian community and the environment benefit from protection(s) as agreed by the NEPC.

### Response

The National Environment Protection Council **note** the recommendation to amend the Object of the Act.

The Object of the Act will be considered alongside potential amendments in response to Recommendations 2 and Recommendation 15. The Act already ensures the environment benefits from protection.

## Recommendation 10

- The Object of the Act should continue to ensure the decisions of the business community are not distorted and markets are not fragmented

### Response

The National Environment Protection Council **agree** with this recommendation and note that no amendments to the Act are required in order to keep implementing this Object.

## Recommendation 11

- That s.14 of the NEPC Act be amended to establish that NEPC can make NEPMs for any 'National Environment Protection issue', such as waste, pollutant or other material or substance that has, will or is likely to enter the environment and pose a potential risk to human health and/or cause environmental harm.

### Response

The National Environment Protection Council **agree** to this recommendation and intends to extend the scope to any matter agreed by the National Environment Protection Council.

The National Environment Protection Council will pursue amendments that allow the National Environment Protection Council to make NEPMs on any matter as agreed by The National Environment Protection Council. Any legislative amendments will be subject to appropriate consultation and relevant approvals by each jurisdiction.

The National Environment Protection Council is a cross jurisdictional framework for developing measures unique from other legislation, and ministers should have the ability to make a measure on any environmental protection matters considering the wider legislative context.

## Recommendations 12 and 13

- Implement the 2012 recommendations assessed as 'Remains valid' in Appendix B.
- Implement the 2012 recommendations assessed as 'Partially valid' or 'Valid in principle' as described under the column '2019 validity' in Appendix B.

### Response

See **Appendix B** for National Environment Protection Council's consideration of each of the 2012 recommendations.

## Recommendation 14

- That NEPC develops a publicly available policy statement regarding when s.22A-C (minor variations) can be applied.

### Response

The National Environment Protection Council **agree** with this recommendation.

The National Environment Protection Council will prepare a policy statement which will guide the National Environment Protection Council and inform the public as to the factors the National Environment Protection Council will consider when determining whether a NEPM variation is a major or a minor variation and subsequently what process will be followed. Delegations of powers under s22A will be considered as part of any new delegations instruments developed in response to Recommendation 5.

## Recommendation 15

- Implement the framework as described in Figures 1 and 2 consistent with the features outlined in Chapter 8.

### Response

The National Environment Protection Council **agree in part** to this recommendation. They intend to implement the key principles outlined in the framework (including clearer understanding of NEPM categories, providing credible regulation and better clarification of jurisdictional roles and responsibilities) with two exceptions: The National Environment Protection Council will **not adopt** interim NEPMs and will allow some overlap of NEPM categories where appropriate.

The National Environment Protection Council expects that through implementing key principles of the framework that support monitoring and timely review of the effectiveness of the NEPMs, and the National Environment Protection Council's proposed amendments to the NEPC Act (**Appendix A**), the processes for creating, varying and revoking NEPMs will be improved and NEPMs will be more responsive and flexible in addressing environmental issues.

## NEPM categories

The National Environment Protection Council notes that the NEPC Act states that a national environmental protection measure (NEPM) is comprised of a standard, goal, guideline, protocol or a combination of these and defines what each category is. The NEPC agrees that the purpose of these categories and their regulatory expectations could be better explained by supporting administrative guidance. NEPMs are tailored to circumstances in particular industries and environmental protection issues, and in some cases it may be appropriate for a NEPM to have some overlap between categories (e.g. a NEPM may include both protocols and standards where appropriate) as currently provided for in section 14 of the Act.

## Credible regulation

A better understanding of NEPM categories and its purpose will provide a clear regulatory expectation for the industry and business and help to clarify the roles of government, industry and community. For example, the National Environment Protection Council may decide a NEPM's goal and approve a guideline to be the appropriate NEPM category that gives guidance on possible means for achieving the goal. This could involve a low level of government regulation and enforcement, with industry leading the delivery of the desired regulatory outcomes. If the guideline is not achieving its goals, further government intervention will be expected with stronger regulation and enforcement. The National Environment Protection Council hopes clearer understanding of regulatory expectations and escalation will encourage greater industry-led self-regulation.

Regulation and investigations into non-compliance and compliance penalties would remain the responsibility of each jurisdiction.

