Promise or Pretence - Compliance with the Intergovernmental Agreement on the Environment: The National Environment Protection Council (Western Australia) Act 1996

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Subjects: Environmental law -- International (Other articles)
Environmental law -- State
Environmental law -- Western Australia
Issue: Volume 4, Number 1 (March 1997)
Category: Refereed Articles

Introduction

1. This essay on the *National Environment Protection Council (Western Australia) Act* 1996 is based on an original Consultancy Report undertaken by the Murdoch University Environmental Policy and Law Centre, for the Legislative Assembly of Weste rn Australia Standing Committee on Uniform Legislation and Intergovernmental Agreements. The original Report encompassed a review of the *National Environment Protection Council (Western Australia) Bill* 1996. Since the Report's submission, the Bill has become operative, being proclaimed on the 16 November 1996. The Report was commissioned to address the Committee on a number of issues of concern including the nature of, and the State's compliance with the Intergovernmental Agreement on the Environme nt (IGAE) and the implications for parliamentary scrutiny, now and in the future, of signing the IGAE and enacting the *National Environment Protection Council (Western Australia) Act* 1996. The Committee's recommendations[1]< /A>, although based on the conclusions and recommendations of the Report itself, failed to be incorporated into the final draft of the Bill. The concerns and issues raised by the Report and the Committee remain unaddressed and unresolved, yet their satisf actory resolution is fundamentally important to Western Australia's meaningful participation in the adoption of national environmental protection standards. Furthermore, any suggestion that the State is fully supportive of a national approach to environme ntal protection is undermined when there has been a clear failure to act on the Committee's recommendations. That failure highlights the need for further scrutiny of this newly proclaimed Act.
2. Part I of this article provides a general overview of the establishment, functions, and implementation of intergovernmental agreements, as well as discussing the legal effect and enforceability of such agreements. Part II discusses the IGAE, its ba ckground, aims, structures and its legal enforceability. The National Environment Protection Council (NEPC)

legislation is outlined in Part III. It presents an overview of the basic provisions of the NEPC Acts, and also specifically focuses on the NEPC it self, providing detail as to its establishment and membership as well as its objectives and functions. The form and content of National Environment Protection Measures (NEPMs) are discussed in Part IV. Part V considers whether the NEPC legislation conform s to the IGAE requirements by providing an overview of the NEPC legislative response in each jurisdiction, that is, the methods adopted by each member of the Council to implement NEPMs into their respective legislation. Part VI highlights the variations i n Western Australia's legislative response to those of other Council members, and further considers whether this response conforms to the IGAE. In addition, the issue of whether the NEPMs, as adopted by the NEPC, are legally enforceable irrespective of wh ether Western Australia, or for that matter, any Council member, has provided for some method for NEPMs incorporation into their state or territory law is also addressed. Finally, in Part VII concluding comments are given and recommendations are made as t o how the newly proclaimed Act could be amended to ensure that Western Australia is a meaningful participant in a national approach to environmental protection.

Part I: Intergovernmental Agreements

(i) General Overview: intergovernmental cooperation

3. Since the World Commission on Environment and Development released its report *Our Common Future*[2] (the so-called Brundtland Report), Australia has undertaken extensive national programmes of consultation a nd planning to endeavour to meet the challenge of sustainable development.[3] Along with many other countries Australia has been struggling to maintain development of its primarily natural resource-based economy while a t the same time striving to implement laws for the protection of the environment.[4] A particular feature of Australia's efforts has been the development of the role of the Commonwealth government in environmental prote ction and the consequent conflicts with State governments that have traditionally exercised constitutional authority over management of natural resources and the environment.
4. 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, e xternal affairs[5]. In those cases, Section 109 of the Constitution provides that inconsistent State or Territory legislation is inoperative while validly enacted Commonwealth legislation is operative.[6]
5. This form of over-riding legislation is the simplest method of ensuring consistency.[7] However, this legislation does not require the cooperation of other jurisdictions, and cannot 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 Constitution. In some cases, the Commonwealth may be referred the necess ary power to make overriding legislation in a given area.[8]
6. The Commonwealth lacks any specific constitutional authority to legislate in relation to environmental affairs. 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 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" a nd the "trade and commerce" powers[9], create real potential for conflict with the States. Clearly, Commonwealth priorities might contrast with those of individual States, especially in the sensitive area of environmenta l measures, which frequently contend 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 s tate sovereignty. Cooperative federalism is one response to this potential conflict.

7. 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 enviro nmental matters, and come within the over-arching process of intergovernmental cooperation. Intergovernmental agreements evidencing this cooperation precede and support schemes requiring uniform legislation.[10] In ad dition to intergovernmental agreements, the other main vehicle used in Australia for federal cooperation in regard to environmental and natural resource issues, as in other areas of public policy, are ministerial councils.[11]

(ii) Establishment and definition

8. Intergovernmental agreements, being vehicles of "executive federalism"[12], are sometimes considered to encompass national policy strategies and statements[13] which have dev eloped through processes of public consultation for guiding national environmental management.[14] However, the main intergovernmental agreements are more formal documents intended to be "political compacts"[15] which represent agreement in principle reached by the executive branches of government.[16] In this broad context, the executive branch of government includes both the responsible minis ters and the bureaucracies that serve them.[17]
9. Agreement by the executive branches of governments at the Council of Australian Governments[18] and/or other Ministerial Councils to a scheme involving the passage of uniform legislation in different jurisdictio ns 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.[19] In Australia, the degree of certainty and validity achieved by any agreement d epends to a large extent on the form of legislation, if any, used to implement it.

