



1996

WESTERN AUSTRALIA
LEGISLATIVE ASSEMBLY

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS**

**REVIEW OF THE
*NATIONAL ENVIRONMENT PROTECTION
COUNCIL (WESTERN AUSTRALIA)*
*BILL 1996.***

Fifteenth Report
In the Thirty-Fourth Parliament

Presented by:
Hon. P. G. Pandal, MLA
Laid on the Table of the Legislative Assembly
on the 24 October 1996

ORDERED TO BE PRINTED

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TERMS OF REFERENCE

On Wednesday 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference:

1. to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth;
2. when considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister;
3. the Committee shall consider and, if the Committee considers a report is required, report on any matter within three months; but if it is unable to report in three months, it shall report its reasons to the Assembly;
4. each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament;
5. no member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown;
6. when a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly;
7. the Committee has power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters;
8. if the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report; and
9. in respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

CHAIRMAN'S FOREWORD

This Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements reviews the *National Environment Protection Council (Western Australia) Bill 1996*.

The Report inquires into the contents of the Bill and Western Australia's compliance with, and the nature, of the Intergovernmental Agreement on the Environment.

The Report indicates the Intergovernmental Agreement on the Environment is not legally enforceable. That is, Western Australia is not legally bound by the terms of the Agreement. However the Intergovernmental Agreement presupposes that all jurisdictions will embrace the spirit of the Agreement.

The Report acknowledges that regulation of the environment is inherently difficult and it is even more challenging in a federal system such as ours. The Intergovernmental Agreement anticipates the difficulty of achieving consensus decision making and instead provides for the adopting of National Environmental Protection Measures (NEPMs) by a two thirds majority. The clear intent of the Intergovernmental Agreement is that once adopted such NEPM's will be binding on all parties. The mechanism for binding parties is the enabling legislation which incorporates the NEPMs into State and Territory law.

The Report concludes that the Western Australian Bill makes no provision for the automatic adoption of the NEPMs in State Law. The responsibility for adopting the NEPMs is vested in the Minister and thus the Executive. The Committee views this with deep concern.

The Report recommends that section 7 of the Bill be amended to clearly indicate how NEPMs will be incorporated into State law. It also recommends that the Bill provide that all NEPMs adopted by the National Environment Protection Council be tabled before both Houses of Parliament for 21 days and that all NEPMs be incorporated as State Environmental Protection Policies as administered under the Western Australian Act unless disallowed by either House of Parliament.

I am especially grateful for the input into this report to consultants Dr Gary Meyers, Associate Professor of Law and Mr Geoff Leane, Lecturer in Law and Ms Sonia Potter, Research Associate from Murdoch University, whose advice has meant the delivery to Parliament of an excellent report. I am also grateful for the work of our Clerk, Mr Keith Kendrick, and our Legal/Research Officer, Ms Melina Newnan who continue to serve the Committee in a most professional and highly enthusiastic manner.

I commend the Report to all Members.

HON. PHILLIP PENDAL, MLA
CHAIRMAN

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CHAPTER ONE

1. INTRODUCTION

Against the background of the Terms of Reference of the Committee to examine and report to the Legislative Assembly on uniform legislation and intergovernmental agreements, this Report examines the *National Environment Protection Council (Western Australian) Bill 1996* introduced into the Legislative Council on 1 May 1996 and passed on 28 August 1996. The Bill was then introduced into the Legislative Assembly on 28 August 1996. The following terms of reference were detailed:

- to inquire into the nature of, and the State's compliance with, the Intergovernmental Agreement on the Environment (IGAE) into which Western Australia has entered;
- to determine how the IGAE compares with the structure already identified by the Committee in its No. 2 and subsequent reports; and
- to inquire into the implications for parliamentary scrutiny, now and in the future, of signing the IGAE and enacting the *National Environment Protection Council (Western Australian) Bill 1996*.

CHAPTER TWO

2. INTERGOVERNMENTAL AGREEMENTS

2.1 General Overview: Intergovernmental Cooperation

Since the World Commission on Environment and Development released its report *Our Common Future*¹ (the so-called Brundtland Report), Australia has undertaken extensive national programmes of consultation and planning to endeavour to meet the challenge of sustainable development.² Along with many other countries Australia has been struggling to maintain development of its primarily natural resource-based economy while at the same time striving to implement laws for the protection of the environment.³ A particular feature of Australia's efforts has been the development of the role of the Commonwealth government in environmental protection and the consequent conflicts with State governments which have traditionally exercised constitutional authority over management of natural resources and the environment.

Despite this traditional distribution of authority, the Commonwealth has always been able to legislate to achieve absolute consistency in regard to environmental matters where it has constitutional power to legislate in a given area, for example, external affairs.⁴ In those cases, Section 109 of the Australian Constitution provides that inconsistent State or Territory legislation is inoperative while validly enacted Commonwealth legislation is operative.⁵

This form of over-riding legislation is the simplest method of ensuring consistency.⁶ However, such Commonwealth legislation does not require the cooperation of other jurisdictions. Neither does it require any action of those other jurisdictions and can not therefore be characterised as a mechanism of intergovernmental cooperation. Commonwealth legislation may, however, implement intergovernmental cooperation even where the power to legislate is not specified in the Australian Constitution. In some cases, the Commonwealth may be referred the necessary power to make overriding legislation in a given area.⁷

¹ World Commission on Environment and Development, *Our Common Future*, Oxford University Press, 1987.

² Gardner, A. Federal Intergovernmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada. *Environmental and Planning Law Journal*, Vol. 11, No. 2, April 1990, p. 104

³ Ibid.

⁴ Section 51(xxix) of the *Constitution of the Commonwealth of Australia*: External Affairs, enables the Commonwealth to enter international treaties and conventions.

⁵ Section 109 of the *Constitution of the Commonwealth of Australia*: ...(w)hen a law is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former, to the extent of the inconsistency, will be invalid.

⁶ Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Structures: A consideration of the different structures available for uniformity in legislation*, Second Report, 1994, p. 2.

⁷ Section 51 of the *Constitution of the Commonwealth of Australia* states "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to : (xxxvii) Matters referred to the Parliament of the commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law".

The Commonwealth lacks any specific constitutional authority to legislate in relation to environmental affairs. As noted, however, a series of High Court decisions has conferred on the Commonwealth a constitutional authority in respect of the environment far wider than earlier readings of the Australian Constitution might have suggested. These new found powers, not only in specified areas such as external affairs, but also indirectly wielded in respect of other Commonwealth heads of power such as the corporations power⁸ and the trade and commerce power, create real potential for conflict with the States which historically exercised jurisdiction over their environments. Clearly Commonwealth priorities might contrast with those of individual States, especially in the sensitive area of environmental measures which frequently conflict with policies for economic growth and development. These Commonwealth powers with respect to the environment have not been fully exploited, but present a significant potential threat to important areas of traditional state sovereignty. Cooperative federalism is one response to this potential conflict.

A significant aspect of cooperative federalism, as opposed to over-riding legislation, is that intergovernmental agreements have emerged as one of the key methods adopted within Australia to deal with this constitutional complexity regarding environmental matters, and come within the over-arching process of intergovernmental cooperation. Intergovernmental agreements evidencing this cooperation precede and support schemes requiring uniform legislation.⁹ In addition to intergovernmental agreements, the other main vehicle used in Australia for federal cooperation in regard to the environmental and natural resource issues, as in other areas of public policy, is ministerial councils.¹⁰

⁸ See generally, Crawford, J. The Constitution and the Environment, *Sydney Law Review*, Vol. 13, No. 1, May 1991, p. 24.

⁹ Supra footnote 6.

¹⁰ Ministerial Councils are vehicles of "executive federalism" (see footnote 11) are typically comprised of the relevant Government Ministers from each State and Territory and the Commonwealth, and are assisted in their work by a committee of senior bureaucrats selected on a similarly representative basis. Some of these councils also include representation for New Zealand. Examples of such Councils include most importantly the Council of Australian Governments (see footnote 17) comprising heads of each of the Governments of the Commonwealth, States and Territories, and the President of the Australian Local Government Association, but also includes in relation to environmental matters, the Australian and New Zealand Environment and Conservation Council (ANZECC) and most significantly for present purposes, the National Environment Protection Council, being a statutory Ministerial Council established under the Commonwealth/State *National Environment Protection Council* legislation. See: Gardner, supra footnote 2 at p. 108.