## Jurisdictional clarity and program design

The National Environment Protection Council agrees that it is the National Environment Protection Council's role to determine if a NEPM is needed, including the NEPM's goals and category. The NEPC Committee would undertake program design and delivery of NEPMs. Program design will include implementation, monitoring requirements, evaluation criteria and compliance options. Reviews of NEPMs will consider alignment with any agreed framework.

Each jurisdiction would remain responsible for, where appropriate: implementing, monitoring, reporting, compliance and enforcement of each NEPM.



## Interim NEPMs

The National Environment Protection Council supports the intent and principles of interim NEPMs, however the National Environment Protection Council considers it is not necessary to create interim NEPMs at this stage. The review recommends interim NEPMs as a means of creating responsive and flexible tools to address emerging environmental issues. The legislative amendments proposed and supported will enable an efficient process to create and amend NEPMs, removing the need for interim NEPMs. The National Environment Protection Council also believes creation of interim NEPMs could potentially cause additional complexities around compliance and enforceability. Introduction of interim NEPMs is considered unnecessary at this time.

## Recommendation 16

- NEPC secretariat maintains a publicly available register of the NEPMs agreed by the NEPC, which notes if jurisdictions have fully implemented, partially implemented or not implemented NEPMs or that the NEPM is not applicable in the jurisdiction.

## Response

The National Environment Protection Council **agree in principle** to this recommendation and notes the recommendation will be addressed through the development of improved reporting in response to Recommendation 6.

# Appendix A – Potential amendments to the NEPC Act to be considered

- Amend sections 16–20 to maintain a requirement to consult, but modernise the consultation requirements, include minor streamlining amendments to remove requirement to gazette notice in newspaper and replace with website notice (Recommendation 3).
- Amend section 61 to allow NEPC delegating powers to NEPC Committee to create, vary, and revoke NEPMs. Any jurisdiction can request a matter is sent to NEPC (Recommendation 5).
- Amend sections 23 and 24 to modernise reporting requirements to remove tabling requirements and reduce duplicate reporting including where real-time online reporting is available (Recommendation 6).
- Consider amend section 3 to redraft the Object of the Act to include reference to the environment and the Object should continue to ensure the decisions of the business community are not distorted and markets are not fragmented (Recommendation 9 and 10).
- Amend section 14 to broaden the scope of NEPMs to any environment protection matters as agreed by NEPC. This change will allow any emerging national environmental issues to be addressed through NEPM framework (Recommendation 11).

Amend sections 9, 20, 25–28 to enable each jurisdiction’s Environment Ministers to be NEPC members without First Minister appointment; easier revocation of out of date NEPMs; and allow NEPC to make decisions out of session (for example, through exchange of letters) (Recommendation 12 and 13).

