THE NEXT GENERATION OF AUSTRALIA’S ENVIRONMENTAL LAWS

INTRODUCTORY PAPER PREPARED BY:

Adjunct Professor Rob Fowler
Emeritus Professor Ben Boer
Emeritus Professor David Farrier
Professor Lee Godden
Professor Neil Gunningham
Dr. Cameron Holley
Dr. Hanna Jaireth
Bruce Lindsay
Professor Jan McDonald
Dr. Chris McGrath
Professor Zen Makuch
Professor Paul Martin
Professor Jacqueline Peel
Professor Robert Percival
Professor Benjamin Richardson
Nicola Rivers
Rachel Walmsley
Murray Wilcox, AO QC
INTRODUCTION

Australia faces unprecedented ecological challenges. These include invasive species impacting our native biodiversity, water scarcity, looming extinctions of many endemic plants and animals, plastic pollution and other threats to our oceans, the significant impact of mining and gas extraction on health and water, and the effects of climate change. Scientists have ranked Australia as ninth worst in the world for absolute environmental degradation.

It is apparent that in order to take care of our unique country for the benefit of us of all we need an improved system of environmental management. At the heart of that system, we need laws that will effectively protect, restore and sustainably manage our natural and cultural heritage.

We each expect governments and companies to do their best to look after our magnificent natural and cultural assets. Australia has a strong history of acting to protect natural and cultural wonders – the Great Barrier Reef, the Franklin River and Kakadu, for example. But many of these successes were responses to crises. On a day-to-day basis, our current environmental laws often fail to achieve positive environmental outcomes. Too often environmental goals are overridden by development and economic considerations. Environmental monitoring and compliance action is inadequate. Environmental damage is being regulated but it is not being halted or reversed. As a result, the state of our environment is in decline.

That is why Places You Love – Australia’s largest ever alliance of environmental groups – established the Australian Panel of Experts on Environmental Law (APEEL). Our goal is to develop recommendations for a new generation of national environmental laws. APEEL is comprised of experts with experience in environmental law, research, practice and design and our aim is to set out a vision for environmental laws that ensure we have a healthy, functioning and resilient environment to benefit people for generations to come. We will achieve this through a system of laws that makes their implementation as transparent, efficient, effective and participatory as possible.

Before we make our recommendations, we are looking at the design and implementation of current environmental law, reviewing options for their reform, engaging in conversations with a wide range of people and taking into considering how we might integrate varying perspectives.

We invite you to become part of a national conversation about what the next generation of environmental laws could look like.

ENVIRONMENTAL LAW AND WHY IT IS IMPORTANT

Environmental law consists of an extensive body of rules, principles and models of behaviour and includes the institutions, practices and forms of government necessary to make it work. While there is a limit to what laws alone can achieve, visionary and effective laws are critical to securing a healthy, resilient and productive environment. Environmental laws should benefit all Australians, by serving the following purposes:

(i) Protecting the quality of our air, water and land, enabling us to avoid significant negative impacts on human and ecosystem health;
(ii) contributing to human prosperity, by ensuring that resources such as forests, soil, water and wildlife are managed sustainably to support economic development and social wellbeing;
(iii) safeguarding nature’s values, by protecting biodiversity, life cycles and evolutionary processes;
(iv) protecting important attributes of our cultural heritage and national character, such as our wildlife and iconic landscapes, which are intimately connected to Australia’s cultural identity including for Aboriginal and Torres Strait Islander Australians; and
(v) enabling individuals and communities to be involved in decisions that affect their environment and their livelihoods.
In this Introductory Paper, we discuss environmental law in a number of ways and refer to various parts of the overall machinery that makes up that whole body of law. There are principles and overarching goals. There are layers of government and the relationships between political and legal decision-making. There is democracy and environmental management. There are ideas about how law should relate to the management of land and water resources. There are the increasingly urgent issues of climate change and energy governance. And there is a range of areas outside of traditional environmental law, such as business and consumer laws, that impact on environmental performance.

We invite you to engage in the conversation about what our next generation of environmental laws could be, how they should work and the role they are to play in society.

THE AUSTRALIAN PANEL OF EXPERTS IN ENVIRONMENTAL LAW PROJECT

The APEEL project is intended as an collaboration in which you, your communities and organisations can contribute and participate. APEEL seeks your input, ideas and experiences about how environmental laws and institutions work or could be improved.