(iii) Functions and purposes

10. Intergovernmental agreements perform numerous functions and purposes. These include the facilitation of information sharing, the coordination of policy making, the reaching of agreements in principle on specific issues, the provision of a cooperati ve framework for the administration of governmental powers including policy considerations and the directing of routine administration of government.[20] In addition, intergovernmental agreements set the stage for the implementation of uniform legislation and standards, and provide support for policies requiring uniform legislation.[21]

(iv) Implementation of intergovernmental agreements and the need for uniform legislation

11. 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 consisten tly with the principles adopted by the councils or expressed in the agreements.[22] However, in Australia, recent exercises in executive federalism have emphasised the enactment of uniform or complementary legislation establishing an intergovernmental agency as the method of implementation.[23]
12. 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 include areas:
    - 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;
    - 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
    - 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.

(v) Legal effects of intergovernmental agreements

13. 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 multijurisdictional intergovernmental agreements; and
    - bilateral intergovernmental agreements.[24]
14. The *Intergovernmental Agreement on the Environment*[25] is an example of a multijurisdictional intergovernmental agreement that provides a cooperative "framework" for the administration of governmental pow ers relating to environmental matters, including policy considerations, between the Commonwealth and the States and Territories.

(vi) General Principles for enforceability of intergovernmental agreements

15. 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."[26] 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 justiciable[27], while others have been held to be non-justiciable.< A HREF="#t28">[28] 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".[29] Moreover, 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 issues.[30]

16. 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 the validity or authority to make them;
    - agreements ratified by legislation to transform contractual duties into statutory duties;
    - agreements ratified in such a way as to enact the agreement as law, thus changing any inconsistent law;
    - agreements which although not ratified or enacted by statute are implemented by new legislation; and
    - agreements which are given constitutional status.[31]
17. 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 givi ng effect to the agreement changes the law, did the parties intend their agreement to create legal obligations.

Part II: The Intergovernmental Agreement on the Environment (the IGAE)

(i) Background

18. 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 of a number of important High Court d ecisions which had effectively expanded Commonwealth powers to regulate matters affecting the environment,[32] 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.[33] This created a new set of intergovernmental dynamics which, at the extreme, were manifested in poor process, extended time-lines for decision making and had great uncertainty.
19. The intention to develop the Agreement was announced in a communique issued by the first Special Premier's Conference, the forerunner to the Council of Australian Governments (COAG)[34], in Brisbane in October 1 990. 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 IGAE[35] was instructed to report to the November 1991 Special Premiers' Conference on appropriate and effective arrangements for standard sett ing and

implementation including a possible National Environmental Protection Agency and its roles and relationship with Commonwealth, State and Territory agencies."[36]

20. The IGAE was negotiated by a sub-group of the Working Group on Environmental Policy (the WGEP), and came into effect on 1 May 1992.[37] The Agreement was entered into by all the governments of Australia, those r epresenting the Commonwealth, States and major Territories (The Northern Territory and the Australian Capital Territory)[38] and the President of the Australian Local Government Association.[39] 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 en vironmental 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 con stitutional 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 environ mental arena. The Commonwealth had a number of constitutional powers through which it could justify involvement in State environmental issues.[40]

21. 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 uncert ainty between Commonwealth and State governments in areas of environmental management and to develop a cooperative national approach to the environment.[41]

(ii) Aims and structure

22. 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 t he expectations of governments in relation to the management of environmental issues.[42] In essence, the Agreement aims to provide the basis for a new cooperative approach to management by governments of environmenta l 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 envi ronmental disputes, greater certainty in respect to government and business decision making, and better environmental protection.[43]
23. The IGAE seeks to perform among others, three specific functions. The first is to identify the responsibilities and interests of the Commonwealth and of the States and Territories in relation to the management of the environment. The second is to p rovide 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 and the third is

to set out principles that should guide the dev elopment and implementation of environmental policy and programmes by the Commonwealth and by the States and Territories.[44]

24. The allocation of responsibilities within the IGAE identifies those areas that are within the ambit of the Commonwealth and effectively leaves the rest to the States and Territories.[45] The responsibilities al located 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.[46]
25. 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;[47]
    - States have responsibility for the policy, legislative and administrative framework within which living and non-living resources are managed within the State;[48]
    - States have an interest in the development of Australia's position in relation to any proposed international agreements, either bilateral or multilateral, of environmental significance which may impact on the discharge of their responsibilities;[49] and
    - States have an interest and responsibility to participate in the development of national environmental policies and standards.[50]
26. 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 practises and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and enviro nment. 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.[51]

27. This system is based upon six specific foundations:
    a. ecologically sustainable development;[52]
    b. the integration of environmental considerations into government decision-making processes;[53]
    c. the precautionary principle;[54]
    d. the principle of intergenerational equity;[55]
    e. conservation of biological diversity and ecological integrity;[56]
    f. 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.[57]

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);[58]
- environmental impact assessment;[59]
- national environment protection measures (including the setting up of a Ministerial Council to be called the National Environment Protection Council);[60]
- measures to address climate change;[61]
- protection of biological diversity;[62] and/or
- nature conservation.[63]

In the specific context of the 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 jurisdiction*…".[64] This paragraph clearly indicates the need for enabling legislation that 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 rel ation to the Corporations Law.[65] 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 Co mmonwealth and State environment protection bodies."

