

1998

THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA

SENATE

NATIONAL ENVIRONMENT PROTECTION MEASURES
(IMPLEMENTATION) BILL 1998

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment and Heritage,
Senator the Hon Robert Hill)

NATIONAL ENVIRONMENT PROTECTION MEASURES (IMPLEMENTATION) BILL 1998

OUTLINE

The purpose of this Bill is to provide for the implementation of national environment protection measures (NEPMs) in respect of certain activities by or on behalf of the Commonwealth and Commonwealth authorities, and for related purposes.

Pursuant to the Intergovernmental Agreement on the Environment the Commonwealth and the State and Territory governments agreed to the establishment of the National Environment Protection Council (NEPC) to make NEPMs which could include standards, guidelines, goals and protocols. The Intergovernmental Agreement on the Environment requires that the NEPMs are implemented by separate legislation in each jurisdiction in Australia to guarantee effective implementation. The *National Environment Protection Council Act 1994* established the NEPC.

The major features of the Bill include provisions for the implementation of NEPMs:

- i) in Commonwealth places by extending the application of certain applied State Laws to Commonwealth activities; or
- ii) by extending the application of certain State and Territory laws to Commonwealth activities; or
- iii) by the making of appropriate regulations; or
- iv) by environmental audits and environment management plans; or
- v) by another law of the Commonwealth that the Environment Minister is satisfied will achieve appropriate environmental outcomes in relation to implementation of the NEPM.

FINANCIAL IMPACT STATEMENT

The management of the Commonwealth's compliance with NEPMs may entail costs in the first few years of the Act as management systems become established. The Government has decided that these costs should be managed by Departments within their budgetary allocations.

It is possible that early costs incurred will in time be off-set by the general thrust of the NEPC legislation, and the Commonwealth's interest in particular, to achieve more harmony and uniformity in environmental outcomes across Australia.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

CLAUSE 1 - SHORT TITLE

1. This clause provides that the short title of the Bill, when enacted, shall be the *National Environment Protection Measures (Implementation) Act 1998*.

CLAUSE 2 - COMMENCEMENT

2. This clause provides that the Bill will come into effect on the date it receives the Royal Assent.

CLAUSE 3 - OBJECT OF ACT

3. This clause sets out the object of the Bill namely to make provision for the implementation of national environment protection measures in respect of certain activities carried on by or on behalf of the Commonwealth and Commonwealth authorities.

CLAUSE 4 - SIMPLIFIED OUTLINE OF ACT

4. The clause provides a simplified outline of the operation of the Bill:

State and Territory laws implementing NEPMs do not apply to the activities of the Commonwealth or Commonwealth authorities, either of their own force or because of the *Commonwealth Places (Application of Laws) Act 1970* (see clause 9).

Under this Bill, the Environment Minister may, in consultation with the relevant Minister(s):

- apply those State laws to the activities of the Commonwealth or Commonwealth authorities in Commonwealth places (Part 2); or
- apply those State or Territory laws to the activities of the Commonwealth or Commonwealth authorities in other places (Part 3); or

If NEPMs are not implemented in relation to the activities of the Commonwealth or Commonwealth authorities under Part 2 or Part 3, they can be implemented

- by regulations (Part 4). Part 4 may be used where a State decides not to implement a NEPM or where a State is not adequately implementing a NEPM. Part 4 could also be used where no

declaration has been made under Parts 2 or 3 and no existing mechanism exists whereby a Commonwealth agency can implement a NEPM; or

- if there are no regulations under Part 4, through environmental audits and environmental management plans (Part 5).
The implementation of NEPMs in relation to the activities of the Commonwealth or Commonwealth authorities may be restricted by the Environment Minister in the national interest.

The Environment Minister has a discretion, in consultation with the relevant Minister(s), as to which Part of the Bill will apply to a particular Commonwealth place or activity.

These places or activities will benefit from being regulated under another law of the Commonwealth which will achieve appropriate environmental outcomes. Such outcomes will be at least equivalent to State and Territory law. The definition of 'matter of national interest' is provided under clause 5.

It is intended that Parts 4 and 5 will be used to implement NEPMs only after the Environment Minister, in consultation with the relevant Minister(s), considers that it is not 'necessary' and/or 'desirable' to make declarations to apply State and Territory law under Parts 2 or 3.

In considering whether the application of provisions of State and Territory law to Commonwealth activities under Parts 2 or 3 is 'desirable', regard will be had to whether:

- (1) (i) the activities would benefit from being regulated under a law of the Commonwealth which will achieve appropriate environmental outcomes ie at least the equivalent requirements of State legislation; and
(ii) the activities would be hindered significantly by differing State and Territory requirements; or
- (2) there are any practical alternatives.

In the consideration of the existence of such alternatives, regard may be given to whether:

- the application of provisions of State and Territory law represents the most effective and efficient regulation or non-regulatory means for the Commonwealth to comply with the requirements of the NEPM; or

- such application would hinder significantly an activity for which there is no technically and economically feasible alternative or substitute available that is acceptable from the standpoint of environment and health and is suitable for the particular circumstances.