This Introductory Paper identifies key themes, challenges and questions including:

- Chapter 1 – The foundations of environmental law
- Chapter 2 – Environmental governance
- Chapter 3 – Land-based conservation and natural resources management
- Chapter 4 – Climate laws and energy regulation
- Chapter 5 – Business, law and environmental performance
- Chapter 6 – Democracy and the environment

A series of detailed technical discussion papers are being prepared on each of these themes. These technical discussion papers will explore the themes and challenges in detail and provide further analysis, case studies, references and preliminary panel recommendations.

What else do we need to include in the discussion?

We are conscious that there are some key gaps in the commentary and questions posed in the following chapters. In particular, some very important issues of governance and environmental law are touched on in a limited manner or only in particular ways or not dealt with in this Introductory Paper. These include:

- Including Indigenous perspectives on environmental law
- Management and governance of marine environments
- Environmental pollution, such as land, water and air contamination
- Regulation of hazardous materials
- Measures for adapting to climate change and managing its impacts

We seek your views on these matters of environmental law and governance that may be important to the project of developing the next generation of environmental laws.
CHAPTER 1: THE FOUNDATIONS OF ENVIRONMENTAL LAW

This chapter explores what the foundations for the next generation of environmental law should be. We identify key challenges and pose some questions about environmental goals (such as ecological sustainability), objects for specific legal instruments, and principles that should be reflected in legal instruments to achieve these objects.

Effective and well-designed environmental laws need solid foundations in the form of clear, effective and efficient goals, objects and principles. Our present system is insufficiently clear about what it is aiming to achieve, and the legal or other principles that underpin the design and implementation of specific laws. It needs to be forceful, to ensure that these basic elements are truly reflected in how legal instruments are designed, their mechanisms for implementation, and the integrity with which they are implemented. Australia’s environmental laws need significant improvement in all of these aspects.

The foundations for the next generation of environmental law must involve three elements. First, we need to identify what the fundamental goal of environmental law is to be, as derived from a broader societal goal in relation to the management of the environment. Next, it is useful to figure out what the objects of environmental laws should be, an exercise that often requires consideration of what particular environmental laws should do, should be achieving, and how they are to be interpreted and applied. Finally, we need to identify the key overarching principles of environmental law that can operate as the more detailed rationale or rule upon which environmental law should be based.

1.1 THE FUNDAMENTAL GOAL – SUSTAINABILITY WITH JUSTICE

In Australia, ecologically sustainable development (ESD) has been the main goal of environmental law for more than 20 years. It has been incorporated in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) and other Commonwealth, state and territory legislation. The idea behind ESD is that we should use natural resources to achieve economic development, improve our quality of life and protect the environment, all at the same time.

Australia’s National Strategy for Ecologically Sustainable Development (1992) states the following objectives:

- to enhance individual and community wellbeing and welfare by following a path of economic development that safeguards the welfare of future generations;
- to provide for equity within and between generations; and,
- to protect biological diversity and maintain essential ecological processes and life-support systems.

Can we develop a better fundamental goal for environmental law? The answer to this question, we believe, lies in the identification of an agreed societal goal that underpins the sustainable management of the environment in Australia. APEEL is examining whether the concept of ESD has proved sufficiently effective in practice to date.

Whilst ESD has exerted some influence on the development and operation of environmental law in Australia, it has not been applied to its fullest extent and has been the subject of widely-differing interpretations. Consequently, it has not always guaranteed desired environmental outcomes.

When translated into law, application of ESD often requires decision-makers to integrate environmental, economic and social goals. They have to make subjective judgments, sometimes in the face of scientific uncertainty. In practice, this often results in environmental and social concerns being under weighted. It does not put sufficient weight on the possibility of a thriving society that does not rely on continuing to increase consumption of resources. Rather, it encourages a trade-off between economic activity, social justice and the ability of nature to provide opportunities for future generations. A key challenge is to ensure the next iteration of an ESD goal can actually be effectively implemented through law. Issues of implementation are addressed in the following chapters.
In 2015, the member states of the United Nations adopted new sustainable development goals (SDGs) to overcome the joint challenges of poverty and environmental collapse. The UN’s 2030 Agenda for Sustainable Development provides a powerful catalyst for the review and reform of the current ESD goal in Australia.