As Fowler observes, "[t]he [NEPC] enabling legislation clearly has not adopted this approach…;"[66] thus, the "automatic" adoption of NEPMs is not assured as with measures under the Corporations Law. As noted in subsequent sections of this article, the commitment of the members to implementation of NEPMs appears to have failed given that the various State and Territory enabling statutes do n ot in fact provide for automatic incorporation of NEPMs as envisaged by the IGAE. In this respect, the Western Australian Act is among the weakest legislative schemes.

(iii) Legal enforceability of the IGAE

The question of legal enforceability is important not only in evaluating the extent to which the Western Australian Act 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 provi sions and carefully drafted clauses; the 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 the 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.[67] However the true natu re of the Agreement is

revealed when considering its substance and the language used.[68] It is apparent that the IGAE is intended only to be a "political compact", a multijurisdictional framework agreement, providing a cooperative structure for the administration of governmental powers including policy considerations.[69] 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 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, ie, disputes are to be referred to ministerial councils;[70] and
- there is no clear statement whether the parties intend the agreement to be enforceable in the courts of law.[71]

Given this analysis, it is generally regarded that the IGAE is not a legally enforceable document; a party that breaches or reneges on the IGAE faces only the political repercussions that may flow from that action.[72]< /A> 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 st atement 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."[73]

In that case, the question of whether the Western Australian Act 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 strictures 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 incorp oration of NEPMs, but there is no *legal* consequence flowing from that omission.

Furthermore, as noted below it may not be whether the Western Australian Act has complied 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 withi n the Commonwealth, States and Territories. Before considering this issue it is necessary to broadly outline the nature and content of the *National Environment Protection Council Acts* of the Commonwealth, States and Territories.

Part III: The National Environment Protection Council (the NEPC) [74] legislation: a brief outline

(i) 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 th e equivalent complementary legislation in each of the participating States and Territories were 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 participa te in the NEPC,

however, on 16 November 1996, Western Australia's *National Environment Protection Council Act* became effective, and supposedly confirmed Western Australia's willingness to participate in the NEPC.

The Commonwealth Act's purpose is to provide for the establishment of the NEPC. The Act outlines both the manner in which the NEPC is established and the Council's membership (Part 2). It sets out the NEPC's objectives (Section 3) as well as func tions and powers (Part 3, Div. 1), and contains provisions concerning the making of NEPMs (Part 3, Div. 2), being measures adopted by the NEPC and incorporated into Commonwealth, State or Territory law. These form the core provisions of the Act and are f urther discussed below. Other provisions, which are nonetheless still an integral part of the Act include those relating to the establishment of the Council's committees and procedural matters regarding meetings of the Council and its various committees (Part 4); the NEPC service corporation and the NEPC Executive Officer and staff (Part 5); financial provisions (Part 6); and other miscellaneous matters (Part 7).

(ii) The NEPC

Establishment and membership

The Act establishes the National Environment Protection Council.[75] The NEPC is a direct outcome of the IGAE. The Fourth Schedule of the IGAE proposes that a National Environment Protection Authority be establi shed as a ministerial council for the purposes of "establishing measures for the protection of the environment for the benefit of the people of Australia".[76]

Under the enabling legislation, the Prime Minister, the State Premiers and the Chief Ministers will each nominate a ministerial member and may replace that member at any time.[77] As Brennan notes, "[t]he Enviro nment 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."[78] The Minister nominated b y the Commonwealth is the Chairperson of NEPC.[79] Each member of the NEPC has one vote, and decisions of the NEPC must be supported by a vote of at least two-thirds of the NEPC's members.[80]

NEPC's objectives

The objectives of the NEPC Act are to ensure that the people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia, and that the decisions of the business community are not dis torted and markets are not fragmented by variations in major environmental protection measures between Australian jurisdictions.[81] It is important to note that the objectives clearly envisage uniform environmental me asures across the country, for the benefit both of citizens and the business community.

NEPC's functions

The functions of the NEPC fall into two areas. The first of these is to make national environment protection measures[82] and the second is to assess and report on the

implementation and effectiveness of NEPMs in participating jurisdictions.[83] It is the adoption of NEPMs that is at the heart of the effectiveness of the NEPC.