2.2 Establishment and Definition

Intergovernmental agreements, being vehicles of executive federalism¹¹, are sometimes considered to encompass national policy strategies and statements¹² which have developed through processes of public consultation for guiding national environmental management.¹³ However, the main intergovernmental agreements are more formal documents intended to be political compacts¹⁴ which represent agreement in principle reached by the executive branches of government¹⁵. In this broad context, the executive branch of government includes both the responsible ministers and the bureaucracies that serve them.¹⁶

Agreement by the executive branches of governments at the Council of Australian Governments¹⁷ and/or other Ministerial Councils, to a scheme involving the passage of uniform legislation in different jurisdictions is usually contained in a formal intergovernmental agreement. Articulating the distinction between the policy strategies and the more formal documents is often difficult, and the transition from policy to administrative procedure may only become clear where the powers and procedures for intergovernmental cooperation are legislated to ensure validity and certainty in their application.¹⁸ In Australia, the degree of certainty and validity achieved by any agreement depends to a large extent on the form of legislation, if any, used to implement the agreement.

2.3 Functions and Purposes

Intergovernmental agreements perform numerous functions and purposes including:

- information sharing;
- coordination of policy making;
- to reach agreement in principle on specific issues;
- to provide a cooperative framework for the administration of governmental powers including policy considerations; and

¹¹ See generally, Sharman, C. Executive Federalism, in Galligan, B. & Hughes, O & Walsh, C. Sydney (Eds), *Intergovernmental Relations and Public Policy*, Allen & Unwin, 1991.

¹² The National Policy Strategies and Statements form part of a plethora of policy instruments that have emerged in recent years and are situated alongside an equally large group of instruments which are titled collectively national standards, codes, guidelines and principles. (Fowler, R.J. New Directions in Environmental Protection and Conservation, in Boer, B. & Fowler, R. & Gunningham, N. (Eds), *Environmental Outlook: Law and Policy*, Federation Press, pp. 113-148.

¹³ Gardner, *supra* footnote 2 at p. 110.

¹⁴ *Supra* footnote 6 at p. 3.

¹⁵ *Ibid.*

¹⁶ *Supra* footnote 6 at p. 2.

¹⁷ The Council of Australian Governments, know by its acronym COAG, is a formalisation of the Special Premiers' Conferences originally convened in 1990 and comprises the Prime Minister, Premiers and Chief Ministers and the President of the Australian Local Government Association.

¹⁸ *Ibid.*

- directing the routine administration of government.¹⁹

In addition, intergovernmental agreements set the stage for the implementation of uniform legislation and standards, and provide support for policies requiring uniform legislation.²⁰

2.4 Implementation of Intergovernmental Agreements - The Need for Uniform Legislation

Generally, though certainly not exclusively, the implementation of intergovernmental agreements, as well as the decisions of ministerial councils, depends upon the respective governments exercising their executive and legislative powers consistently with the principles adopted by the councils or expressed in the agreements.²¹ However, in Australia, the recent exercises in executive federalism have seen a push for uniform or complementary legislation establishing an intergovernmental agency as the method of implementation.²²

In relation to the regulation of environmental affairs, there are a number of areas where intergovernmental cooperation and adoption of uniform legislation may be appropriate. These areas include:

- where pollution crosses state lines via a shared medium, such as water or air, or there is a potential for transboundary harm, eg, pest and disease control;
- where resource allocation decisions involve more than one jurisdiction, eg, allocation of water rights in a shared water course;
- where the resource itself moves across state lines, eg, migratory wildlife, including fisheries;
- where necessary (by implication) to comply with international agreements, such as the control of interstate trade in protected wildlife to comply with the convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES);
- where necessary to directly implement an international treaty such as the Vienna Convention for the Protection of the Ozone Layer or the 1992 Biodiversity Convention; and

¹⁹ Gardner, *supra* footnote 2.

²⁰ *Supra* footnote 6.

²¹ *Ibid.*

²² For example, the complementary Commonwealth/State legislation to establish the National Environment Protection Council under the terms of the *Intergovernmental Agreement on the Environment*, May 1993. Other examples are documented within the *Parliamentary Procedures for Uniform Legislation Agreements*, Report of the Select Committee of the Legislative Assembly of Western Australia, 1992, p. 59, which identified 22 topics on which uniform or complementary legislation was being considered or drafted. Further, the Western Australian Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, has produced a register identifying the existing and proposed Uniform Legislation and Intergovernmental Agreements, *Register: A Register of Existing and Proposed Uniform Legislation and Intergovernmental Agreements*, 1994, p. 4-25. And most recently, the Western Australian Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Committee Report 1 January 1995 to 31 May 1996*, 1996, p. 19-22, provides current details of proposed uniform legislation.

- where a determination is made that an issue is of such overriding, national public interest that a voluntary intergovernmental response is appropriate, eg, forest estate, heritage, or biodiversity conservation.

2.5 Legal Effects of Intergovernmental Agreements

In Australia, under the over arching process of intergovernmental cooperation there are three types of agreements utilised in respect to environmental matters:

- governmental endorsement of policy documents;
- multilateral or multi jurisdictional intergovernmental agreements;
- bilateral intergovernmental agreements.²³

The *Intergovernmental Agreement on the Environment* (IGAE)²⁴ is an example of a multi jurisdictional intergovernmental agreement that provides a cooperative framework for the administration of governmental powers relating to environmental matters, including policy considerations, between the Commonwealth and the States and Territories.

2.6 General Principles for Enforceability of Intergovernmental Agreements

It is important to note that -

there is a common general view that intergovernmental agreements are policy instruments not intended to have legal effect or be enforceable by a court.²⁵

However, the High Court of Australia has had occasion to determine questions relating to intergovernmental agreements and has found some of the disputes to be justiciable²⁶, while others have been held to be non-justiciable.²⁷ In addition, in other jurisdictions such as Canada, the courts have shown a willingness to treat intergovernmental agreements as justiciable where there is

a sufficient legal component to warrant a decision by a court.²⁸

And further, different questions arising out of the same intergovernmental agreement may be considered by the court as justiciable or not depending on the nature of the issues²⁹.

²³ Gardner, supra footnote 2 at p. 116.

²⁴ Intergovernmental Agreement on the Environment, May 1992.

²⁵ Gardner, supra footnote 2 at p. 116.

²⁶ For example: *Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382; *Gilbert v Western Australia* (1962) 107 CLR 494; *Re Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535; *Re Crown; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

²⁷ For example, *South Australia v Commonwealth* (1962) 108 CLR 130

²⁸ For example, *Reference re Canada Assistance Plan; Attorney General of British Columbia v Attorney General of Canada* (1991) 83 DLR (4th) 297 at 310. See also *Finlay No 2* [1986] 2 SCR 607. See also decision of *Saskatchewan Court of Appeal in Canada (Attorney General) v Saskatchewan Water Corporation* [1992] 4 WWR 712.

²⁹ See Dixon CJ comments in *South Australia v Commonwealth* (1962) 108 CLR 130 at 141.

To accept this general view belies the range of methods by which the Commonwealth and States and Territories may give effect to intergovernmental agreements. To date, these methods have included:

- agreements with no statutory authority basis;
- agreements authorised by legislation to remove any doubts about validity or authority to make them;
- agreements ratified by legislation to transform contractual duties into statutory duties;
- agreements ratified in a way to enact the agreement as law, thus changing any inconsistent law;
- agreements which although not ratified or enacted by statute are implemented by other legislation; and
- agreements which are given constitutional status.³⁰

The legal enforceability of these agreements will depend on the consideration of such issues as whether the agreement was validly made, whether the method of giving effect to the agreement changes the law, and further, if in fact, the method of giving effect to the agreement changes the law, did the parties intend their agreement to create legal obligations.

³⁰ Gardner, *supra* footnote 2 at p. 116

CHAPTER THREE

3. THE INTERGOVERNMENTAL AGREEMENT ON THE ENVIRONMENT (THE IGAE)

3.1 Background

The IGAE was conceived in a political climate where the environmental responsibilities and authority of the Commonwealth Government were growing rapidly. Notably, negotiation of the IGAE occurred in the context where a number of important High Court decisions had effectively expanded Commonwealth powers to regulate matters affecting the environment³¹, thereby creating a new source of tension with traditional environmental protection and resource allocation responsibilities which generally fell to State and local governments under their plenary powers.³² This created a new set of intergovernmental dynamics which, at the extreme, were manifested in poor process, extended time-lines for decision making and great uncertainty. It is in the face of these complex political forces and a rejuvenated and redefined federal system that the IGAE was born.