A goal for the next generation of environmental laws might be influenced by broader notions of sustainability, as distinct from sustainable development. An ethical framework for sustainability is not a legal concept in itself, but it may be recognised and endorsed through law. This is explored in further detail in the technical discussion paper that is being prepared on goals, objectives and principles.

APEEL’s preliminary recommendation is to propose a new nationwide, cross-sectoral consultative process to identify an agreed societal goal to underpin the management of the environment and develop a reformed strategy for ESD / sustainability in Australia.

**KEY QUESTION:** SHOULD ESD BE THE MAIN GOAL OF ENVIRONMENTAL LAW OR IS THERE A NEED TO IDENTIFY A NEW SOCIETAL GOAL FOR ENVIRONMENTAL MANAGEMENT IN AUSTRALIA?

### 1.2 OBJECTS

We use the term object to describe an aim or outcome that the law is trying to achieve, normally represented in an objects clause in legislation. Statutory objects clauses are relatively common, and many explicitly identify the societal goal of ecologically sustainable development as a core objective.

Objects clauses are an important way that goals may be set out in legislation, but can be ineffective if vague or poorly defined. For example, some current object clauses are overly long, unduly complex, confuse principles and objectives, and can be internally inconsistent. The objects built into the next generation of environmental laws should be shorter and simpler. They could be confined to the following examples:

- A statement that the legislation is intended to support, and contribute to, the pursuit of the goal of ESD sustainability (or such other agreed societal goal); and,
- A statement in simple and plain language of the additional, more specific objects that are relevant to the particular context of each law.

**KEY QUESTIONS:** HOW ADEQUATE AND EFFECTIVE IS THE CURRENT APPROACH TO THE PRESCRIPTION OF OBJECTS IN AUSTRALIAN ENVIRONMENTAL LEGISLATION? HOW CAN THE OBJECTS OF OUR ENVIRONMENTAL LAWS BE IMPROVED IN THE NEXT GENERATION OF ENVIRONMENTAL LAWS IN AUSTRALIA?

### 1.3 PRINCIPLES

Principles of environmental law were globalised in the 1987 report of the United Nations World Commission on Environment and Development (UNCED) (the Brundtland report), Our Common Future, and have evolved since. Building on these principles, APEEL is considering various concepts and innovative ideas in terms of whether they could be framed as foundational principles for the next generation of environmental law.

New and strengthened principles may be needed, for example, to meet the profound challenges that climate change will pose. We have identified different types of principles and the purpose and function of each type is explored in detail in the full technical discussion paper on goals, objectives and principles.
a) Principles for designing environmental law (design principles)

A great body of work has been carried out – perhaps given the increasing urgency of environmental challenges – proposing regulatory design principles to ensure that we have a systematic approach to action and decision making in environmental governance. We have identified the following design principles that we believe should be utilised by law-makers when designing future Australian environmental laws:

(i) Principles promoting the objective of smart regulation, such as:

a. The policy mix principle – i.e. a complementary range of instruments is desirable to address an issue. Available measures include regulatory tools, economic measures, information-based measures, self-regulatory alternatives (for low impact, low risk activities) and voluntary measures.

b. The parsimony principle – i.e. less interventionist instruments or approaches should be applied first to achieve desired environmental outcomes (for example it would make little sense to deploy scarce enforcement resources on those who are willing to comply voluntarily under less interventionist approaches).

c. The escalation principle – i.e., regulatory measures should ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals. One example of how this principle is applied is in relation to a hierarchy of options to address non-compliance with an environmental law. An inspector might assume a duty holder was willing to comply voluntarily and send an information letter explaining legal requirements. However, if this did not produce willing compliance, they might escalate to a warning letter, to a remediation or clean up notice, followed by a penalty notice, with the options of last resort involving legal action and penalties.