CLAUSE 5 - INTERPRETATION

5. The definitions in this clause are largely self explanatory with the following exceptions:
 - 'activity' means a physical activity that has a direct effect on, or represents a substantial risk of damage to, an aspect of the environment to which a NEPM applies. The decision as to whether or not a risk is 'substantial' for the purpose of this definition will be made by the Environment Minister in consultation with the relevant Minister(s). It does not include the formulation of a policy or the making of a decision either by a Minister or a person to whom the power has been delegated to make the decision.
 - 'make a decision' includes: make, suspend, revoke or make an order, award or determination; give, suspend, revoke or refuse to give a certificate, direction, approval, consent or permission; issue, suspend, revoke or refuse to issue a licence, authority or other instrument; impose a condition or restriction; make a declaration, demand or requirement; retain, or refuse to deliver up, an article; and do or refuse to do anything else.
 - 'matter of national interest' means:
 - (a) a matter concerning:
 - (i) Australia's relations with another country or Australia's international obligations; or
 - (ii) national security; or
 - (iii) national defence; or
 - (iv) a national emergency; or
 - (b) a matter relating to:
 - (i) a telecommunications activity authorised by Division 2, 3 or 4 of Schedule 3 to the *Telecommunications Act 1997*; or

(ii) the management of aviation airspace or airports, including aircraft emissions, aircraft noise and on-ground airport management, but not including matters specified in subregulation 1.04 (2) of the Airports (Environment Protection) Regulations; or

(c) any other matter agreed between the Commonwealth, the States and the Territories.

- 'premises' includes, in particular, a building, aircraft, vehicle or vessel, any structure and a part of premises.

CLAUSE 6 - EXTENSION TO CERTAIN EXTERNAL TERRITORIES

6. This clause provides that the Act extends to the external Territories other than Norfolk Island.

CLAUSE 7 - ACTIVITIES CARRIED ON BY CONTRACTORS

7. This clause provides that a reference in the Act to the carrying on of an activity by the Commonwealth or a Commonwealth authority includes activities carried on for or on behalf of the Commonwealth or a Commonwealth authority by contractors.

CLAUSE 8 - LAWS MADE BY LOCAL GOVERNING AUTHORITIES

8. This clause provides that for the purposes of this Act, no Act passed by the Legislative Assemblies of the Australian Capital Territory or the Northern Territory shall be considered to be a law made by a local governing authority.

CLAUSE 9 - OPERATION OF STATE AND TERRITORY LAWS IMPLEMENTING NEPMs

9. Under sub-clause (1) a provision of a State law implementing a NEPM that applies in a Commonwealth place in a State because of the operation of the *Commonwealth Places (Application of Laws) Act 1970* does not extend to activities carried on in that place by or on behalf of the Commonwealth or a Commonwealth authority, except to the extent that it so applies under this Bill.

Sub-clause (2) states that a provision of a State or Territory law implementing a NEPM does not extend to activities carried on by or on behalf of the Commonwealth or a Commonwealth authority anywhere other than in a Commonwealth place in a State, except to the extent that it so applies under this Bill.

CLAUSE 10 - OPERATION OF ACT IN RELATION TO COMMONWEALTH OR A COMMONWEALTH AUTHORITY

10. This clause contains a number of sub-clauses providing as follows:

- Sub-clause (1) provides that the Bill binds the Crown in right of the Commonwealth.
- Sub-clause (2) provides that nothing in the Bill renders the Crown in right of the Commonwealth liable to be prosecuted for an offence. Therefore, authorities that have the shield of the Crown in right of the Commonwealth have no criminal liability. Other Commonwealth authorities have the same liability as members of the public.

No provisions in this Bill are intended to change the existing position of individual public servants in relation to the situations whereby they may be liable and prosecuted under the criminal law.

This sub-clause does not extend to Commonwealth business enterprises which are subject to criminal liability under Parts 2, 3 and 4 of the Bill. It is intended that the implementation of NEPMs by Commonwealth business enterprises will come under Parts 2 and 3. However, in any case where this may not be possible, the implementation of NEPMs by Commonwealth business enterprises will come under Part 4.

The prosecution of criminal offences under the Bill is the responsibility of the Commonwealth Director of Public Prosecutions.

- Sub-clauses (3) and (4) provide that if the chief executive of a State or Territory environment department considers that the Commonwealth or a Commonwealth authority or officer or employee of the Commonwealth has contravened an applied provision of an applied State law of the State or an applied provision of the law of the State or Territory law and, after informing the Secretary of the relevant Commonwealth Department or the chief executive officer of the authority, decides that appropriate action has not been taken, the chief executive may report the circumstances in writing to the Environment Secretary of the Commonwealth Environment Department.
- Sub-clause (5) provides that if a report is made under sub-clauses (3) or (4) the Commonwealth Environment Secretary must investigate the circumstances and if he or she thinks it appropriate, prepare draft recommendations for action to be taken by the relevant Department or authority and give written notice of those recommendations to the Secretary of the Department or the chief executive officer of the authority with a request for comments.
- After consideration of the comments, the Environment Secretary must in each case give a written report to the Environment Minister setting out any comments received from the Secretary of the relevant Department or

chief executive officer of the authority and putting forward the action the Environment Secretary recommends should be taken.

Sub-clauses (6) and (7) provide that The Environment Minister may, if he or she administers the relevant Department or is responsible for the relevant authority, take such action he or she thinks fit or make any recommendations to the relevant Minister. That Minister is to provide the Environment Minister with his or her comments on the recommendation and a report on any action that may have been taken.