Part IV: National Environment Protection Measures (NEPMs)

(i) 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:

- national environment protection goal;
- national environment protection guidelines;
- national environment protection standards; or
- national environment protection protocols.[84]

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

- "national environment protection goal" means a goal:
  a. that relates to desired environmental outcomes; and
  b. 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,
  a. whether a particular standard or goal is being met or achieved; or
  b. 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 translate in practise 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.[85]

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 only one vote.[86] The process outlined for the establishment of NEPMs requires the:

- giving of public notice of the intention to draft an NEPM;
- preparing a draft NEPM and an impact statement which must address a number of determined criteria;
- giving 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.[87]

After outlining the nature and content of the NEPC Acts, and detailing the core provisions, attention now shifts to considering whether this legislation conforms to the IGAE requirements. Specifically, the next part provides an analysis of the inco rporation mechanisms adopted by each Council member to implement NEPMs into their State/Territory law, as clearly envisaged by the IGAE.

Part V: National Environment Protection Council legislation - conforming to IGAE requirements?

(i) Overview of NEPC legislative responses in each jurisdiction

This section of the article briefly reviews the legislative responses of the States and Territories to illustrate how each incorporates NEPMs in their State/Territory legislation. The Commonwealth's response is also reviewed.

It is clear that the incorporation of NEPMs into State law was envisaged in the IGAE (see Schedule 4, Section 16 IGAE), and there has been a variety of responses afforded varying degrees of discretion in adopting them into State law. However, Weste rn Australia stands alone as the only NEPC member that has made no provision for their incorporation at all. The only provision is the statement of intent to do so in Section 7 of the Act.

(ii) Methods of incorporating NEPMs into Commonwealth/State/Territory legislation

Tasmania has provided in its *National Environment Protection Council (Tasmania) Act 1995* for incorporation of NEPMs through Section 65.[88] Pursuant to Section 65 NEPMs are taken to be State Policies with in 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 incorporation of NEPMs through Schedule 2.[89] 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" (in an undefined sense) by the SA Environmental Protection Authority, suggesting a degree of discretion in their application.

Victoria has provided in its *National Environment Protection Council (Victoria) Act 1995* for incorporation of NEPMs through Section 67[90], which provides that the Governor-in-Council "may", by ord er, 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, "[o]rders 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."[91] Thus under Victorian law, the executive has a discretionary power to incorporate NEPMs into State law.[92]

New South Wales does not provide in its enabling Act for automatic incorporation of NEPMs into State instruments. However, an exposure draft of the *Protection of the Environment Operations Bill 1996* which consolidates various environmental r egulations was released in

December of 1996 and brings NSW in line with the other states' and territories' environmental protection policies (EPPs). The Bill provides for the making of Protection of the Environment Policies (PEP) which will set out in det ail the environmental standards, goals, guidelines and protocols which will guide the Environment Protection Authority and Government in making decisions that affect the environment. They will also be the instrument for incorporating NEPMs adopted by the NEPC.

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* 1994 (Qld) for NEPMs commenced under the national scheme to be taken a s an environmental protection policy if it is approved by regulation.[93] 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 incorporating mechanism will be similar to that of Queensland and Victoria (and pr obably New South Wales), that is to say presumably subject to an element of discretion.

The Northern Territory is currently drafting a Waste Management and Pollution Control Bill 1997, with the public discussion exposure draft released in November 1996. Co ntained within the Bill are provisions for the incorporation 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 are akin to state environmental protection policies, which are the implementation mechanism in other states and territories. Furthermore, other parts of the Bill may also deliver on the NEPMs, and other Northern Territory legislation may also be utilised to incorporate the NEPMs in, for example, the Water Act, Motor Vehicle Act, Planning Act etc. 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, after reviewing the various enabling enactments. Given that those State/Territory responses are not unifo rm, and continue to threaten different standards in different States through the element of discretion in adopting NEPMs, the Commonwealth will be required to conform to different standards with respect to its activities in different States. Clearly the I GAE objective of uniform standards is being undermined.

Thus, there appears to be a very clear intent within the enabling legislation of most jurisdictions 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 j urisdiction, which in turn will have sole responsibility for the implementation of the relevant laws and arrangements.[94] All States, it appears, have fallen short of the "uniform" commitments contemplated in the IGAE .

As highlighted, the various members of the Council have approached the incorporation of NEPMs into their own legislation differently. However, Western Australia's legislative response stands alone not only for lack of an incorporation mechanism, bu t also for a further modification to the supposedly uniform legislation to ensure Western Australia's 'regional differences' are taken into account. The existence of these significant variations to other members' legislation demand that Western Australia' s legislative response, particularly these differences, is considered further.

Part VI: Western Australia's Legislative Response

(i) Variations from the other States and Territories - deceptively small but significant differences

Leading up to the establishment of the Commonwealth NEPC, there was unease in Western Australia over whether the legislation "adequately… [took]… account of the continental size of Australia by allowing for 'regional differences' …[and concerns wer e 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".[95] So to "make clear the Western Australian Parliament's responsibilities in this regard [the] Act contains a small, but significant, modification from the uniform legislatio n to enable the Parliament to disallow a 'national environment protection' measure where the Western Australian member of the NEPC is of the opinion that that 'measure' does not take into account Western Australian's 'regional differences'." [96] This modification is incorporated into the Act through Section 22(2)-(6). The Section provides that the Minister, being Western Australia's representative on the NEPC may lay an NEPM before each House of the Western Australian Parliament if he or she does not believe it complies with the commitment to take into account 'regional differences' and that either House of Parliament may reject such a measure, in which case it ceases to be an NEPM for the purpose of the WA Act.