The intention to develop the Agreement was announced in the communique issued by the first Special Premiers' Conference, the forerunner to the Council of Australian Governments (COAG)³³, in Brisbane, October 1990. As Pain notes -

[a]t the Special Premiers' Conference in July 1991 agreement was reached on the need for effective national arrangements for setting consistent environmental standards across Australia, and that the establishment of arrangements would be a crucial component of the IGAE. Accordingly, the Working Group on the IGAE³⁴ was instructed to report to the November 1991 Special Premiers' Conference on appropriate and effective arrangements for standard setting and implementation including a possible National Environmental Protection Agency and its roles and relationship with Commonwealth, State and Territory agencies.³⁵

The IGAE was negotiated by a group of officials, (the WGEP) and came into effect on the 1 May 1992.³⁶ The Agreement was entered into by all the governments of Australia, those representing the Commonwealth, States and major Territories (The Northern Territory and the

³¹ See generally, Crawford, *supra* footnote 8.

³² Robinson, B. 'Smarter Regulation and Intergovernmental Cooperation in the Environmental Field', in Carroll, P. & Painter, M. (Eds.) *Microeconomic reform and federalism*, Federalism Research Centre, The Australian National University, Canberra, 1995, p. 191.

³³ *Supra* footnote 6 at p. 3.

³⁴ The Working Group on Environmental Policy was a sub-group of the Working Group on Environmental Policy (WGEP) which is a joint Commonwealth/State Government officials group, composed of a mix of central agency and environmental agency public servants, as well as the Australian Local Government Association. The WGEP worked on the establishment of the NEPC and related issues for which it has had responsibility in pursuit of different aspect of the IGAE. Pain, N., Current Initiatives on National Standardisation of Environmental Standards in Boer, B. & Fowler, R. & Gunningham, N. (Eds.), *Environmental Outlook No 2: Law and Policy*, The Federation Press, NSW, 1996, p. 303.

³⁵ *Ibid* at p. 304.

³⁶ Fowler, R.J. Environmental Impact Assessment: What Role for the Commonwealth? - An Overview, *Environmental Planning and Law Journal*, August 1996, Vol. 13, No. 4, p. 251.

Australian Capital Territory)³⁷ and the President of the Australian Local Government Association.³⁸ In respect of the WGEP's negotiation of the IGAE, Pain observes that notably:

when the WGEP negotiated the IGAE, the political reality was that environmental matters were clearly local, State, national, and international in nature. It was inevitable that the Commonwealth Government would become further involved in environmental issues given the nature of those issues, Commonwealth/State relations in Australia and the context of national policies. The possibility of Commonwealth involvement in these circumstances was considered in all likelihood to be greater. The constitutional realities were that the States had traditionally exercised power in relation to land use in environmental matters. In discharging international environmental obligations the Commonwealth had clear constitutional power to enter into the environmental arena. The Commonwealth had a number of constitutional powers through which it could justify involvement in State environmental issues.³⁹

In the light of the political reality surrounding the negotiations and the constitutional power of the Commonwealth, the aim of the IGAE was therefore to try and abandon a totally states rights versus national interest competition, to remove uncertainty between Commonwealth and State governments in areas of environmental management and to develop a cooperative national approach to the environment.⁴⁰

3.2 Aims and Structure

The IGAE presents a statement of some basic principles, procedures and processes for intergovernmental cooperation on environmental management and is intended to be a working document for regular government administration and a method of defining the expectations of governments in relation to the management of environmental issues.⁴¹

In essence, the Agreement aims to provide the basis for a new cooperative approach to management by governments of environmental issues in Australia. In particular, it is the mechanism for providing:

- \$ a cooperative national approach to the environment;
- \$ better definition of the roles of the respective governments with respect to the environment;
- \$ a reduction in intergovernmental environmental disputes;
- \$ greater certainty in respect to government and business decision making; and

³⁷ IGAE, supra footnote 24 at Section 1 - Application and Interpretation: "States" is defined as a State or Territory named as a party to the Agreement and as such reference to "States" includes the Northern Territory and the Australian Capital Territory. This definition is adopted for the purposes of the report.

³⁸ The Australian Local Government Association is a signatory to the Agreement although its participation in NEPC is as a non-voting member of the NEPC Committee of Officials. IGAE, *ibid* at para. 1.11: The IGAE acknowledges that, although the Australian Local Government Association is a party to the Agreement, it cannot bind local government bodies to observe its terms. It is included because the Federal and State Governments wished to recognise the responsibility and interests of local government in environmental matters.

³⁹ Pain, supra footnote 34.

⁴⁰ *Ibid*.

⁴¹ Hamilton, S. The Intergovernmental Agreement on the Environment - Three Years On. In *Microeconomic Reform and Federalism*, (Eds.) Carroll, P. & Painter, M., Federalism Research Centre, The Australian National University, Canberra, 1995, p. 186; and Gardner, supra footnote 2 at p. 110.

\$ better environment protection.⁴²

The IGAE seeks to perform among others, three specific functions:

1. to identify the responsibilities and interests of the Commonwealth and of the States and Territories in relation to the management of the environment;
2. to provide mechanisms to resolve any difficulties that arise in accommodating the interests of the Commonwealth and of the States and Territories in relation to the management of the environment;
3. to set out principles that should guide the development and implementation of environmental policy and programmes by the Commonwealth and by the States and Territories.⁴³

The allocation of responsibilities within the IGAE identifies those that are within the ambit of the Commonwealth and effectively leaves the rest to the States and Territories.⁴⁴ Those allocated to the Commonwealth are essentially:

\$ matters of foreign policy relating to the environment (in particular negotiating international agreements and ensuring that international obligations are met);

\$ ensuring that the policies or practises of a State do not result in significant adverse external effects in relation to the environment of another State or the lands or Territories of the Commonwealth or maritime areas within Australia's jurisdiction; and

\$ facilitating the cooperative development of national environmental standards and guidelines.⁴⁵

The IGAE recognises that States also have responsibilities and interests. It provides that:

\$ States will continue to have responsibility for the development and implementation of policy in relation to environmental matters which have no significant effects on matters which are the responsibility of the Commonwealth or any other State.⁴⁶

\$ States have responsibility for the policy, legislative and administrative framework within which living and non-living resources are managed within the State;⁴⁷

\$ States have an interest in the development of Australia's position in relation to any proposed international agreements, either bilateral or multilateral, of environmental

⁴² IGAE, supra footnote 24 at *Preamble*.

⁴³ Fisher, D.E. 'Land-Sourced Pollution of the Marine Environment. *Environmental and Planning Law Journal*, Vol. 12 No. 2, April 1995, p. 124.

⁴⁴ IGAE, supra footnote 24.

⁴⁵ *Ibid*, para. 2.2.1

⁴⁶ *Ibid*, para. 2.3.1

⁴⁷ *Ibid*, para. 2.3.2

significance which may impact on the discharge of their responsibilities;⁴⁸ and

\$ States have an interest and responsibility to participate in the development of national environmental policies and standards.⁴⁹

The Agreement sets out the principles guiding environmental policy and programmes formulation by the Commonwealth, the States, and the Territories. The fundamental principle underpinning environmental policy is stated as follows:

*The parties consider that the adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and environment. This requires the effective integration of economic and environmental considerations in decision-making processes, in order to improve community well-being and to benefit future generations.*⁵⁰

This system is based upon six specific foundations:

\$ ecologically sustainable development;⁵¹

\$ the integration of environmental considerations into government decision-making processes;⁵²

\$ the precautionary principle;⁵³

\$ the principle of intergenerational equity;⁵⁴

\$ conservation of biological diversity and ecological integrity;⁵⁵

\$ improved valuation, pricing and incentive mechanisms - including the polluter-pays principle in relation to pollution and the user-pays principle in relation to the provision of services using natural resources.⁵⁶

⁴⁸ Ibid, para. 2.3.3

⁴⁹ Ibid, para. 2.3.4

⁵⁰ Ibid, para. 3.2

⁵¹ Ibid, para. 3.3

⁵² Ibid, para. 3.4

⁵³ Ibid, para. 3.5.1

⁵⁴ Ibid, para. 3.5.2

⁵⁵ Ibid, para. 3.5.3

⁵⁶ Ibid, para. 3.5.4

These principles and considerations apply in a number of different contexts relating to environmental management. For example, they apply to:

- \$ resource assessment, land-use decisions and approval processes (involving ecologically sustainable use of natural resources, including land, coastal and marine resources);⁵⁷
- \$ environmental impact assessment;⁵⁸
- \$ national environment protection measures (including the setting up of a Ministerial Council to be called the National Environment Protection Council);⁵⁹
- \$ climate change;⁶⁰
- \$ biological diversity;⁶¹ and /or
- \$ nature conservation.⁶²

In the specific context of the National Environment Protection Council (NEPC), which is dealt with in Schedule 4 of the IGAE, it should be highlighted that the IGAE commits the members to enacting implementing legislation which

will ensure that any measures established by the Authority ... will apply, as from the date of the commencement of the measure, throughout Australia, as a valid law of each jurisdiction⁶³

This paragraph clearly indicates the need for enabling legislation which provides for mandatory incorporation of National Environment Protection Measures (NEPMs) by members.