# Appendix B – Consideration of 2012 NEPC Act review recommendations

Combined consideration of 2012 and 2019 recommendations and NEPC response

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
3.7 a	<p>2012: Consider amendments that give effect to adopting the Council of Australian Governments' decision to remove any reference to the National Environment Protection Council in the Act and replace it with references to Ministers with responsibility for environment protection.</p> <p>2019: Valid in principle, noting as per the recommendations in Chapter 8 of this review, the NEPC Act be replaced by a new Act or as part of a new Act.</p>	Valid in principle	<p>Agree in principle. Subject to further consultation and broader consideration of the Act, NEPC intends to amend the appointment processes so that each jurisdiction's ministers responsible for Environment protection are automatically taken to be member of NEPC without the need for first minister's appointments.</p> <p>Reference to the National Environment Protection Council will be maintained in the Act.</p>
3.7 b	<p>2012: The Acts should retain a process for developing National Environment Protection Measures and potentially other future national decisions.</p> <p>2019: Partially valid, retaining NEPMs received strong jurisdictional and stakeholder support during the 2019 review. The section of the recommendation noting "... and potentially other future national decisions" is not valid generally (and specifically in the context of other national environmental legislation).</p>	Partially valid	Agree. See response to Recommendation 1.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
4.	<p>2012: National Environment Protection Measures are an important tool for national action for environmental protection and should be retained.</p> <p>2019: Remains valid, the principle of retaining NEPMs received strong jurisdictional and stakeholder support during the 2019 review.</p>	Remains valid	Agree. See response to Recommendation 1.
4.1 a	<p>2012: Consideration should be given to amending the Act to more directly state the purpose of the Act rather than have the Object of the Act dependent on the establishment of the National Environment Protection Council.</p> <p>2019: Remains valid, see Chapter 5 of this review.</p>	Remains valid	Noted. See response to Recommendation 9.
4.1 b	<p>2012: The Objects of the Act should be amended to: recognise the purpose of protection of the Australian community and the environment from harm.</p> <p>2019: Remains valid, see Chapter 5 of this review.</p>	Remains valid	Noted. See response to Recommendation 9.
4.1 c	<p>2012: Better reflect the Council of Australian Governments' objectives of a seamless and harmonised national economy.</p> <p>2019: Valid in principle, see Chapter 5 of this review.</p>	Valid in principle	Noted. See response to Recommendation 10.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
4.4 a	<p>2012: The scope of the National Environment Protection Council Acts should be amended to allow the National Environment Protection Council to make a National Environment Protection Measure on any environmental protection matter as determined unanimously by the National Environment Protection Council.</p> <p>2019: Partially valid, the recommendation remains valid in relation to the NEPC having the ability to make a National Environment Protection Measure on any National Environment Protection issue but not matters of National Environmental Significance, see Chapter 6.</p> <p>In addition, the ability to make a National Environment Protection Measure on any environmental protection matter should not require unanimity, but be determined consistent with the existing voting requirement at s.28, where "a decision of the Council must be supported by the votes of at least two-thirds of the members, whether present or not".</p>	Partially valid	Agreed. See response to recommendation 11.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
4.4 b	<p>2012: Any proposal to amend the National Environment Protection Council Acts should investigate broadening the scope of the National Environment Protection Council Act and establishing a framework for national decisions implemented through jurisdictions and enable the setting of environmental performance standards for products and equipment. The preferred approach should be determined following detailed consideration of the specific needs of any scheme.</p> <p>2019: Remains valid.</p>	Remains valid	Agreed. See response to recommendation 11.
4.4 c	<p>2012: As the Standing Council on Environment and Water considers the National Plan for Clean Air, the Council of Australian Governments' Chemical Reform Program and other priorities, consideration should be given to adopting a framework approach in any legislative proposals to maximise the utility of the toolkit available for national action. Such proposals should include consideration of amendment of the National Environment Protection Council Acts, as well as alternative legislative approaches.</p> <p>2019: Valid in principle, however priority should be given to addressing the constraint in the NEPC Act and not to establishing or utilising frameworks that encourage avoidance of the NEPM framework.</p>	Valid in principle	Agreed. See response to recommendation 15.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
4.5 a	<p>2012: The National Environment Protection Council should determine the most appropriate approach to support consistent implementation of each National Environment Protection Measure, focusing on areas where consistent implementation can strengthen environmental outcomes and reduce business costs.</p> <p>2019: Remains valid.</p>	Remains valid	Agreed. See discussion of new framework at Recommendation 15.
4.5 b	<p>2012: Where greater consistency in implementation is of benefit, particularly when inconsistent implementation has a negative impact on business, it is recommended that jurisdictions: -- work together to pursue opportunities to improve and harmonise implementation of National Environment Protection Measures, including improved regulatory practice -- ensure timely translation of National Environment Protection Measure requirements into jurisdictional instruments.</p> <p>2019: Remains valid.</p>	Remains valid	Agreed. See discussion of new framework at Recommendation 15.
5.1 a	<p>2012: A contemporary model for National Environment Protection Measures should be developed that focuses on outcomes and allows for flexibility to enable rapid updates as new information becomes available.</p> <p>2019: Remains valid, noting a proposed new NEPM framework, including providing for interim guidance, protocols and measures, is outlined in Chapter 8 of this review.</p>	Remains valid	Agreed. See discussion of new framework at Recommendation 15.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
<b>5.1 b</b>	<p>2012: Any new model should ensure National Environment Protection Measures contain a clear outcome statement with goals, key performance indicators, standards and/or high-level protocols.</p> <p>2019: Valid in principle, noting the proposed new NEPM framework (inclusive of guidelines, protocols and measures), as outlined in Chapter 8 of this review, recognises the differing needs regarding goals, key performance indicators, standards and/or high-level protocols.</p>	Valid in principle	Agreed. See discussion of new framework at Recommendation 15.
<b>5.1 c</b>	<p>2012: Technical monitoring and reporting processes should be included in separate subordinate instruments that can be readily amended or updated when required, while still providing certainty for business. Formal regulation impact statements or Office of Best Practice Regulation mechanisms may not be required where there is no significant business impact.</p> <p>2019: Remains valid.</p>	Remains valid	See response to recommendation 5, noting increased delegations will allow faster amendments or updates when required.
<b>5.2 a</b>	<p>2012: The National Environment Protection Council Act should be amended to remove prescriptions around public consultation and development of impact statements, while retaining the requirement for consultation. Further:</p> <p>2019: Remains valid.</p>	Remains valid	Agreed. See response to recommendation 3.



Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
<b>5.2 b</b>	<p>2012: the nature and extent of consultation should be determined by the National Environment Protection Council and Council of Australian Governments specified consultation processes, relevant legislation such as the Commonwealth Legislative Instruments Act 2003 and any other requirements for consultation as may be in effect from time to time.</p> <p>2019: Remains valid, noting the nature and extent of consultation should also be responsive to the regulatory risk framework and comply with the OBPR's Guidance Note- Best Practice Consultation (February 2016) as set out in recommendation 2 of this review.</p>	Remains valid	Agreed. See response to recommendation 3.
<b>5.2 c</b>	<p>2012: The National Environment Protection Council should retain the ability to introduce any additional consultation mechanisms and impact statements as it sees fit.</p> <p>2019: Remains valid.</p>	Remains valid	Agreed. See response to recommendation 3.
<b>5.2 d</b>	<p>2012: consideration should be given to a streamlined National Environment Protection Measure revocation process or a specific sunset period.</p> <p>2019: Remains valid, noting the use and length of sunset periods require determination on a case by case basis.</p>	Remains valid	Agreed.
<b>5.4</b>	2012: When making or reviewing a National Environment Protection Measure, the National Environment Protection Council should consider including the following:	See below	See below.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
5.4 a	<p>2012: a sunset clause for National Environment Protection Measures that by their nature have a limited operational life.</p> <p>2019: Remains valid, noting amending the Act to also allow for the interim NEPMs, that is a short term NEPM of up to two years with one extension of up to two years, would complement the sunset clause provision. See recommendation Chapter 8 of this review.</p>	Remains valid	Noted. See discussion of new framework at Recommendation 15.
5.4 b	<p>2012: a requirement for review within a specified period where the nature of the National Environment Protection Measure is such that, subject to assessment of its effectiveness and efficiency, the National Environment Protection Measure should be ongoing. In this case the National Environment Protection Measure should specify that it will be reviewed within 10 years.</p> <p>2019: Remains valid, noting the appropriateness of an ongoing NEPM must be assessed in addition to its effectiveness and efficiency.</p>	Remains valid	Noted. See discussion of new framework at Recommendation 15.
5.4 c	<p>2012: review of National Environment Protection Measures should focus on policy and implementation as well as the detailed scientific methodology—with the aim of determining the ongoing need for each National Environment Protection Measure and moving towards a better and more responsive framework.</p> <p>2019: Valid in principle, noting that NEPM's should be established within the framework set out in Chapter 8 of this review.</p>	Valid in principle	Noted. See discussion of new framework at Recommendation 15.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
5.4 d	<p>2012: National Environment Protection Measures should be revoked if no longer necessary and the National Environment Protection Council Act should be amended to allow for a streamlined process to revoke National Environment Protection Measures, making provision for flexibility on the method of public consultation.</p> <p>2019: Remains valid.</p>	Remains valid	Noted. See discussion of new framework at Recommendation 15.
5.4 e	<p>2012: consideration should be given to the ongoing costs and benefits of the Air Toxics National Environment Protection Measure and the Diesel Vehicle Emissions National Environment Protection Measure, and the National Environment Protection Council should be advised on the desirability and timing of review and variation of the National Environment Protection Measures or their formal revocation under section 20 of the National Environment Protection Council Act.</p> <p>2019: Remains valid, in relation to both the principle of the recommendation and the actions to review and potentially revoke the Air Toxics NEPM and the Diesel Vehicle Emissions NEPM.</p>	Remains valid	Noted. See response to Recommendation 5 and discussion of new framework at Recommendation 15.
6.1	<p>2012: Remove requirement for preparation and tabling of an annual report in every jurisdiction on implementation of National Environment Protection Measures.</p> <p>2019: Partially valid, noting that jurisdictional reporting requirements, as set out in s.24 of the Act, should be included where appropriate in Agency annual reports.</p>	Partially valid	Agreed. See response to Recommendation 6.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
<b>6.3 a</b>	<p>2012: National Environment Protection Measures should explicitly address the need for reporting with the aim of ensuring relevant information is made available in readily accessible forms, particularly by utilising the web, for the purpose of informing the community and business sectors and for use by government in policy and decision making.</p> <p>2019: Valid in principle, noting that recommendations 6.3 a)-e) are of a prescriptive nature and may not be responsive to the recommended changes of the NEPM framework set out in chapter 8 of this review.</p> <p>This review recommends that future NEPM reporting should be modernised to be timely, accessible and easy to understand. This form of reporting on NEPMs would add value for government, community and industry.</p> <p>This review recommends that NEPM reporting should not duplicate existing reporting such as 'real time' air quality reporting.</p>	Valid in principle	Agreed. See response to Recommendation 6.
<b>6.3 b</b>	<p>2012: Future reviews of National Environment Protection Measures should carefully consider the reporting requirements specific to each National Environment Protection Measure to ensure that effort is focused on producing useable, valuable and targeted information in a cost-effective manner.</p> <p>2019: Remains valid.</p>	Remains valid	Agreed. See response to Recommendation 6.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
<b>6.3 c</b>	<p>2012: Consideration should be given to developing/refining key performance indicators for National Environment Protection Measures implementation and effectiveness.</p> <p>2019: Valid in principle, noting that NEPMs should be established within the framework set out in Chapter 8 of this review.</p>	Valid in principle	Agreed. See response to Recommendation 6.
<b>6.3 d</b>	<p>2012: Jurisdictions should continue to report annually on data arising out of National Environment Protection Measures; however, this could be done separately via jurisdictional websites or similar means, rather than in the form of tabled annual reports.</p> <p>2019: Remains valid.</p>	Remains valid	Agreed. See response to Recommendation 6.
<b>6.3 e</b>	<p>2012: Reporting on the effectiveness of National Environment Protection Measures should be conducted as part of a National Environment Protection Measure review process (Refer to Part 5).</p> <p>2019: Remains valid.</p>	Remains valid	Noted. See response to Recommendation 6.
<b>7.1 a</b>	<p>2012: The National Environment Protection Council should have more flexibility in determining its operating and meeting procedures.</p> <p>2019: Remains valid insofar as modernising meeting procedures as outlined in recommendation 7.1b.</p>	Remains valid	Agreed. See response to Recommendation 7 and Recommendation 15.