PART 2 - IMPLEMENTATION OF NEPMs BY EXTENDING THE APPLICATION OF CERTAIN PROVISIONS OF APPLIED STATE LAWS TO COMMONWEALTH ACTIVITIES IN COMMONWEALTH PLACES

CLAUSE 11 - PART DOES NOT APPLY TO CERTAIN NEPMs AFFECTING NATIONAL INTEREST ETC.

11. Sub-clause (1) provides that Part 2 does not apply in relation to an applied State law providing for the implementation of a NEPM that is relevant to the carrying on of a particular activity by the Commonwealth or a Commonwealth authority if there is in force a declaration by the Environment Minister stating:
 - that an alternative Commonwealth regime for the implementation of the NEPM in relation to that activity will achieve appropriate environmental outcomes; and
 - that the application of that alternative Commonwealth regime is more appropriate than taking any action under this Part:
 - because the activity involves a specified matter of national interest; or
 - for reasons of administrative efficiency.

Sub-clause (2) states that the Environment Minister may, by writing, make declarations for the purposes of subsection (1). A copy of a declaration is to be published in the Gazette.

CLAUSE 12 - APPLIED STATE LAWS IMPLEMENTING NEPMs TO APPLY TO COMMONWEALTH AND ITS AUTHORITIES

12. This clause relates to the application of applied State law, that is, law which already applies to Commonwealth places under the *Commonwealth Places (Application of Laws) Act 1970*.
 - Sub-clause (1) provides that if the Environment Minister makes a declaration that a provision of an applied State law that is applicable in a Commonwealth place is necessary for the implementation of a NEPM and there is in force a declaration by the Environment Minister that it is desirable for the provision to apply to the carrying on of an activity by the

Commonwealth or by a particular Commonwealth authority in the Commonwealth place, the provision applies to the carrying on of an activity by the Commonwealth or by a particular Commonwealth authority in the Commonwealth place.

- Sub-clause (2) provides that the Environment Minister may make declarations for the purposes of sub-clause (1) which are to be published in the *Gazette*.
- Sub-clause (3) provides that to ensure that a provision of an applied State law which applies to a Commonwealth activity can operate effectively, regulations may provide that the provision applies subject to modifications. In the preparation of these regulations, the Environment Minister is to ensure that the appropriate State officers are consulted.
- The decision whether a declaration or a regulation is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).
- The clause is subject to clause 13.

CLAUSE 13 - CERTAIN PROVISIONS OF APPLIED STATE LAWS NOT TO APPLY TO COMMONWEALTH AND ITS AUTHORITIES

13. This clause qualifies the application of applied State laws. The clause provides that Clause 12 does not have effect so as to:
- (a) alter the purpose for which land may be used if the land had been used for that purpose at any time before the commencement of this Bill; or
 - (b) require a licence, permit or other authorisation for the construction, alteration or demolition of a building or structure or require installation, alteration or removal of plant or equipment, except where the requirement is made for the purpose of implementing a NEPM; or
 - (c) apply a provision to regulate the making of decisions about the use of land except where such regulation is for the purpose of implementing a NEPM; or
 - (d) require the preparation of an environmental impact statement before commencing or continuing an activity; or
 - (e) provide for the judicial or administrative review, under a State law, of a decision; or
 - (f) require the payment of a fee or charge, although this provision does not affect the operation of Clause 37 which enables the Commonwealth or a Commonwealth authority to pay fees and charges to States and Territories for activities in Commonwealth places and States and Territories.

- Sub-clause (3) provides that regulations may exclude the application of a provision of an applied State law either indefinitely or for a particular period.
- Sub-clause (4) provides that regulations may also exclude any provision of an applied State law from applying in relation to a particular Commonwealth activity or activities in all Commonwealth places, a particular Commonwealth place or a particular part of a Commonwealth place in the State either indefinitely or for a particular period.
- Sub-clause (5) provides that regulations may only be made under this clause if the Environment Minister is satisfied that they are desirable because of considerations relating to a matter of national interest.
- The decision whether a regulation is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).

CLAUSE 14 - FUNCTIONS AND POWERS OF AUTHORITIES OR OFFICERS UNDER APPLIED PROVISIONS OF APPLIED STATE LAWS

14. This clause provides that if a provision of an applied State law confers functions or powers on an authority or officer of the State, the authority or officer shall have corresponding functions or powers under the provision as applied under clause 12 (subject to clause 13). These functions or powers must be exercised as closely as practicable to how the authority or officer would act under the corresponding provision of the applied State law.

Sub-clause (3) provides that the State laws relating to the investigation of offences against an applied State law apply so far as they are applicable to the relevant investigation undertaken by an authority or officer of the State under sub-clause (1) of offences against the applied law. Therefore, the State laws about the investigation of offences against an applied State law apply to the exclusion of Commonwealth laws which would have otherwise applied to the investigation of an offence against a Commonwealth law.

Sub-clause (4) provides that, to avoid doubt, subclause (3) does not affect the operation of any of the following laws in relation to offences against an applied State law:

- (a) *the Director of Public Prosecutions Act 1983*;
- (b) section 21B of the *Crimes Act 1914* ;
- (c) Part 1 B of the *Crimes Act 1914*; and
- (d) *the Proceeds of Crime Act 1987*.

CLAUSE 15 - APPLIED PROVISIONS OF APPLIED STATE LAWS TO BE INTERPRETED BY REFERENCE TO THE RELEVANT STATE INTERPRETATION STATUTE.