What appears to have been envisaged of the IGAE in respect to NEPMs, is that once adopted at the Commonwealth level, NEPMs would operate automatically as laws of each State or Territory (and the Commonwealth), in the same way as has occurred in relation to the *Corporations Law*.⁶⁴ The responsibility for implementation of NEPMs, however, falls on the shoulders of both Commonwealth and State Environment Protection bodies, pursuant to clause 17 of the IGAE, which provides that -

[t]he Commonwealth and the States will be responsible for the attainment and maintenance of agreed national standards or goals through appropriate mechanisms such as Commonwealth and State Environment Protection bodies.

⁵⁷ Ibid, Schedule 2, cl.2

⁵⁸ Ibid, Schedule 3

⁵⁹ Ibid, Schedule 4

⁶⁰ Ibid, Schedule 5

⁶¹ Ibid, Schedule 6

⁶² Ibid, Schedule 7

⁶³ Ibid, Schedule 4, cl. 16

⁶⁴ Fowler, R.J., Law and Policy Aspects of National Standardisation in Boer, B. & Fowler, R. Gunningham, N. (Eds.) *Environmental Outlook No 2: Law and Policy*, The Federation Press, NSW, 1996, p. 327.

As Fowler observes,

[t]he [NEPC] enabling legislation clearly has not adopted this approach...;⁶⁵

thus, the “automatic” adoption of NEPMs is not assured as with measures under the *Corporations Law*. As noted in subsequent sections of this report, the commitment of the members to such implementation of NEPMs appears to have failed given that the various State and Territory enabling statutes do not in fact provide for automatic incorporation of NEPMs as envisaged by the IGAE. In this respect, the proposed Western Australian Bill may be seen by some as among the weakest legislative schemes. However, from the State’s point of view, without this concession Western Australia may not have entered the scheme.

3.3 Legal Enforceability of the IGAE

The question of legal enforceability is important not only in evaluating the extent to which the Western Australian Bill complies with the requirements of the IGAE, but indeed whether or not there is any such need to comply.

On first reading the IGAE shows a relatively high degree of formality as indicated by:

- \$ the document being expressed as an agreement between the Commonwealth and the States, each of them being specifically named;
- \$ the Preambles, interpretation provisions and carefully drafted clauses with clearly set out schedules;
- \$ a formal signature clause and signatures by the heads of each of the governments party to the Agreement; and
- \$ the contemplation of implementing legislation in respect of determination of national pollution control measures, although it is generally envisaged that the execution of the Agreement will be within the framework of the existent legislation of each of the parties.⁶⁶

However the true nature of the Agreement is revealed when considering its substance and the language used.⁶⁷ It is apparent that the IGAE is intended only to be a “political compact”, a multi jurisdictional framework agreement, providing a cooperative structure for the administration of governmental powers including policy considerations⁶⁸. This Structure is illustrated by the following features:

- \$ the IGAE calls for the execution of bilateral agreements between the Commonwealth and the States (effectively making many of the commitments, “agreements to agree” at a later date);
- \$ many of the Agreement’s terms are merely aspirational, for example, the principles

⁶⁵ Ibid.

⁶⁶ Gardner, *supra* footnote 2 at p. 119.

⁶⁷ Ibid.

⁶⁸ Ibid.

and considerations to be used by each party as guidelines in the execution of their legislative and administrative powers;

\$ the Agreement provides for a “political” method of dispute resolution, for example, disputes are to be referred to ministerial councils;⁶⁹ and

\$ there is no clear statement whether the parties intend the agreement to be enforceable in the courts of law.⁷⁰

Given this analysis, it is generally regarded that the IGAE is not a legally enforceable document, rather it appears to constitute a non-justiciable political compact, and on this basis a party which breaches or reneges on the IGAE faces only the political repercussions which may flow from that action.⁷¹ As Hamilton notes,

[i]ts only heads of power are political and moral. No government is formally constrained in its use of fundamental constitutional powers by the IGAE. Nor does the IGAE seek to define those powers. It is not an interpretative statement on the constitution. It is primarily an agreement about principles and processes. It is about the way powers are used. It defines the expectations of governments in relation to the management of environmental issues.⁷²

In that case the question of whether the Western Australian Bill complies with the requirements of the IGAE is, at least legally speaking, moot. Not only does the IGAE not specify any required form of enabling State legislation, its structures are not in any case legally binding. Sanctions for non-compliance must therefore be political rather than legal. Western Australia, along with other members, does not in fact appear to have complied with the IGAE, particularly in respect of mandatory incorporation of NEPMs, but there is no *legal* consequence flowing from that omission.

Furthermore, as is noted below, it may not be whether the Western Australian Bill complies with the IGAE which is of crucial significance, rather the real concern may in fact be the enforceability of the legislation used to implement the NEPMs within the Commonwealth, States and Territories.

⁶⁹ IGAE, *supra* footnote 24 at paras. 1.13 and 2.5.3.5.

⁷⁰ Although Intergovernmental Agreements rarely specifically state that the agreement is intended to be enforceable in the courts of law as indicated by the statement: “The enforcement of an Agreement is open to question, ... An agreement between Governments about whether to legislate, or not to legislate, is highly likely to be treated as justiciable. Other parts of an agreement may be enforceable, however: Dixon J has acknowledged that some Agreements were “mixed” in nature, and others were not. It is desirable for parties to any Agreement to determine whether and to what extent it is intended to be enforceable and to state this clearly”. Lovegrove, K. (Ed) *Constitutional Options for Uniform Legislation*, Australian Uniform Building Regulations Co-ordinating Council, 1991, p. 27.

⁷¹ Ramsay, R. and Rowe, G.C., *Environmental Law and Policy in Australia*, Butterworths, 1995, p. 304.

⁷² Hamilton, *supra* footnote 40 at p. 186.

CHAPTER FOUR

4. LEGISLATIVE RESPONSE: NATIONAL ENVIRONMENT PROTECTION COUNCIL (THE NEPC)⁷³

4.1 Legislative Overview

(a) *Background and Basic Provisions of NEPC Acts*

The Commonwealth *National Environment Protection Act* 1994 was passed on 13 October 1994 by the Commonwealth Parliament and assented to on 18 October 1994. The Act and the equivalent complementary legislation in each of the participating States and Territories was proclaimed on 15 September 1995, except for Tasmania which was late and the ACT which was early. Western Australia had at this point declined to participate in the NEPC. The Commonwealth Act was passed in response to the Federal Government's obligations under the 1992 *Intergovernmental Agreement on the Environment*, as implemented by all States and Territories except Western Australia.

The Act establishes the National Environment Protection Council.⁷⁴ The NEPC is a direct outcome of the IGAE, the Fourth Schedule of which proposes that a National Environment Protection Authority be established as a ministerial council for the purposes of

establishing measures for the protection of the environment for the benefit of the people of Australia.⁷⁵

Under the enabling legislation, the Prime Minister, the Premiers and the Chief Ministers will each nominate a ministerial member and may replace that member at any time.⁷⁶ As Brennan notes:

[t]he Environment Minister of each State and Territory has been nominated although there is nothing under the legislation preventing a Resources or Industries Minister being put forward in the future.⁷⁷

The Minister nominated by the Commonwealth is the Chairperson of NEPC.⁷⁸ Each member of the NEPC has one vote, and decisions of the NEPC must be supported by a

⁷³ The IGAE refers to the National Environment Protection Authority. At the meeting of COAG in February 1994 a change of name to the National Environment Protection Council was agreed to.

⁷⁴ *National Environment Protection Council Act* 1994 (Cth), section 8.

⁷⁵ IGAE, Schedule 4, cl 5.

⁷⁶ *NEPC Act* 1994 (Cth), section 9(1).

⁷⁷ Brennan, M. National Environment Protection Council Act Proclaimed: Ramifications for the Commonwealth and its Activities, *Australian Environmental Law News*, Issue 3, 1995, p. 10.

⁷⁸ *NEPC Act* 1994, section 101.

vote of at least two-thirds of the NEPC's members.⁷⁹

(b) NEPC's objectives

The objectives of the establishment and operation of the NEPC through the Act are to ensure that:

- (i) people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia; and
- (ii) decisions of the business community are not distorted and markets are not fragmented by variations in major environment protection measures between Australian jurisdictions.⁸⁰

It is important to note that the objectives clearly envisage uniform environmental measures across the country, for the benefit both of citizens and the business community.