(ii) The principles that polluters pay for their environmental impacts, for example, by the imposition of load-based licensing fees for industries that pollute, and in valuation, pricing and incentive mechanisms for sustainable development;

(iii) Principles that endorse particular tools or mechanisms for environmental management (for example, robust, comprehensive and independent environmental impact assessment of relevant activities, or an environmental duty of care);

(iv) Principles related to environmental democracy such as access to environmental information, public participation and access to justice (the Aarhus Convention’s three pillars); and,

(v) The principle of non-regression, which suggests that whilst change to environmental laws and policies are likely to be required for many reasons, these should not result in any reduction in the effective protection of the environment.

b) Principles that set rules (directing principles)

Rules based principles should be of fundamental importance to the effective operation of environmental law. Numerous principles have emerged over time in international and Australian environmental law, but their recognition and application remains haphazard and inconsistent.

Here are some key principles we think may be important to the next generation of environmental laws.

(i) Acting to prevent harm where science is uncertain – in environmental law, the precautionary principle is expressed as the idea that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. What this means is that where scientific knowledge about possible environmental damage is incomplete or uncertain, we should err on the side of caution and implement protective measures as if we were certain that harms will occur. The precautionary principle is an existing principle of Australian environmental law, but it has been subject to many different interpretations and attempted applications.
The principle is closely related to, but differs from the prevention principle which calls for action to be taken to prevent known risks of environmental harms from materialising. Both the precautionary principle, and the prevention principle, need to be clarified and strengthened to meet new challenges – such as the impacts of climate change. Risk assessment processes that properly weight uncertain environmental outcomes by applying a more clearly defined precautionary principle might be more effective than conventional environmental impact assessment.

In precautionary decision-making, society should have a say in what level of risk and potential harm is acceptable and, where possible, the agreed level of risk should be clearly set out in law.

Adaptive management is an environmental management technique based on the idea of ‘learning by doing’. It is one way to respond in situations where scientific uncertainty means we have incomplete knowledge of how a particular activity will affect the environment. For that reason it is often put forward as an approach for applying the precautionary principle. To be effective, adaptive management of a potentially harmful activity should monitor the environmental outcomes of the activity and feed that information back into decision-making about whether or not the activity should continue, be modified or halted altogether.

(ii) **Justice and fairness** – how should principles of justice and fairness best be represented and function in the context of environmental management? Currently, the national goal of ecologically sustainable development includes the principles of inter- and intra-generational equity. This is the requirement that, in the decision-making mix, it is necessary to take into account the fairness and justice of impacts across society (principle of intra-generational equity) and also, consider what the impacts of any action or proposal may be on future generations (principle of inter-generational equity). The significance of the latter is that it accounts for the fact that environmental impacts can be long-lasting, even across many generations. These principles are important for us all and in particular for addressing justice issues such as land access and management for Aboriginal and Torres Strait Islander peoples.

(iii) **Environmental rehabilitation and environmental innovation** – in relation to arresting trajectories of environmental decline and encouraging best practice (as opposed to creating a race to the bottom by requiring minimum standards), APEEL seeks your feedback on the inclusion of the following foundational principles for the next generation of environmental law:

- **A highest environmental quality principle.** Defined carefully, this principle is potentially a strong alternative for the current approach of integrating economic, social and environmental considerations. It requires all decisions and actions to aim for an optimal level of environmental protection and biodiversity conservation.
- **A best available techniques principle.** This principle would require all decisions and actions to be based upon the application of the best available techniques, by requiring the application of up-to-date tools and methods suitable for protecting the environment and conserving biological diversity. (This might be framed alternatively as an environmental innovation principle).
- **A rectification principle.** Current environmental legislation is largely silent on the important challenges of rehabilitation of landscapes and biodiversity, and therefore an explicit principle of environmental rectification could clarify this duty. An alternative formulation of this principle, which may be useful in the context of climate change, focuses on ecosystem reconciliation. It involves working to restore ecosystems while recognising that humans are continually having an impact on those systems, requiring monitoring and adaptive management.

The different categories of principles are discussed in detail in the technical discussion paper on goals, objectives and principles.

**KEY QUESTIONS:**
- ARE THE ABOVE PRINCIPLES THOSE NEEDED TO INFORM ENVIRONMENTAL LAW AND REGULATION?
- ARE SOME MORE IMPORTANT THAN OTHERS? ARE SOME OF THESE UNNECESSARY OR UNHELPFUL?
- ARE OTHER APPROACHES ALSO NEEDED?
CHAPTER 2: ENVIRONMENTAL GOVERNANCE

This chapter sets the context for exploring what the governance frameworks for the next generation of environmental laws might look like. We identify key challenges and pose questions relating to the key themes of constitutional responsibility for the environment, environmental federalism, environmental institutions, shared governance, and implementation and effectiveness of environmental laws.