Western Australia's concerns were further addressed by the omission in the enabling legislation or in, for example, the *Environmental Protection Act 1986* (WA), of automatic incorporation of NEPMs. Although other member States, with the excep tion of Tasmania, have also stopped short of mandatory incorporation, Western Australia alone has declined to provide formally for even a discretionary inclusion in complementary State legislation (such as the *Environmental Protection Act*), and the current understanding is that there are no plans to do so. The only provision, in conformity with all of the other Council members' legislation, is the statement of intent to incorporate NEPMs in State law contained in Section 7 of the Act. Western Austr alia's response will be limited, in that NEPMs will be ad hoc depending on the nature of the NEPM. For example, an NEPM on air quality already initiated will be implemented through an Environmental Protection Policy in WA.

The 'regional differences' provision, combined with the failure to make provision for any NEPM incorporation mechanism as clearly intended by Section 7, highlights the lack of commitment on Western Australia's part to meaningful participation in a national approach to environmental protection. The legislation as it currently stands, merely presents a front of support and participation, while behind the facade Western Australia has enacted the legislation in a manner to have the best of two worlds: national environmental protection when it suits, and the ability to use an 'escape' mechanism when it, or more accurately the nominated Minister appointed to the NEPC acting upon his or her own discretion, does not want to adopt a particular NEPM.

(ii) Western Australia's legislative response - conforming to the IGAE?

As explained previously when discussing the other members of the Council's legislative responses, the IGAE requires that the Commonwealth and the States agree to develop legislation which will authorise that Authority (NEPC) to establish any measur es. The legislation is also required to establish mechanisms for the application of measures in the States. The legislation is

to ensure that any measures established by the Authority will apply, as from the date of the commencement of the measure, throug hout 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 members 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 IGA E save only for Section 7, which (in conformity with all other States) states an intention to comply "by [enacting] such laws and other arrangements as are necessary".

The question then arises as to whether it matters whether the Western Australian Act has conformed to the IGAE? On close analysis of the IGAE there are strong arguments that:

- 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 the degree of specificity required to make it enforceable, but it contemplates a National Environmental Protection Authority; that is to say the IGAE does not specify the particular manner of enabling legislation to be enact ed by the States and so the field is open (at least in a strictly legal sense) to such a response as the WA Act; and
- other states have enacted NEPC Acts which allow for varying degrees of discretion to implement NEPMs, setting a precedent which the WA response similarly contemplates (to an even greater extent because of its failure to say how NEPMs may be incorpo rated in State law).

Again, the point is that, given the non-justiciable nature of the IGAE, the sovereign WA Parliament has the authority to respond in any legislative form it wishes, except where inconsistent with valid Commonwealth legislation. It was not constraine d 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 sovereignty includes the power to overturn earlier enactments - that is to say the WA Parliament always has the option of withdrawing from the IGAE and "going its own way" on environmental regulation.)

Furthermore, rather than the WA Act'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 enactin g 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.[97]

It will be clear at this point that the WA modification in Section 22 may be viewed as being in breach of the spirit of the IGAE. That it arguably does not raise legal difficulties (since WA 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 th rough 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 (o r nationally significant) 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 d oes 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 necessa rily be assuaged.

Note also in respect of Section 22, that it contemplates, where the Minister judges non-compliance with respect to regional environmental differences, that at his or her discretion a notice of rejection of the offending NEPM may be given to the Par liament 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 som e 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 sup erfluous.

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 neg ating the very intent of the IGAE and the agreement of rule by a two-thirds majority. It would appear to be open to the State to re-visit NEPMs almost at will, though of course as has been suggested it can in any case, as their adoption is impliedly discr etionary. On the other hand, Section 22 refers to measures with respect to which the "Council did not comply with Section 15(g)", ie, 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)). Note that Section 22 is c haracterised in the Act as one relating to "procedural" requirements, whereas the added Subsection (2) (a provision unique to WA among State NEPC Acts) appears to contemplate a challenge on substantive grounds to the adequacy of the Council's consideratio n 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 diff icult to invoke Section 22 without legal challenge on those grounds.

In summary, one might challenge the integrity of Section 22 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 WA Parliament, or alternatively of being "overkill" by preserving an already potentially sweeping discretion.

Apart from concerns over the clear failure of the WA Act to have any form of incorporation mechanism at all, a further question must surely be raised. Irrespective of whether an incorporation mechanism exists within the WA Act, or for that matter, any of the Council member's NEPC legislation, would the NEPMs, as adopted by the NEPC be legally enforceable anyway?