(c) NEPC's functions

The functions of the NEPC fall into two areas:

- (1) to make national environment protection measures⁸¹; and
- (2) to assess and report on the implementation and effectiveness of NEPMs in participating jurisdictions.⁸²

4.2 National Environment Protection Council (Western Australia) Bill 1996 - Conforming to IGAE requirements?

(a) Overview of NEPC Legislative Responses in each Jurisdiction

The *National Environment Protection Council (Western Australia) Bill 1996* was introduced into the Western Australian Legislative Council on 1 May 1996, and confirmed Western Australia's willingness to participate in the NEPC. All the other States and Territories and Commonwealth had already proclaimed equivalent complementary legislation on 15 September 1995, except for Tasmania which was late and the ACT which was early.

The **Western Australian** legislation varies from that of the other members in two respects.

- (1) The first relates to section 22 of the Western Australia Bill. Subsection (1) of the section is consistent with other member legislation in permitting substantial

⁷⁹ Ibid at section 28.

⁸⁰ Ibid at section 3.

⁸¹ Ibid at section 14(1).

⁸² Ibid at section 23.

compliance with the procedural aspects of producing a NEPM to suffice so as not to invalidate a measure. Western Australia alone has, however, added subsection (2) which provides for a specific exception in the case of “regional environmental differences.” We discuss the importance of this section below.

- (2) The second area of difference is in the incorporation of NEPMs into State law as was envisaged in the IGAE (see above re: Schedule 4, section 16 of the IGAE). There have been a variety of responses which afford varying degrees of status to NEPMs, characterised by varying degrees of discretion in adopting them into State law. Western Australia appears to stand alone in making no provision for their incorporation, discretionary or otherwise, either in the Bill itself, as a Schedule, or as we understand, in complementary legislation. The only provision is the statement of intent to do so in section 7 of the Bill. While the Bill, once enacted, will be legally enforceable, the failure to actually incorporate NEPMs in subsequent legislation is essentially unchallengeable, as the legislature can not be compelled to legislate in any particular way.

Tasmania has provided in its *National Environment Protection Council (Tasmania) Act 1995* for implementation of NEPMs through section 65.⁸³ Pursuant to section 65 NEPMs are taken to be State Policies within the *State Policies and Projects Act 1993*, an Act which creates a framework for sustainable development policies in Tasmania. Penalties are provided for their breach. The NEPMs are taken to have been approved by both Houses of Parliament.

South Australia has also provided in its *National Environment Protection Council (South Australia) Act 1995* for the implementation of NEPMs through Schedule 2.⁸⁴ Pursuant to Schedule 2, NEPMs automatically operate as Environmental Protection Policies under the *Environment Protection Act 1993* (SA.). Such policies are to be “taken into account” by the South Australian Environmental Protection Authority, suggesting a degree of discretion in their application.

Victoria has provided in its *National Environment Protection Council (Victoria) Act 1995* for implementation of NEPMs through section 67⁸⁵, which provides that the Governor -in-Council “may” by order incorporate a NEPM into a State environment protection policy or industrial waste management policy, or vary such a policy, so as to make the policy consistent with a NEPM. The Act provides that:

Orders are exempt from disallowance by the Victorian Parliament. The Victorian Environment Protection Authority must, in considering applications concerning works approvals and licenses, ensure that the approvals and licenses to which they are subject are consistent with State policy.⁸⁶ Thus under Victorian law, the executive has a discretionary power to implement NEPMs.⁸⁷

⁸³ Section 65 inserts a new section 12A into the *State Policies and Projects Act 1993* (Tas.).

⁸⁴ Schedule 2 inserts a new section 28a into the *Environment Protection Act 1993* (SA.).

⁸⁵ Section 67 inserts a new section 17A into the *Environment Protection Act 1970* (Vic.).

⁸⁶ *Environment Protection Act 1970* (Vic) section 20C.

⁸⁷ Gardner, A, in *Legal Effect of National Environment Protection Measures*, *Australian Environment Law News*, Issue No. 3, 1995, p.8, argues Brian Robinson’s contention in his article, *State Implementation of National Environment Protection Measures*, *Australian Environmental Law News*, Issue 3, 1995, that Victoria has provided for automatic adoption of NEPMs as State Environmental Protection Policies, is, given the nature of discretion involved, inaccurate.

New South Wales does not provide in its enabling Act for automatic incorporation of NEPMs into State instruments. However, we understand that forthcoming legislation to consolidate various areas of environmental regulation into a single statute, tentatively named the *Protection of the Environment Operations Act*, draft Bill to be available in the Autumn of 1996, and will provide for incorporation of NEPMs in a manner consistent with the requirements of the IGAE. We can probably assume that it will be similar to legislation in the other States.

Queensland does not provide in its enabling Act for automatic incorporation of NEPMs into State instruments. However, it makes provision in its *Environment Protection Act (Qld) 1994* for NEPMs commenced under the national scheme to be taken as an environmental protection policy if it is approved by regulation.⁸⁸ This method suggests retention of a degree of State discretion.

In the **ACT** a forthcoming *Environment Protection Bill* will repeal existing pollution control legislation and will include provisions to incorporate NEPMs. The Committee is advised that the incorporating mechanism will be similar to that of Queensland and Victoria, that is to say presumably subject to an element of discretion.

The Committee is advised that the **Northern Territory** is currently drafting a *Waste Management and Pollution Control Bill 1997*, with the public exposure draft expected in November 1996. Incorporated within the Bill are provisions for the implementation of environmental protection objectives. It is these objectives that will be the central mechanism for the incorporation of NEPMs, whether automatic or discretionary. The environmental protection objectives, the Committee understands, are akin to State Environmental Protection policies which are the implementation mechanism in other States and Territories. Furthermore, the Committee is led to believe that other parts of the *Bill* may also deliver on the NEPMs, and that other Northern Territory legislation may also be utilised to implement the NEPMs in, for example, the Water Act and the Motor Vehicle Act. Additionally, policies adopted outside legislation may also be utilised.

Finally, the **Commonwealth** will enact its own implementing legislation, requiring it to meet the same standards as those adopted by the States and Territories, after reviewing the various enabling enactments. Given that those State/Territory responses are not uniform, and continue to threaten different standards in different States and Territories through the element of discretion in adopting NEPMs, the Commonwealth may itself similarly be required to conform to different standards with respect to its activities in different States and Territories.

Thus, there appears to be a very clear intent within the enabling legislation of each jurisdiction that NEPMs will not be “self-executing”. Rather they will be or have been put into effect by laws and other arrangements within each participating jurisdiction, which in turn will have sole responsibility for the implementation of the relevant laws and arrangements.⁸⁹

⁸⁸ Section 34, *Environment Protection Act (Qld) 1994*.

⁸⁹ Pain, *supra* footnote 34 at p. 328.

In Western Australia there has been unease over whether the legislation -

adequately takes account of the continental size of Australia by allowing for 'regional difference' ...[and concerns were raised that]...Western Australia's interests might be circumscribed by positions adopted by the Commonwealth in combination with some other States. Moreover, there was no certainty that the 'regional differences' which were alluded to in the IGAE would be adequately addressed in the legislation.⁹⁰

[So to] make clear the Western Australian Parliament's responsibilities in this regard [the] Bill contains a small, but significant, modification from the uniform legislation to enable the Parliament to disallow a 'national environment protection' measure where the Western Australian member of the NEPC is of the opinion that 'measure' does not take into account Western Australian 'regional difference'.⁹¹

Western Australian concerns have been addressed first, by the addition of section 22 (2)-(6) in the Bill with respect to regional environmental differences, and second, by the omission in the enabling legislation or in, for example, the Western Australian *Environmental Protection Act* 1986, of automatic incorporation of NEPMs. Although other member States and Territories have also stopped short of mandatory incorporation, Western Australia alone appears to have declined to provide formally for even a discretionary inclusion in complementary State legislation, such as the *Environmental Protection Act*. The Committee understands that there are no plans to do so. Rather the Committee understands that the Western Australian response to NEPMs will be *ad hoc* depending on the nature of the NEPM. For example, a NEPM on air quality already initiated will be implemented through an Environmental Protection Policy in Western Australia.

In summary, the Committee has been advised that it appears that all States and Territories have fallen short of the uniform commitments contemplated in the IGAE. The next section of this report examines the Western Australian response in detail.