15. This clause provides that if a provision of an applied State law is applied as mentioned in clause 12, any provisions of the applied State laws about

interpretation of the provision have effect for the purposes of that provision as it is applied. The *Acts Interpretation Act 1901* does not therefore apply in relation to the applied provision.

Part 3 - IMPLEMENTATION OF NEPMs BY EXTENDING THE APPLICATION OF CERTAIN PROVISIONS OF STATE OR TERRITORY LAWS TO COMMONWEALTH ACTIVITIES

CLAUSE 16 - PART DOES NOT APPLY TO CERTAIN NEPMs AFFECTING NATIONAL INTEREST ETC

- 16 Sub-clause (1) provides that Part 3 does not apply in relation to a State or Territory law providing for the implementation of a NEPM that is relevant to the carrying on of a particular activity by the Commonwealth or a Commonwealth authority if there is in force a declaration by the Environment Minister stating:
- that an alternative Commonwealth regime for the implementation of the NEPM in relation to that activity will achieve appropriate environmental outcomes; and
 - that the application of that alternative Commonwealth regime is more appropriate than taking any action under this Part either:
 - because the activity involves a specified matter of national interest; or
 - for reasons of administrative efficiency.

Sub-clause (2) states that the Environment Minister may, by writing, make declarations for the purposes of subsection (1). A copy of a declaration is to be published in the Gazette.

CLAUSE 17 - STATE OR TERRITORY LAWS IMPLEMENTING NEPMs TO APPLY TO COMMONWEALTH AND ITS AUTHORITIES

17. This clause relates to the implementation of NEPMs by the application of provisions of State laws which do not already apply through the operation of the *Commonwealth Places (Application of Laws) Act 1970*, and by the application of provisions of Territory laws to Commonwealth activities.
- Sub-clause (1) provides that if the Environment Minister makes a declaration that a provision of a State or Territory law is necessary for the implementation of a NEPM and there is in force a declaration by the Environment Minister that it is desirable for the provision to apply to the carrying on of an activity by the Commonwealth or by a Commonwealth authority, then the provision applies to the carrying on of the activity by the Commonwealth or the authority in the State or Territory or in the coastal waters of the State or Territory.

- If the provision is in force in an external Territory to which the Act applies, the provision will apply to the carrying on of the activity by the Commonwealth or the Commonwealth authority in the external Territory and its coastal waters.
- Sub-clause (2) provides that the Environment Minister may, by writing, make declarations for the purposes of the clause which are to be published in the *Gazette*.
- To ensure that a provision of a State or Territory law which applies to a Commonwealth activity can operate effectively, Sub-clause (3) provides that regulations may provide that the provision applies subject to modifications. Under Sub-clause (4), the Environment Minister is to ensure that the appropriate State or Territory officers are consulted in the preparation of regulations.
- The decision whether a declaration or a regulation is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).
- This clause is subject to clause 18.

CLAUSE 18 - CERTAIN PROVISIONS OF STATE OR TERRITORY LAWS NOT TO APPLY TO COMMONWEALTH AND ITS AUTHORITIES

18. This clause qualifies the application of State or Territory laws. The clause provides that clause 17 does not have effect so as to:
- (a) alter the purpose for which land may be used if the land had been used for that purpose at any time before the commencement of this Bill; or
 - (b) require a licence, permit or other authorisation for the construction, alteration or demolition of a building or structure or require installation, alteration or removal of plant or equipment, except where the requirement is made for the purpose of implementing a NEPM; or
 - (c) apply a provision to regulate the making of decisions about the use of land except where such regulation is for the purpose of implementing a NEPM; or
 - (d) require the preparation of an environmental impact statement before commencing or continuing an activity; or
 - (e) confer any judicial power; or
 - (f) provide for the judicial or administrative review, under a State law, of a decision; or
 - (g) impose a tax; or

(h) require the payment of a fee or charge, although this provision does not affect the operation of Clause 37 which enables the Commonwealth or a Commonwealth authority to pay fees and charges to States and Territories for activities in Commonwealth places and States and Territories.

- Sub-clause (3) provides that regulations may exclude the application of a provision of a State or Territory law either indefinitely or for a particular period.
- Sub-clause (4) provides that regulations may also exclude any provision of a State or Territory law from applying in relation to a particular Commonwealth activity in all Commonwealth places or a particular Commonwealth place in the State or Territory either indefinitely or for a particular period.
- Sub-clause (5) provides that Regulations may only be made under this clause if the Environment Minister is satisfied they are desirable because of considerations relating to a matter of national interest.
- The decision whether a declaration or a regulation is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).

CLAUSE 19 - FUNCTIONS AND POWERS OF AUTHORITIES OR OFFICERS UNDER APPLIED PROVISIONS OF STATE OR TERRITORY LAWS

19. Sub-clause (1) provides that if a provision of a State or Territory law confers functions or powers on an authority or officer of the State or Territory, the authority or officer shall have corresponding functions or powers under the provision as applied under clause 17 (subject to clause 18). Under sub-clause (2) these functions or powers must be exercised as closely as practicable to how the authority or officer would act under the corresponding provision of the State or Territory law.

Sub-clause (3) provides that the State or Territory laws relating to the investigation of offences against an applied State law apply so far as they are applicable to the relevant investigation undertaken by an authority or officer of the State or Territory under sub-clause (1) of offences against the applied law. Therefore, the State or Territory laws about the investigation of offences against an applied State or Territory law apply to the exclusion of Commonwealth laws which would have otherwise applied to the investigation of an offence against a Commonwealth law.