(iii) 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:

There is no statement in the WA Act, for example, about the legal force of those NEPMs. NEPMs are to be adopted by the NEPC and then tabled in the Commonwealth Parliament for disallowance.[98] Although such a pr ocedure has the appearance of making them look like regulations, there is no indication in the Act and the IGAE to demonstrate that they are of the same status as regulations,[99] which are law enforceable by the court s. 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 impr acticality 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 incorpo ration. Again, it appears that the intent of the IGAE has been undermined.

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 definition sections in all the NEPC Acts 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.[100]

Section 7 of the WA Act is the clearest statement 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 [the] parliament" of WA that the State (in cluding the Legislature and the Executive) will, in compliance with its obligations under the IGAE, implement by such laws and other arrangements as are necessary, for 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;
- 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 it could not do so in a court of law because Western Australia could not be forced to comp ly 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" elevate the IGAE and NEPMs to legally enforceable obligations;[101] and finally
- implementation of NEPMs "by such …other arrangements as are 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. A s one commentator notes, "if the NEPMs

did not create limits, they would at least create mandatory relevant considerations."[102]

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 whic h 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 of the impact they are intended to hav e 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 WA and other members from relaxing them beyond the stated NEPM.

The language in all the NEPC Acts is unlikely to be deemed to have the force to create judicially enforceable obligations given the nature of the NEPMs.[103] Generally speaking, the measures only set ambient stan dards for two reasons:

- considerable further decision making either legislative or executive is required to implement ambient standards; and
- implementation of NEPMs is "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 are incon sistent 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.[104]

Within one Act there may be clauses or sections that are justiciable while others are not, depending on the issues involved.

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 of the Act). The Council in turn has a duty to report annually to the Commonwea lth 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" provi ded by the Act for the implementation of NEPMs.[105]

Part VII: Conclusions and Recommendations

It must be acknowledged that regulation of environmental pollution and environmental protection generally is inherently difficult. In many instances, environmental protection challenges traditional and fundamental values of economic growth and deve lopment 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 con troversial 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 unifor m standards is left to individual polities rather than to a central body.[106] The one method of avoiding lowest common denominator standard setting is the method adopted by the NEPC, ie, the requirement for a two-th irds 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 'proleps is', 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 jeal ous 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 th e only practical way of achieving any kind of meaningful environmental reform. So it is with the Commonwealth and the Australian States. Of course individual States compromise a measure of sovereignty in doing so, but that is the price all states (and the nation) must pay for any realistic prospect of meaningful environmental reform. The states and territories must decide whether their priority is environmental reform or protection of regional sovereignty, and where there is a conflict, how compromise is to be managed and achieved. (Assuming that there are real and not imaginary regional differences among the States, those regional differences may make compromise a more complex issue.)

Whatever the original motivation for the two-thirds majority rule (and it is understood that it is rooted more in federal political realities than in notions of prolepsis), it is one that makes a great deal of sense with respect to environmental re form. Unfortunately, as observed, it has not yet translated into a strong commitment by NEPC members to automatically incorporate NEPMs in state law, especially in the case of WA.

The IGAE, together with the enabling legislation of its constituent parties, represents an attempt to deal with two very difficult tensions. First, the tension between the central and regional governments in a federal system, particularly in the ar ea of environmental matters where recent High Court decisions have significantly empowered the federal government at the expense of the States, and second, the tension between environmental reforms and development, that is, the public's desire for both me aningful 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 t he 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 partie s. Arguably, the appropriate mechanism for binding parties would appear to be enabling legislation that automatically incorporates NEPMs into State law.

While the IGAE as a multijurisdictional 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, WA is arguably at the extreme end of discretion or possibly even non-compliance. The WA Act makes no provision, other than the Section 7 statement of intent, which has been

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 WA response is not, in a technical sense, illegal simply because the IGAE itself is not legally bi nding and does not, in any case, stipulate the required form of enabling legislation. But, given the spirit of the Agreement, the WA Act, to an even greater extent than those of other States, does not facilitate the participation of WA 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 the Commonwealth and other States and Territories appeared to have accepted that compromise. Western Australia's enabling legislation now appears to suggest otherwise, and the provisions of WA's Section 22, by ende avouring to rescue a measure of parliamentary scrutiny (if that is its intent) are probably illusory.

It is not surprising 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 sc heme."[107] Professor Fowler describes the legislative response of the members to Schedule 4 of the IGAE as "the production of an elaborate facade" and concludes "the whole NEPC scheme is essentially tokenistic in na ture and… unlikely to deliver the objects of its enabling legislation."[108]

If Western Australia is to meaningfully participate in a national approach to environmental protection the Committee's original concerns must be genuinely addressed. The first of their concerns was whether WA's legislative response complied with th e State's obligations under the IGAE; and second, whether the NEPC (WA) Act preserved Parliament's legislative supremacy to determine the content of state law. The key issue for both of these concerns is the measure and manner of incorporation in the law of Western Australia of NEPC adopted National Environment Protection Measures as contemplated by the WA Act.

In the first instance, as noted in the body of this essay, WA 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, that is, WA has set out an "intent to comply," but has failed to provide any 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.

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

Is it possible therefore, for WA 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 co ntent of State policy on the environment? The key to answering this question is Section 22 of the Act, and to a lesser extent, Section 7.