(b) Western Australia's Legislative Response

At face value the IGAE requires that the Commonwealth and the States and Territories agree to develop legislation which will authorise that Authority (NEPC) to establish any measures. The legislation is also required to establish mechanisms for the application of measures in the States and Territories. The legislation is to ensure that any measures established by the Authority will apply, as from the date of the commencement of the measure, throughout Australia, as a valid law of each jurisdiction. That is clearly the intent of the IGAE. The discussion above suggests that the enabling enactments of the member jurisdictions generally fall somewhat short of the degree of commitment envisaged in the IGAE, and that in particular the Western Australian response cannot be said to conform to the IGAE save only for section 7, which, in conformity with all other States and Territories, states an intention to comply

by [enacting] such laws and other arrangements as are necessary.

On close analysis of the IGAE there are strong arguments that:

⁹⁰ *Western Australian Parliamentary Debates (Hansard), Legislative Council, Second Reading Speech: National Environment Protection Council (Western Australia) Bill 1996, Hon Peter Foss MLC, pp. 1222-1224.*

⁹¹ *Ibid.*; and see: NEPC (Western Australia) Bill, ss 22(2)-(6).

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- \$ **the IGAE is not a legally enforceable document**, so Western Australia is not legally bound by the terms of the Agreement;
 - \$ **the IGAE does not go to that degree of specificity, but it contemplates a NEP Authority**; that is to say the IGAE does not specify the particular manner of enabling legislation to be enacted by the States and so the field is open at least in a strictly legal sense, to such a response as the Western Australia Bill; and
 - \$ **other States have enacted NEPC Acts which allow for varying degrees of discretion to implement NEPMs**, setting a precedent which the Western Australian response similarly contemplates with an even greater measure of discretion with respect to NEPMs.

Given the non-justiciable nature of the IGAE, the Western Australian Parliament may choose to respond in any legislative form it wishes, except where inconsistent with valid Commonwealth legislation. It is not constrained legally, but only by the spirit of the Agreement. Of course, it should also be recalled, that the Parliament cannot bind future Parliaments and Parliamentary Supremacy includes the power to overturn earlier enactments - that is to say the Western Australian Parliament always has the option of withdrawing from the IGAE and going its own way on environmental regulation.

Furthermore, as highlighted above, rather than the Western Australian Bill's compliance with the IGAE, what may in fact be of real concern is the enforceability of the enabling legislation each State and Territory, as well as the Commonwealth, enacts to implement the NEPMs. Upon enacting legislation to implement the NEPMs within a jurisdiction, the implementation mechanism becomes law within that jurisdiction and may in fact create rights and liabilities enforceable in the courts.⁹²

The Western Australian modification in section 22 may be viewed as being in breach of the spirit of the IGAE. That it does not raise legal difficulties since Western Australia is free to adopt any form of implementing legislation it chooses, is perhaps to miss the point. If the State has agreed in principle to the notion of uniform national environmental standards and the institutional mechanisms for defining them in NEPMs, then what purpose is served in compromising the principle through section 22? If the motivation is to protect against inroads into State sovereignty then the State should not have agreed to membership of the IGAE, for such a compromise of sovereignty is inherent in any serious attempt to deal with transboundary environmental problems. In any event, the failure of members to enact mandatory incorporation of NEPMs impliedly preserves all the States' discretion to reject them. It is quite possible to conclude that this is protection enough against inroads into State sovereignty.

If the motivation is to preserve Legislative supremacy against incursions by the Executive, then section 22 fails to accomplish that purpose. The Minister still has the discretion to place, or not place, before the Parliament a proposed NEPM that does not adequately address "the regional environmental differences of [the] State." Again, the initial discretion with respect to any particular NEPM lies with the Executive and not the Parliament. Thus, concerns over executive federalism will not necessarily be assuaged.

Section 22, contemplates that where the Minister judges non-compliance with respect

⁹² Fowler, *supra* footnote 67 at pp. 327-28.

to regional environmental differences, at his or her discretion a notice of rejection of the offending NEPM may be given to the Parliament under section 22(4) for possible rejection by either House. One can only reject that which has already been accepted. If there has been no automatic incorporation of the NEPM, and if such incorporation is dependent on the discretionary act of some State regulatory body, or in some cases, legislative action by Parliament, then what need is there for section 22? There is already ample opportunity for rejection, or rather non-adoption, of an objectionable NEPM and so section 22 would seem to be superfluous.

Finally, the substance of section 22 itself is problematic. On the one hand, the criterion of regional environmental differences is arguably so broad and vague as to lend itself to an invocation of section 22 at the will of the Minister, thus negating the very intent of the IGAE and the agreement of rule by two thirds majority. It would appear to be open to the State to revisit NEPMs almost at will, though of course as has been suggested it can in any case, as their adoption is impliedly discretionary. On the other hand, section 22 refers to measures with respect to which the Council did not comply with section 15(g), for example, the requirement that:

[i]n making any national environment protection measure, the Council *must have regard to ...*
(g) any regional environmental differences in Australia (emphasis added).

The Council must also include in an NEPM Impact Statement a statement of how any regional environmental differences have been addressed (section 17(b)(v)). It should be noted that section 22 is characterised in the Bill as one relating to procedural requirements, whereas the added subsection (2) appears to contemplate a challenge on substantive grounds to the adequacy of the Council's consideration of regional environmental differences. In any event, in legal terms, it may be difficult to show that the Council failed to meet the rather modest threshold test of having regard to regional environmental differences, and so arguably it may prove difficult to invoke section 22 without legal challenge on those grounds.

In summary, the Committee concludes that the integrity of section 22 may be challenged both on grounds of principle, as undercutting the spirit of the IGAE, and of pragmatism, as possibly being of limited legal and practical use. It certainly raises questions of good faith without necessarily achieving its purpose of preserving a meaningful discretion in the Western Australian Parliament, or alternatively of being overkill by preserving an already potentially sweeping discretion.

(c) *Comparison with other Uniform Legislative Models*

In regard to the second Term of Reference for this report, an examination of the legislative Structure used to introduce uniform environment protection measures under the *National Environment Protection Council Acts* in the light of Legislative Structures which have been previously used and identified by the Standing Committee in earlier reports⁹³ suggests that it falls within the "Complementary" or "Mirror" legislation model. Such a model is identified by the enactment of separate identical legislation in all participating jurisdictions. The intergovernmental agreement may require the Minister to introduce a bill in identical terms as in the case of the IGAE, however, the bill is considered and debated in each Parliament. And as such there is a tendency for each participating jurisdiction to vary the draft agreed to by the executive

⁹³ Western Australia Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Structures: A consideration of the different structures available for uniformity in legislation*, Second Report, 1994, p. 2.

branch of government, to accommodate local concerns and the different drafting styles of local parliamentary draftspersons.⁹⁴ This is clearly the case in Western Australia where the draft Bill was varied to accommodate Western Australia's concerns. This legislative model is particularly common when each jurisdiction wants to establish a national regulatory body, for example, the NEPC. Any further discussion of these models, however, is outside the scope of this report.

4.3 National Environment Protection Measures (NEPMs)

(a) *Form and Content of NEPMs*

The enabling legislation relies substantially upon the definition of national environment protection measures contained in the IGAE, Schedule 4, clauses 1 and 26. Section 14(3) provides that NEPMs may comprise one or more of the following:

- (i) national environment protection goal;
- (ii) national environment protection guidelines;
- (iii) national environment protection standards; or
- (iv) national environment protection protocols.⁹⁵

Each of these terms is defined in section 5(1) of the Act, as follows:

\$ “national environment protection goal” means a goal:

- that relates to desired environmental outcomes; and
- that guides the formulation of strategies for the management of human activities that may affect the environment;

\$ *national environment protection guideline* means a guideline that gives guidance on possible means for achieving desired environmental outcomes;

\$ *national environment protection standard* means a standard that consists of quantifiable characteristics of the environment against which environmental quality can be assessed; and

\$ *national environment protection protocol* means a protocol that relates to the process to be followed in measuring environmental outcomes, such as:

- whether a particular standard or goal is being met or achieved; or
- the extent of the difference between the measured characteristics of the environment and a particular standard or a particular goal.

It is clear that these definitions, by their very nature, are broad. How they will

⁹⁴ Ibid at p. 8.

⁹⁵ *NEPC Act 1994* (Cth), section 14(3); and *Commonwealth of Australia Senate Hansard*, Second Reading Speech, Monday, 6 June 1994, p. 1315.

translate in practice is far from clear.