Pinpoint	Combined 2012 and 2019 recommendations	2019 independent reviewer's assessment	NEPC response
<b>7.1 b</b>	<p>2012: The Act should enable the National Environment Protection Council, and committees of the council, to meet and make decisions out of session, including by electronic means such as email, fax, phone or video.</p> <p>2019: Partially valid, the Act currently allows meeting decisions to be made by phone or video-conferencing although both have been underutilised which has added to the inefficiency of the Act's operation. Amending the Act to provide for out of session decision making remains valid.</p>	Partially valid	Agreed.
<b>7.3</b>	<p>2012: The review notes that the National Environment Protection Council has moved to abolish the National Environment Protection Council Service Corporation and, replace it with a flexible and fit-for-purpose secretariat within the financial framework of a host jurisdiction. Subject to the decision to abolish the NEPC Service Corporation, financial reporting on NEPM expenditure will be via annual reporting by the host jurisdiction on a special account established for the purpose of, inter alia, establishing and managing NEPMs and covering the operating costs of the secretariat.</p> <p>2019: Remains valid, noting the need for ongoing clarity and consistency of service through the publishing of a service charter by the NEPC Secretariat, set out in Chapter 4 of this review.</p>	Remains valid	Agreed. See response to Recommendation 7 and Recommendation 8.