Sub-clause (4) provides that, to avoid doubt, sub-clause (3) does not affect the operation of any of the following laws in relation to offences against an applied State or Territory law:

- (a) *the Director of Public Prosecutions Act 1983;*
- (b) *section 21B of the Crimes Act 1914 ;*
- (c) *Part 1 B of the Crimes Act 1914; and*
- (d) *the Proceeds of Crime Act 1987.*

CLAUSE 20 - APPLIED PROVISIONS OF STATE OR TERRITORY LAWS TO BE INTERPRETED BY REFERENCE TO THE RELEVANT STATE OR TERRITORY INTERPRETATION STATUTE

20. This clause provides that if a provision of a State or Territory law is applied as mentioned in clause 17, any provisions of the State or Territory laws about interpretation of the provision have effect for the purposes of that provision as it is applied. The *Acts Interpretation Act 1901* does not therefore apply in relation to the applied provision.

PART 4 - IMPLEMENTATION OF NEPMs BY THE MAKING OF APPROPRIATE REGULATIONS

CLAUSE 21 - NEPMs MAY BE IMPLEMENTED BY REGULATIONS

21. Sub- clause (1) provides that this Part applies for the purposes of the implementation of a NEPM in relation to an activity carried on by the Commonwealth or a Commonwealth authority if the Environment Minister is satisfied that:
- a NEPM is relevant to the carrying on of the activities of the Commonwealth or a Commonwealth authority; and
 - the activities are carried on in:
 - (i) a Commonwealth place in which, in the Environment Minister's opinion, the NEPM is not being implemented, or satisfactorily implemented under an applied State law of the State in which the Commonwealth place is situated;
 - (ii) a State or Territory, or the coastal waters of a State or Territory, in which, in the Environment Minister's opinion, the NEPM is not being implemented, or satisfactorily implemented under a law of the State or Territory;
 - (iii) a Commonwealth place in a State, where a provision of a law of the State for the implementation of the NEPM is not, and is not to be, applied under Part 2 in relation to the carrying on of the activity;
 - (iv) a State or Territory, or the coastal waters of a State or Territory where a provision of a law of the State or Territory for the implementation of the NEPM is not, and is not to be applied under Part 3 in relation to the carrying on of the activity;
 - (v) an external Territory to which this Act extends or its coastal waters;

- (vi) a part of the territorial sea of Australia that is not part of the coastal waters of a State or Territory;
 - (vii) a part of the exclusive economic zone;
 - (viii) a part of any area of the continental shelf of Australia that is beyond the limits of the exclusive economic zone; and
- the NEPM is not, and is not to be, implemented by another law of the Commonwealth in a way that the Environment Minister is satisfied will achieve appropriate environmental outcomes.
- Sub-clause (2) provides that Part 4 does not apply for the purposes of the implementation of a NEPM in relation to an activity if the activity is excluded, under the regulations, from the application of this Part for the purposes of the implementation of the NEPM.
 - Sub-clause (3) provides that regulations made for the purposes of sub-clause (2) may exclude an activity for the purposes of the application of a NEPM indefinitely or for a particular period and either wherever the activity is carried on or in a particular place where the activity is carried on.
 - Sub-clause (4) provides that regulations may only be made for the purposes of sub-clause (2) if the Environment Minister is satisfied that it is desirable to make the regulations because of considerations relating to a matter of national interest. The decision whether a regulation is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).
 - Sub-clause (5) provides that the regulations may make provision for or in relation to the implementation of a NEPM in respect of the carrying on of an activity by the Commonwealth or a Commonwealth authority including provision for penalties for offences against the regulations.
 - Sub-clause (6) provides that the penalty for a contravention of the regulations must not exceed (except in the circumstances mentioned in sub-clause (9)):
- (a) if the contravention causes or is likely to cause, whether directly or indirectly, harm to the environment (irrespective of the duration of the harm):
 - (i) in respect of a contravention by an individual - 2,000 penalty units; or
 - (ii) in respect of a contravention by a corporation - 10,000 penalty units; or
 - (b) otherwise:
 - (i) in respect of a contravention by an individual- 500 penalty units; or
 - (ii) in respect of a contravention by a corporation - 2,500 penalty units.

These maximum penalties were decided on for the following reasons:

The legislative framework being established for the implementation of NEPMs is unprecedented in Australia and is needed for the development of a wide range of NEPMs. Section 14(1) of the *National Environment Protection Council Act 1994* includes mention of NEPMs relating to ambient air and ambient marine, estuarine and fresh water quality, the protection of amenity in relation to noise, the movement of hazardous wastes across State and Territory boundaries and general guidelines for the assessment of site contamination. The potential breadth of the application of NEPMs and the potential degree of environmental harm which may result in the failure to implement a NEPM necessitate the prescribed maxima.

Because these penalties apply to government business enterprises they ensure that, as part of national competition policy, a 'level playing field' exists between such enterprises and those owned by the private sector. The penalties are in line with those penalties which exist under State environmental legislation to which privately owned enterprises are currently subject.