The NEPC may make measures in relation to:

- \$ ambient air quality;
- \$ ambient marine, estuarine and fresh water quality;
- \$ the protection of amenity in relation to noise;
- \$ environment impacts associated with hazardous wastes;
- \$ the reuse and recycling of materials; and
- \$ motor vehicle noise and emissions.⁹⁶

A decision by NEPC must be supported by the votes of at least two-thirds of its members, with each member presiding at a NEPC meeting having one vote only.⁹⁷

The process outlined for the establishment of NEPMs requires:

- \$ giving of public notice of the intention to draft an NEPM;
- \$ in preparing a draft NEPM the preparation of an impact statement which must address a number of determined criteria;
- \$ the giving of notice of the intention to make a measure and inviting submissions on the draft measure and impact statement; and
- \$ NEPC considering the impact statements and submissions.⁹⁸

(b) *Legal effect of NEPMs: States and Territory Legislative and Executive Powers*

The degree of legal enforceability of NEPMs made by the NEPC is dependent on a number of arguments including:

- (1) There is no statement in the Bill about the legal force of those NEPMs. NEPMs are to be adopted by the NEPC and then tabled in the Commonwealth Parliament for disallowance.⁹⁹ Although such a procedure has the appearance of making them look like regulations, there is no indication in the Bill and the IGAE to demonstrate that they are of the same status as regulations,¹⁰⁰ which are law enforceable by the courts. The provision for disallowance by only the Commonwealth Parliament is presumably intended to provide for at least some measure of Parliamentary scrutiny of what are, at least on their face, otherwise binding Executive decisions, while avoiding the impracticality of submitting such measures to the Parliaments of all Council members. Of course as outlined above, the discretion to re-visit NEPMs in each State or Territory remains viable as their enabling legislation does not provide for mandatory

⁹⁶ *NEPC Act 1994* (Cth), section 14(1).

⁹⁷ *Ibid* at section 28.

⁹⁸ *Ibid* at sections 16-19.

⁹⁹ *Ibid* at section 21.

¹⁰⁰ *Standing Committee on Uniform legislation and Intergovernmental Agreements*, Transcript of Meeting held at Perth, Wednesday, 13 August 1996, with Alex Gardner, Senior Lecturer in Law at the University of Western Australia, p. 2.

incorporation. Again, it appears that the intent of the IGAE has been undermined.

- (2) There are four defined aspects of NEPMs: standards, goals, guidelines and protocols. The IGAE states that standards are mandatory. That would, if translated into law, make them legally enforceable obligations. Guidelines are not mandatory, and the Agreement is silent as to the legal effect of goals and protocols. The NEPC Bill definitions are silent regarding the mandatory nature of standards and guidelines. Thus, as Gardner notes -

it is unlikely as a matter of definition, that a court would hold that NEPMs are legally binding or sufficient to limit environmental decisions made by Government.¹⁰¹

- (3) Section 7 of the Bill is the clearest statement in the proposed legislation regarding the commitment of the State to implement NEPMs, that is, to bind itself to a uniform national standard. It indicates that it is the intention of parliament of Western Australia that the State, including the Legislature and the Executive, will, in compliance with its obligations under the IGAE, implement by such laws and other arrangements as are necessary, each National Environment Protection Measure in respect of activities that are subject to State law, including activities of the State Government and its instrumentalities. However, there are a number of factors which mitigate against any mandatory reading of section 7:

§ the IGAE is not a legally enforceable document, so obligations of the Agreement are not themselves legally enforceable; and

§ if another State or some aggrieved party with a particular objective within the State of Western Australia were to seek to enforce NEPMs it seems clear that they could not do so in a court of law as:

- Western Australia could not be forced to comply with the NEPMs, at least in terms of their obligations under the Agreement, and although the legislation may be enforceable, the IGAE is probably not enforceable;

§ it is doubtful that a court would rule that the words “intention of parliament” elevates the IGAE and NEPMs to legally enforceable obligations;¹⁰² and finally,

§ implementation of NEPMs “by such ...other arrangements as necessary” would cover general administrative decision-making to environmental regulations, such as the grant of administrative authorities to conduct polluting activities, the monitoring of such activities and the prosecution of breaches by authorities implementing ambient standards. It is arguable that a court would construe section 7 as conferring on NEPMs the effect of legally binding limits on the scope of administrative discretion. As one commentator notes, “if the NEPMs did not create limits, they would at least create mandatory

¹⁰¹ Legal Effect of National Environment Protection Measures, *supra* footnote 87 at p. 7.

¹⁰² See generally, Transcript, *supra* footnote 100.

relevant considerations.”¹⁰³

Thus it may be that the initial legal effect of the NEPMs is to define parameters within which complementary State legislation must operate, given the general section 7 statement of intent to comply. That is, they might achieve indirectly that which the States have precluded them from achieving directly through mandatory incorporation. This seems rather convoluted but may in practice prove effective. In other words, it is possible that the NEPMs will have much the impact they are intended to have notwithstanding the reluctance of members to opt for automatic incorporation. It has always been open to members to set more stringent standards, and section 7 may inhibit them from relaxing them beyond the stated NEPM.

- (4) It would be very difficult to create language in the Bill that will have the force to create judicial obligations given the nature of the NEPMs.¹⁰⁴ Generally speaking, the measures only set ambient standards for two reasons:
- \$ considerable further decision making either legislative or executive is required to implement ambient standards; and
 - \$ implementation of NEPMs is to be “by such laws and other arrangements as are necessary”. This phrase acknowledges that the implementation of some NEPMs may require the enactment of specific legislation or subordinate legislation where the NEPMs is inconsistent with a current law applying in the jurisdiction. No court of law would consider mandating the making of a law by the legislature or the executive to implement an NEPM. However, it would be possible for a State or Territory Parliament to legislate for the general adoption as a law of any NEPM.¹⁰⁵
- (5) Within one Act there may be clauses or sections that are justiciable while others are not, depending on the issues involved.
- (6) It is suggested that the reporting functions established by the Act provide the basis for political sanctions. The functions of the Council include assessing and reporting on the implementation and effectiveness in participating jurisdictions of an NEPM: section 12(b). The minister of each participating jurisdiction has a duty to report annually to the Council on the implementation and effectiveness of NEPMs: section 23. The Council in turn has a duty to report annually to the Commonwealth Parliament, its report containing a copy of each of the jurisdictional reports and the Council’s overall assessment of the implementation and effectiveness of the NEPMs. It is arguable that political sanctions are the only means of “enforcement” provided by the Bill for the implementation of NEPMs.¹⁰⁶

¹⁰³ Legal Effect of National Environment Protection Measures, *supra* footnote 87 at p. 7.

¹⁰⁴ See generally, Transcript, *supra* footnote 100.

¹⁰⁵ Legal Effect of National Environment Protection Measures, *supra* footnote 87 at p. 7.

¹⁰⁶ *Ibid* at p. 8.

CHAPTER FIVE

5. CONCLUSIONS AND RECOMMENDATIONS

The Committee acknowledges that regulation of environmental pollution and environmental protection is generally inherently difficult. In many instances, environmental protection challenges traditional and fundamental values of economic growth and development and may be expected to ultimately confront society with very difficult social and political choices. This is daunting enough in a unitary political system. It is even more challenging in a federal system such as ours with differing ideologies and priorities among the constituent members of the Australian Federation.

In that light, and given the difficulties historically encountered in reaching accord between the Commonwealth and the various States and Territories, it will always be problematic to aspire to any semblance of unanimity, particularly in such a controversial area as environmental regulation. Each effort towards uniformity risks settling for weak, lowest common denominator standards that are essentially meaningless for environmental protection. This is particularly true where enforcement of uniform standards is left to individual polities rather than to a central body.¹⁰⁷ One method of avoiding lowest common denominator standard setting is the method adopted by the NEPC, for example, the requirement for a two thirds majority for decisions of the NEPC. Its members, including of course, Western Australia, have agreed to be bound by future rules to which they have not yet consented, and indeed from which they may dissent. That principle - sometimes known as *prolepsis*, or the representation of a thing as existing before it actually does - is increasingly employed in international environmental law.

In the international arena, problems of different and conflicting ideologies, values and priorities together with jealous protection of sovereignty, are even more exacerbated than in the present case of Australian Federalism. Prior agreement to be bound by the future decisions of a stipulated majority from which one may have dissented in the particular case is seen as the only practical way of achieving any kind of meaningful environmental reform. So it is with the Commonwealth and the Australian States and Territories. Of course individual States and Territories compromise a measure of sovereignty in doing so, but that is the price all must pay for any realistic prospect of meaningful environmental reform.

5.1 Conclusions

The IGAE, together with the enabling legislation of its constituent parties, represents an attempt to deal with two very difficult tensions:

- (1) The tension between the central and regional Governments in a federal system, particularly in the area of environmental matters where recent High Court decisions have significantly empowered the Federal Government at the expense of the States and Territories.