To ensure Western Australia is a meaningful participant in the NEPC, and truly supportive of national environmental protection standards, the Act should be amended to incorporate the following recommendations:

- Section 7 of the Act should be amended to clearly indicate how NEPMs are to be incorporated into State law (see: below, recommendations 2 (a) and (b)); and
- Section 22 of the Act 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* 1986 (WA) unless disallowed by a majority of each House of Parliament.

If implemented, these recommendations would ensure that WA complies (substantially) with the IGAE by providing for the (essentially) automatic adoption of NEPMs approved by the NEPC and the Commonwealth. Incorporation of NEPMs in the manner suggest ed (unless disallowed by both Houses 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 each 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 NEP Ms, that is, to be non-discretionary, national measures, cooperatively established and enforced by the National and State/Territory governments. Finally, the "two-house" disallowal of NEPMs regime is a means of exercising legislative oversight that is wit hin the range of responses adopted by other NEPC members.

Although NEPMs are intended to be incorporated automatically into state law without any scrutiny beyond that given by the NEPC, as a practical matter, no jurisdiction has followed that path. All members provide for some discretion. It is recognised that the IGAE/NEPC regime is intended to avoid the potential for legislative disallowal 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 WA law), is perhaps, preferable to a regime that currently does not provid e at all for the incorporation of NEPMs into State law, and which also contemplates a disallowal of adopted NEPMs by only one House of Parliament.

In summary, the recommendations presented provide a clear method for incorporation of NEPMs into State law while preserving the WA Parliament's legislative supremacy by providing for scrutiny of NEPMs within a defined time limit. At the same time, the method for disallowal 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.

Notes

[1] Western Australian Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, Fifteenth Report in the Thirty-fourth Parliament, *Review of the National Environment Protectio n Council (Western Australia) Bill 1996*, p. 30 (24 October 1996).

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

[3] 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

[4] Id.

[5] Section 51(xxix) of the Constitution of the Commonwealth of Australia*:* External Affairs, enables the Commonwealth to enter int ernational treaties and conventions.

[6] Section 109 of the Constitution of the Commonwealth of Australia: …(w)hen a law is inconsistent with a law of the Commonwealth, the l atter shall prevail, and the former, to the extent of the inconsistency, will be invalid.

[7] Western Australian Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Structures: A consideration of the different structures available for uniformity in legislatio n*, Second Report, 1994, p. 2.

[8] Section 51 of the Constitution of the Commonwealth of Australia states The Parliament shall, subject to this Constitution, hav e 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.

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

[10] Western Australia Standing Committee, Second Report, supra note [7].

[11] Ministerial Councils are vehicles of "executive federalism"(see footnote [12]) and are typically comprised of the relevant government ministers from each State and Territory and the Commonwea lth, 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 A ustralian Governments' (see footnote [18]) comprising heads of each of the Governments of the Commonwealth, States and Territories, and the President of the Australian Local Government Association, but also include, in relation to envir onmental 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 Commonweal th/State *National Environment Protection Council* legislation. See: Gardner, supra note [3] at p 108.

[12] See generally, Sharman, C. 'Executive Federalism', in Galligan, B & Hughes, O & Walsh, C. Sydney (eds.), *Intergovernmental Relations and Public Policy*, Allen & Unwin, 1991.

[13] 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 co llectively 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*,NSW, Feder ation Press, 1994 pp. 113-148.

[14] Gardner, supra note [3] at p. 110

[15] Western Australia Standing Committee, Second Report, supra note [7] at p. 3.

[16] Id.

[17] Ibid at p.2.

[18] 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 Minister s and the President of the Australian Local Government Association.

[19] Western Australia Standing Committee, Second Report, supra note [7] at p.2.

[20] Gardner, supra note [3].

[21] Western Australian Standing Committee, Second Report, supra note [7].

[22] Id.

[23] 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 1992. Oth er 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 complemen tary 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 legisla tion 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 Le gislation and Intergovernmental Agreements, *Committee Report I January 1995 to 31 May 1996*, 1996, p.19-22 provides current details of proposed uniform legislation.

[24] Gardner, supra note [3] at p. 116.

[25] Intergovernmental Agreement on the Environment, May 1992.

[26] Gardner, supra note [3] at p. 116.

[27] 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.

[28] For example, South Australia v Commonwealth (1962) 108 CLR 130

[29] For example, *Reference re Canada Assistance Plan; Attorney General of British Columbia v Attorney General of Canada* (1991) 83 DLR (4^{th}) 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.

[30] See Dixon CJ comments in South Australia v Commonwealth (1962) 108 CLR 130 at 141.

[31] Gardner, supra note [3] at p. 116

[32] See generally, Crawford, supra note [9].

[33] Robinson, B. 'Smarter Regulation and Intergovernmental Cooperation in the Environmental Field', in Carroll, P. & Painter, M. (eds.) *Microeconomic Reform and Federalism*, Federalism Research Centre, Th e Australian National University, Canberra, 1995, p.191.

[34] Western Australia Standing Committee, Second Report, supra note [7] at p. 3.

[35] The Working Group on the IGAE 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 environm ental 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 aspects of the IGAE. Pain, N., "Current I nitiatives 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.