The maximum amounts prescribed by the penalties are based on those contained in the Commonwealth's hazardous waste legislation ie the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* and the *Hazardous Waste (Regulation of Exports and Imports) Amendment Act 1996*. A NEPM for the movement of hazardous wastes across State and Territory boundaries has now been made by the National Environment Protection Council. The limited accessibility of the subordinate legislation will not handicap those who will be bound by the offences to be prescribed in the regulations. Firstly, the regulations to implement a NEPM will be developed in conjunction with those Commonwealth departments and agencies which will be so affected. Such consultation mechanisms will ensure appropriate awareness of the offences and penalties. Secondly, Environment Australia has set aside funds for a communication strategy within the Commonwealth on the Bill and NEPMs.

- Sub-clause (7) provides that if harm to the environment is caused, or is likely to be caused, by a combination of a contravention of the regulations and any other factor or factors, the harm is taken for the purposes of sub-clause 6(a) to be caused, or is likely to be caused, as the case may be, by the contravention.
- Sub-clause (8) provides that the provision for the implementation of a NEPM that may be made under sub-clause (5) in respect of an activity may include the application, with or without modifications, of provisions of a law of any State or Territory which are in force either at a particular time or from time to time, even if the activity is not carried on in that State or Territory.

This sub-clause can be used, for example, when an activity entails trans-boundary movement which, but for the sub-clause, would necessitate the application of provisions of a law of two or more States and/or Territories.

- Sub-clause (9) provides that the provisions of a law of a State or Territory that may be applied by regulations under sub-clause (8) may include provisions of that law imposing penalties for offences against those provisions so applied. However, any modifications of those provisions made by the regulations must not increase those penalties.

Part 5 - IMPLEMENTATION OF NEPMs BY ENVIRONMENTAL AUDITS AND ENVIRONMENT MANAGEMENT PLANS

DIVISION 1 - PRELIMINARY

CLAUSE 22 - MEANING OF ENVIRONMENTAL AUDITOR

22. This clause provides that, in this Part, 'environmental auditor' has the meaning given by clause 25.

CLAUSE 23 - ACTIVITIES IN RELATION TO WHICH THIS PART APPLIES

23. Sub-clause (1) provides that subject to this clause, Divisions 2 and 3 of this Part apply for the purposes of the implementation of a NEPM in relation to an activity carried on by the Commonwealth or a Commonwealth authority if the Environment Minister is satisfied that:

- the NEPM is relevant to the carrying on of the activity : and
- the activity is carried on in:
 - (i) a Commonwealth place in which, in the Environment Minister's opinion, the NEPM is not being implemented, or satisfactorily implemented under an applied State law of the State in which the Commonwealth place is situated;
 - (ii) a State or Territory, or the coastal waters of a State or Territory, in which, in the Environment Minister's opinion, the NEPM is not being implemented, or satisfactorily implemented under a law of the State or Territory;
 - (iii) a Commonwealth place in a State, where a provision of a law of the State for the implementation of the NEPM that applies in the Commonwealth place under the *Commonwealth Places (Application of Laws) Act 1970* is not, and is not to be, applied under Part 2 in relation to the carrying on of the activity;

- (iv) a State or Territory, or the coastal waters of a State or Territory where a provision of a law of the State or Territory for the implementation of the NEPM is not, and is not to be applied under Part 3 in relation to the carrying on of the activity;
 - (v) an external Territory to which this Act extends or its coastal waters;
 - (vi) a part of the territorial sea of Australia that is not part of the coastal waters of a State or Territory;
 - (vii) a part of the exclusive economic zone;
 - (viii) a part of any area of the continental shelf of Australia that is beyond the limits of the exclusive economic zone; and
- the NEPM is not, and is not to be, implemented by regulations under Part 4 or by another law of the Commonwealth in a way that the Environment Minister is satisfied will achieve appropriate environmental outcomes.
- Sub-clause (2) provides that Divisions 2 or 3, or a provision of Division 2 or 3, does not apply for the purposes of the implementation of a NEPM in relation to an activity if the activity is excluded, under the regulations, from the application of the Division or provision, as the case may be, for the purposes of the implementation of the NEPM.
 - Sub-clause (3) provides that regulations made for the purposes of sub-clause (2) may exclude an activity for the purposes of the implementation of a NEPM indefinitely or for a particular period and either wherever the activity is carried on or in a particular place where the activity is carried on.
 - Sub-clause (4) provides that regulations may only be made for the purposes of sub-clause (2) if the Environment Minister is satisfied that it is desirable to make the regulations because of considerations relating to a matter of national interest. The decision whether a regulation is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).
 - Under sub-clause (5) if all or any of the provisions of Divisions 2 and 3 apply for the purposes of the implementation of a NEPM in relation to an activity carried on by the Commonwealth or a Commonwealth authority, the Environment Minister must notify the relevant Minister accordingly.
 - Sub-clause (6) states that if the relevant Minister is so notified, those provisions (other than those that afterwards cease to apply because of regulations made for the purposes of sub-clause (2) after the notification) have effect for the purposes of the implementation of the NEPM in relation to the activity.

DIVISION 2 - ENVIRONMENTAL AUDITS

CLAUSE 24 - RELEVANT MINISTER TO ARRANGE FOR CARRYING OUT OF ENVIRONMENTAL AUDIT

24. This clause provides that if the Environment Minister informs the relevant Minister that this Division applies, the relevant Minister must arrange for an environmental audit to be conducted for the purpose of the implementation of the NEPM with respect to the activities.