¹⁰⁷ This problem has been identified as particularly a product of international agreements, but is equally applicable in any efforts of multi-jurisdictional standard setting. See: Sand, P.H. Lessons Learned in Global Environmental Governance. *Boston College Environmental Affairs Law Review*, Vol. 18, 1991, p. 213 at p. 219.

- (2) The tension between environmental reforms and development, that is, the public's desire for both meaningful environmental reform and economic prosperity, which forces governments to make very difficult and often politically costly compromises.

The IGAE anticipates these tensions. In its desire for uniformity, it rejects consensus decision making. It acknowledges that, in the field of environmental regulation, a requirement for unanimity, or even consensus, between the ten signatories to the IGAE is in practical terms difficult, if not impossible, to satisfy. Instead, the IGAE appropriately provides for the adoption of NEPMs by a two thirds majority. The clear intent of the IGAE is that once adopted, NEPMs are to be binding on all parties. The appropriate mechanism for binding parties would appear to be enabling legislation which automatically incorporates NEPMs into State and Territory law.

While the IGAE as a multi-jurisdictional framework agreement is not legally binding on the parties, its spirit of unified action on the environment is clear. While no member appears to have enacted mandatory incorporation provisions for NEPMs as the IGAE appears to contemplate, Western Australia is arguably at the extreme end of discretion. The Western Australian Bill makes no provision, other than the section 7 statement of intent, which the Committee have characterised as legally unenforceable but possibly a constraint on local standard setting, for even a discretionary inclusion in State law or mandatory adoption as State regulations as have other States. The Western Australian response is not in a technical sense illegal, simply because the IGAE itself is not legally binding and does not in any case stipulate the required form of enabling legislation. But given the spirit of the Agreement, the Western Australian Bill, to an even greater extent than those of other States, does not facilitate the participation of Western Australia in the NEPC as was clearly intended in the IGAE.

The IGAE impliedly requires the reservation of significant parliamentary powers to the Executive in the interests of meaningful environmental regulation, save only for the provision for scrutiny by the Commonwealth Parliament. In signing on to the IGAE, the State of Western Australia and other States appeared to have accepted that compromise. Western Australia's enabling legislation now appears to suggest otherwise, and the provisions of Western Australia's section 22, by endeavouring to rescue a measure of parliamentary scrutiny, if that is its intent, are probably illusory. The Committee in an effort to address this, makes an important recommendation later in the Report concerning proposed section 22.

It is unsurprising that one prominent environmental law academic has concluded that:

the dual goals of 'equivalent environment protection' and consistent environment protection measures throughout Australia are beyond the capacity of the NEPC scheme.¹⁰⁸

Prof. Fowler describes the legislative response of the members to Schedule 4 of the IGAE as

the production of an elaborate facade [and concludes that] the whole NEPC scheme is essentially tokenistic in nature and ... unlikely to deliver the objects of its enabling legislation.¹⁰⁹

¹⁰⁸ Fowler, R., *Law and Policy Aspects of National Standardisation*, in Boer, B. *et al* (Eds.) *Environmental Outlook No 2: Law and Policy*, The Federation Press, 1996 318 at p. 332.

¹⁰⁹ *Ibid.*

5.2 Recommendations

As indicated in paragraph 4.2 the Western Australian Bill conforms with the established models for implementing intergovernmental agreements previously identified by the Committee.¹¹⁰ Beyond this the Committee identified two particular concerns:

- (1) Whether Western Australia's legislative response complies with the State's obligations under the IGAE.
- (2) Whether the NEPC (Western Australia) Bill preserves Parliament's legislative supremacy to determine the content of State law.

The key issue is the measure and manner of incorporation in the law of Western Australia of NEPC adopted National Environment Protection Measures as contemplated by the Western Australian Bill.

In the first instance, as noted in the body of this Report, Western Australia has made no provision for the automatic adoption of NEPMs in State law. In fact, it has gone further than the other States/Territories to make incorporation of NEPMs discretionary, for example, Western Australia has set out an "intent to comply," but has failed to provide a concrete means of meeting that intent and adopting NEPMs.

Second, responsibility for adopting NEPMs is clearly vested in the executive, that is, the nominated Minister serving on the NEPC. Moreover, it is within the Minister's discretion to table or not table an adopted NEPM for legislative scrutiny. Hence the Committee makes a recommendation on this matter.

Thus, most of Parliament's legislative power to review and adopt NEPMs is delegated under the Bill to the Executive, and by extension to the NEPC composed of the Commonwealth Minister and the States' and Territories' Ministers. Such a result is perhaps, inevitable given the nature of the NEPC as a national standard setting body for environmental protection policies.

The Committee's two concerns, are in conflict. Is it possible for Western Australia to comply with its obligations under the IGAE and participate meaningfully in the adoption of national environmental protection standards while still retaining a measure of legislative competence to determine the content of State policy on the environment? The key to answering this question is section 22 of the Bill, and to a lesser extent, section 7.

¹¹⁰ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Censorship Bill: Consideration of the Western Australian Censorship Bill*, Eleventh Report, 1995, 28 November 1995, Annexure 1.

The Committee recommends that:

Recommendation 1

Section 7 of the Bill be amended to clearly indicate how NEPMs will be incorporated into State law (see: below, recommendations 2 (a) and (b)).

Recommendation 2

Section 22 of the Bill be amended/replaced to:

- (a) provide that all NEPMs adopted by the NEPC shall be tabled before both Houses of Parliament for 21 days; and**
- (b) that all NEPMs shall be incorporated as State Environmental Protection Policies as administered under the *Environmental Protection Act (Western Australia)* unless disallowed by either House of Parliament.**

If implemented, these recommendations ensure that Western Australia complies substantially with the IGAE by providing for the essentially automatic adoption of NEPMs approved by the NEPC. Incorporation of NEPMs in the manner suggested, unless disallowed by either House of Parliament, preserves legislative scrutiny of NEPMs to a greater degree than in the other States. It more properly balances the discretion of the Executive to propose policy with the discretion of the Legislature to review and adopt that policy. At the same time, requiring a majority of either House of Parliament to disallow an NEPM, sets a high standard for overriding mandatory incorporation of NEPMs into State law. Such a standard is compatible with the intent of NEPMs, that is, to be non-discretionary, national measures, cooperatively established and enforced by the National and State/Territory Governments. Finally, the disallowance of NEPMs regime is a means of exercising Legislative oversight that is within the range of responses adopted by other NEPC members. In terms of the discretion exercisable by the States and Territories not to incorporate NEPMs automatically into law, the recommended option fits somewhere in the least discretionary range, falling between the Tasmanian and foreshadowed New South Wales approaches, those with a similar level of discretion like Victoria, and those with greater discretion as in South Australia, Queensland, and as foreshadowed in the ACT.

Although NEPMs are intended to be incorporated automatically into State law without any scrutiny beyond that given by the NEPC and the Commonwealth Parliament, as a practical matter, no jurisdiction has followed that path. All States and Territories provide for some discretion. The Committee recognises that the IGAE/NEPC regime is intended to avoid the potential for Legislative disallowance of NEPMs by the States and Territories. That is why the regime can be characterised as an exercise in Executive Federalism. However, in light of the fact that other members all exercise some discretion with respect to the adoption or implementation of NEPMs, the proposed method of review, coupled with the automatic

incorporation of NEPMs into Western Australian law, is perhaps, preferable to a regime that currently does not provide at all for the incorporation of NEPMs into State law, and which also contemplates a disallowance of adopted NEPMs by only one House of Parliament.

In summary, the recommendations provide a clear method for incorporation of NEPMs into State law while preserving the Western Australia Parliament's legislative supremacy by providing for scrutiny of NEPMs within a defined time limit. At the same time, the method for disallowance assures that in all but exceptional circumstances, those NEPMs will in fact be incorporated into State law, thus satisfying the State's obligations under the IGAE.

Parliamentary Direction

That in accordance with Standing Order 378(c) of the Legislative Assembly of Western Australia, this Standing Committee directs that the responsible Minister be required within not more than three months, or at the earliest opportunity after that time if Parliament is in adjournment or recess, to report to the House as to the action, if any, proposed to be taken by the Government with respect to the recommendations of this report.

APPENDIX 1

**INTERGOVERNMENTAL AGREEMENT ON THE ENVIRONMENT
(THE IGAE)**

APPENDIX 2**NATIONAL ENVIRONMENT PROTECTION COUNCIL (WESTERN AUSTRALIA) BILL 1966**

APPENDIX 3

Evidence

14/8/96	GARDNER, Alex Senior Law Lecturer, University of Western Australia	Environmental Law
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