[36] Ibid at p. 304.

[37] 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; and see supra note [35].

[38] IGAE, supra note [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.

[39] 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 ack nowledges 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.

[40] Pain, supra note [35] at p. 304.

[41] Id.

[42] Hamilton, S. 'The Intergovernmental Agreement on the Environment - Three Years On'. In *Microeconomic Reform and Federalism*, Carroll, P. & Painter, M. (eds.), Federalism Research Centre, The Australia n National University, Canberra, 1995, p. 186; and Gardner, supra note [3] at p. 110.

[43] IGAE, supra note [25] at *Preamble*

[44] Fisher, D.E. 'Land-Sourced Pollution of the Marine Environment'. *Environmental and Planning Law Journal*, vol. 12 no. 2, April 1995, p. 124.

[45] IGAE, supra note [25].

[46] Ibid, para. 2.2.1

[47] Ibid, para. 2.3.1

[48] Ibid, para. 2.3.2

[49] Ibid, para. 2.3.3

[50] Ibid, para. 2.3.4

[51] Ibid, para. 3.2

[52] Ibid, para. 3.3

[53] Ibid, para. 3.4

[54] Ibid, para. 3.5.1

[55] Ibid, para. 3.5.2

[56] Ibid, para. 3.5.3

[57] Ibid, para. 3.5.4

[58] Ibid, Sched. 2, cl.2

[59] Ibid, Sched. 3

[60] Ibid, Sched. 4

[61] Ibid, Sched. 5

[62] Ibid, Sched. 6

[63] Ibid, Sched. 7

[64] Ibid, Sched. 4, cl. 16 (emphasis added)

[65] 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. 3 27.

[66] Id.

[67] Gardner, supra note [3] at p. 119.

[68] Id.

[69] Id.

[70] IGAE, supra note [25] at paras. 1.13 and 2.5.3.5.

[71] 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 q uestion,…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" i n 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,* Aust ralian Uniform Building Regulations Coordinating Council, 1991, p. 27.

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

[73] Hamilton, supra note [42] at p. 186.

[74] 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.

[75] National Environment Protection Council Act 1994 (Cth), section 8. (This provision occurs in all State and Territory NEPC Acts).

[76] IGAE, Sched. 4, cl 5.

[77] NEPC Act 1994 (Cth), s 9(1). (This provision occurs in all State and Territory Acts.)

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

[79] NEPC Act 1994 (Cth), s10. (This provision occurs in all State and Territory NEPC Acts)

[80] Ibid at s 28. (This provision occurs in all State and Territory NEPC Acts)

[81] Ibid at s 3. (This provision occurs in all State and Territory NEPC Acts)

[82] Ibid at s 14(1). (This provision occurs in all State and Territory NEPC Acts)

[83] Ibid at s 23. (This provision occurs in all State and Territory NEPC Acts)

[84] NEPC Act 1994 (Cth), s14(3). (This provision occurs in all State and Territory NEPC Acts); and Commonwealth of Australia Senate Hans ard, Second Reading Speech, Monday, 6 June 1994, p. 1315.

[85] NEPC Act 1994 (Cth), s14(1). (This provision occurs in all State and Territory NEPC Acts)

[86] Ibid at s28. (This provision occurs in all State and Territory NEPC Acts)

[87] Ibid at ss 16-19. (This provision occurs in all State and Territory NEPC Acts)

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

[89] Schedule 2 inserts a new section 28a into the Environment Protection Act 1993 (SA.).

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

[91] *Environment Protection Act* 1970 (Vic), Section 20C.

[92] 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 Implementatio n 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, ina ccurate.

[93] Section 34, *Environment Protection Act* (Qld) 1994.

[94] Pain, supra note [35] at p. 328.

[95] *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.

[96] Id.; and see: NEPC (WA) Act, ss 22(2)-(6).

[97] Fowler, supra note [65] at 327-28.

[98] NEPC Act (Cth), s 21. (This provision occurs in all State and Territory NEPC Acts)

[99] *Select 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 We stern Australia, p. 2.

[100] Legal Effect of National Environment Protection Measures, supra note [92] at p. 7.

[101] See generally, Transcript, supra note [99].

[102] Legal Effect of National Environment Protection Measures, supra note [92] at p.7

[103] See generally, Transcript, supra note [99].

[104] Legal Effect of National Environment Protection Measures, supra note [92] at p. 7

[105] Ibid at p. 8.

[106] 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, PH, "Lessons Learned in G lobal Environmental Governance". *Boston College Environmental Affairs Law Review*. Vol 18, 1991, p. 213 at p. 219.

[107] 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 332.

Document author: Gary D Meyers, Associate Professor of Law, Murdoch University
Document creation: March, 1997
HTML document preparation: Mike Willis, Assistant Contents Editor, E Law
HTML last modified: April 29, 1997 - 12:34 PM
Modified by: Brett Lester, Assistant Technical Editor, E Law
Authorised by: Archie Zariski, Technical Editor, E Law

URL: http://www.murdoch.edu.au/elaw/issues/v4n1/meyer497.html