CLAUSE 25 - ENVIRONMENTAL AUDITOR NOT TO BE OFFICER OR EMPLOYEE OF THE RELEVANT MINISTER'S DEPARTMENT OR TO BE EMPLOYED BY THE RELEVANT COMMONWEALTH AUTHORITY

25. This clause provides that the environmental auditor is not to be an officer or employee of the relevant Minister's Department or to be employed by the relevant Commonwealth authority.

CLAUSE 26 - NATURE OF ENVIRONMENTAL AUDIT

26. This clause provides that the environmental audit is to consist of an evaluation of the nature of the environment that will be affected by the activities and an assessment of the resulting risks to the environment from the activities, the existing capacity of the Commonwealth or Commonwealth authority to comply with the NEPM and what the Commonwealth or Commonwealth authority will need to do in order to comply.
- The environmental auditor may take into consideration a previous audit if it was related to the implementation of an NEPM, if it was completed within the preceding two years and if the environmental auditor is satisfied it is still relevant.
 - If, in the course of carrying out an audit, the environmental auditor conceals or fails to take into account any information or document, he or she will be guilty of an offence punishable on conviction by imprisonment for not more than 6 months.

CLAUSE 27 - REPORT BY ENVIRONMENTAL AUDITOR

27. This clause provides that on completion of the environmental audit, a written report setting out the results of the audit and the auditor's qualifications and experience must be prepared by the environmental auditor and sent to the relevant Minister and Environment Minister. The clause prescribes a penalty for the inclusion of false or misleading statements in a report by an environmental auditor.

CLAUSE 28- REPORT OF ENVIRONMENTAL AUDIT NOT ADMISSIBLE IN LEGAL PROCEEDINGS AGAINST THE COMMONWEALTH OR THE RELEVANT COMMONWEALTH AUTHORITY

28. This clause provides that the report and any information obtained as a direct or indirect result of the making of the report are not admissible in evidence in court proceedings against the Commonwealth or Commonwealth authority if the audit relates to activities carried on or to be carried on by the Commonwealth or Commonwealth authority.

DIVISION 3 - ENVIRONMENT MANAGEMENT PLANS

CLAUSE 29 - ENVIRONMENT MANAGEMENT PLAN

29. This clause provides that, after receiving the report of the environmental auditor, the relevant Minister must arrange for the Department or Commonwealth authority in question, to prepare an environment management plan with respect to the activities relevant to the NEPM. An officer of that Department or person employed by that authority must be appointed as the environment manager for the purposes of the environment management plan.

CLAUSE 30 - MATTERS TO BE DEALT WITH IN ENVIRONMENT MANAGEMENT PLAN

30. This clause sets out the matters which must be included in an environment management plan. These include the objectives of the plan, the activities to which the plan relates, appropriate performance indicators at designated intervals, how the NEPM is to be implemented and a timetable for implementation, how the activities will be carried out so as to give effect to the NEPM; an appropriate provision for the participation of, and consultation with, the community in the development of the plan, provision for monitoring and reporting on the plan's implementation and provision for action to be taken in a contingency or emergency.

CLAUSE 31 - DUTIES OF ENVIRONMENT MANAGER

31. This clause sets out the duties of the environment manager in relation to an environment management plan. These include the preparation of a preliminary plan and a final plan, copies of which are to be sent to the relevant Minister and the Environment Minister, and ensuring, to the maximum extent practicable, that the plan is not contravened.
- Unless the regulations provide otherwise, the plan is to be made available for public inspection and purchase. Regulations may only be made for this purpose if the Environment Minister is satisfied that it is desirable to make the regulations because of considerations relating to a matter of

national interest. The decision whether a regulation is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).

- If a further NEPM comes into force or more than three years has elapsed since a final environment management plan has been prepared or last revised, it is the duty of the environment manager to cause the environment management plan to be further revised through the same procedure prescribed by this clause for the original plan.

PART 6 - ENSURING IMPLEMENTATION OF NEPMs UNDER PARTS 4 AND 5.

CLAUSE 32 - RELEVANT MINISTER RESPONSIBLE FOR ADEQUATE IMPLEMENTATION OF A NEPM IN RESPECT OF AN ACTIVITY TO WHICH PART 4 OR 5 APPLIES

32. This clause applies to Commonwealth activities in respect of which either a regulation made for the purposes of Part 4 applies or an environment management plan prepared under Part 5 applies for the purpose of implementing an NEPM.
 - Sub-clause (2) provides that the relevant Minister must do everything necessary to ensure that the NEPM is adequately implemented in respect of the activities.
 - If the Environment Minister is not the relevant Minister and he or she forms the opinion that the NEPM is not being adequately implemented in respect of the activities, the relevant Minister may be requested to give the Environment Minister a written report setting out the reasons for the inadequate implementation, the action the relevant Minister intends to take and the period the relevant Minister thinks necessary for taking the action.
If, after a reasonable time, the Environment Minister is still satisfied that the NEPM has not been adequately implemented he or she may make a written declaration to that effect. The declaration is to be published in the *Gazette* .

PART 7 - ADMINISTRATIVE AND JUDICIAL REVIEW

CLAUSE 33 - REVIEW OF DECISIONS BY ADMINISTRATIVE APPEALS TRIBUNAL

33. Sub-clause (1) provides that application may be made to the Administrative Appeals Tribunal for review of any reviewable decision made under an applied provision of an applied State law, an applied provision of a State or Territory law, a regulation made under Part 4 or

made under Part 5. The clause allows the extent of what is a reviewable decision in relation to those provisions to be determined by regulations.

- **Reviewable decision**, in relation to an applied provision or regulation referred to in sub-clause (1) or a provision of Part 5, means:
 - (a) if the regulations provide that any decision made under the provision is a reviewable decision - any decision made under the provision; or
 - (b) if the regulations provide that a decision of a kind described in the regulations that is made under the provision is a reviewable decision - any decision of that kind made under the provision.
- This clause has effect subject to the *Administrative Appeals Tribunal Act 1975*.

CLAUSE 34- CIVIL JURISDICTION OF FEDERAL COURT

- 34 Jurisdiction is conferred on the Federal Court of Australia with respect to all civil matters which arise under an applied provision of an applied State law, an applied provision of a State or Territory law, a regulation made under Part 4 or made under Part 5. The Federal Court's jurisdiction is subject to the Constitution and the *Jurisdiction of Courts (Cross Vesting) Act 1987*, exclusive of the jurisdiction of any other court.

PART 8 - MISCELLANEOUS

CLAUSE 35 - PERSON ENTERING OR SEARCHING PREMISES OCCUPIED BY COMMONWEALTH OR COMMONWEALTH AUTHORITY NOT TO DISCLOSE INFORMATION OBTAINED FROM ENTRY OR SEARCH

35. This clause provides that a person entering or searching premises occupied by the Commonwealth or a Commonwealth authority under a power she or he has because of clauses 12, 17 or regulations made under clause 21 must not disclose any information obtained during her or his presence on the premises. This does not apply to a disclosure made in the performance of duties.
- A penalty is stipulated for an infringement of this provision.
 - Sub-clause (3) provides that a court, which includes a tribunal, an authority or person having power to require the production of documents or the answering of questions, cannot require a person entering or searching premises under clauses 12, 17 or 21 to disclose any document or any information in his or her possession or control as a result of entering or searching the premises except for the purposes of an applied provision of a law of a State or Territory or a provision of the regulations.

CLAUSE 36 - RESTRICTION OF ENTRY INTO OR SEARCH OF EXEMPT PREMISES.

36. This clause provides that regulations may declare premises to be *exempt premises* for the purposes of this clause in relation to premises if the Environment Minister is satisfied that, because of a matter of national interest, it is desirable that entry into, or search of, the premises should be restricted or prohibited. The Environment Minister may, by order, restrict or prohibit powers of entry into and search of the premises under Parts 2, 3 and 4 with regard to those exempt premises referred to in the order. An order of the Minister under this clause is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901*. A penalty is prescribed for persons who contravene such an order.
- The decision whether a regulation or an order is to be made under this clause will be made by the Environment Minister in consultation with the relevant Minister(s).

CLAUSE 37 - COMMONWEALTH OR COMMONWEALTH AUTHORITY MAY PAY CERTAIN FEES AND CHARGES

37. This clause enables the Commonwealth or a Commonwealth authority to pay a fee or charge to a State or Territory or a State or Territory authority which, if it were not for the qualification provided by clauses 13(1)(f) and 18(1)(h), would have been payable by the Commonwealth or the Commonwealth authority in respect of a licence, a permit or other authorisation relating to an activity carried on, or to be carried on, by the Commonwealth or the authority in the State or Territory or in its coastal waters.

CLAUSE 38 - ARRANGEMENTS WITH STATES AND TERRITORIES

38. Sub-clause (1) enables the Environment Minister to make an arrangement with an appropriate Minister of a State or a Territory in relation to the exercise of a power, or the performance of a duty or function by a State or Territory, a State or Territory authority or by one of their officers.
- Sub-clause (2) provides that if an arrangement is in force under sub-clause (1), the power, duty or function may be, or is to be, as the case may be, exercised or performed by the officer or authority accordingly.
 - Sub-clause (3) enables the Environment Minister to make an arrangement, including a financial arrangement, with an appropriate Minister of a State or a Territory with respect to any matter necessary or convenient for giving effect to this Act.
 - Sub-clause (4) provides that, without limiting the generality of subsections (1), (2), and (3), an arrangement may contain any supplementary or incidental provisions that the Environment Minister and the Minister of the State or Territory think necessary.

- When such an arrangement is in force, sub-clause (5) provides the Environment Minister may arrange with the Minister of a State or a Territory for the variation or revocation of the arrangement.

CLAUSE 39 - ANNUAL REPORTS

39. This clause requires the preparation of an annual report in the year ending on 30 June 1998 or in a later year ending on 30 June by the Minister who administers the Department or Commonwealth authority responsible for the activity to which a NEPM applies. The Minister must give the annual report by the end of July each year to the Environment Minister who must then lay a report as to the implementation of NEPMs by the Commonwealth or Commonwealth authorities before each House of Parliament.

CLAUSE 40 - APPLICATION OF THE *CRIMINAL CODE*

40. This clause provides that Chapter 2 of the *Criminal Code* applies to all offences referred to in sub-clause 21(5) and all offences against Parts 5 and 8.

CLAUSE 41 - REGULATIONS

41. This clause provides that the Governor-General may make regulations prescribing matters required or permitted by this Bill to be prescribed, or necessary or convenient for carrying out or giving effect to this Bill.