In Australia, environmental issues are managed within a federal and democratic system of government. Government includes official institutions of state, such as parliaments, executive governments (including ministers and the broad range of government agencies) and the courts. Systems of taxation and public funding are integral to government functioning, as are relationships with foreign governments and international bodies. Government is responsible for extensive regulation of social and economic life, as well as the environment.

Government in Australia operates under a written constitutional framework with some implied rights and responsibilities. This framework distributes power and responsibilities between federal, state and territory governments. It also provides for basic democratic principles such as representative and responsible government and the rule of law.

In practice, management of the environment often involves people outside of government. Communities, non-governmental organisations, business and citizens do engage in decision-making processes, regulated and influenced by environmental laws. Processes of environmental management beyond direct government regulation are sometimes referred to as environmental governance.

Environmental governance is the system for governing (shaping, regulating, controlling, directing) the ways in which humans interact with the natural world, and how they interact with each other in relation to the environment. Regulation is one instrument of governance.

In this chapter we ask you to:

- look at how government is involved in environmental management, especially in the constitutional context;
- think about the importance of community, business and other sectors in environmental governance; and,
- consider what is needed to make the system of environmental laws effective, efficient and equitable.

In Chapter 6 we explore in more detail the nature of democracy in environmental management, while we look at the role of the private sector in Chapter 5. Both of those discussions expand on the ideas and themes in this chapter.

2.1 GOVERNMENT AND CONSTITUTIONAL RESPONSIBILITY FOR THE ENVIRONMENT

The Australian Constitution governs the roles of state, territory and federal governments, and determines where legislative and executive power rests with respect to environmental matters. There is no express reference to environmental affairs in the Commonwealth Constitution. The Commonwealth, nonetheless, has broad powers to make laws for environmental management.

There are dozens of national laws dealing with environmental matters, ranging from biodiversity and quarantine to oceans and nuclear waste. For Commonwealth laws to be constitutionally valid, the law must be supported by one or more of the Commonwealth’s listed heads of legislative power in the Federal Constitution. For example, the external affairs power that gives the Commonwealth the power to implement international treaties. The nature and scope of the Commonwealth’s law-making powers are critical in determining how the environment is regulated in Australia. States can and do make laws for environmental management, although where Commonwealth and state environmental laws conflict state laws must give way to a valid Commonwealth law.
Most Commonwealth environmental laws, but not all, operate concurrently with state environmental legislation. This can mean that a particular project – for example a resort development with potential environmental impacts – may require approval under relevant Commonwealth laws and state planning and pollution laws. There may also be a decision-making role for local governments. The extent of national legislative and regulatory powers for environmental management however can be controversial. In recent practice, the Commonwealth has left much day-to-day environmental management to the states and territories under State and Territory legislation, although being active in certain environmental legislative and regulatory spheres.

### 2.2 COOPERATIVE FEDERALISM AND ENVIRONMENTAL MANAGEMENT

Environmental law-making depends not only on the formal distribution of power and responsibilities under the Constitution. Political and policy dynamics are also fundamentally important. Political accords or agreements (intergovernmental agreements) are made between governments within the Australian federation. They can influence the nature of environmental management. Under the current policy position of cooperative federalism, environmental management is seen as best achieved through collaborative arrangements between Federal and state governments. Different policy positions between states and territories on how best to achieve environmental management are possible but policies must conform to the federal environmental law framework where federal law operates.

The intergovernmental agreements establishing the current arrangements for environmental management were negotiated in the 1990s, starting with the Intergovernmental Agreement on the Environment 1992. The basis for existing arrangements is more than 20 years old and it reflects priorities of that time. Over time, the intergovernmental arrangements have gained prominence as a source of environmental policy. Such policies and arrangements are negotiated solely between governments and are usually not subject to parliamentary scrutiny before being concluded, unlike legislation.

The Council of Australian Governments (COAG) and Ministerial Councils have generated a number of agreements and national strategies addressing specific aspects of environmental management, such as ESD (as noted in chapter 1). The public has no opportunity to help shape these agreements and this raises questions of public accountability. The capacity to hold governments accountable through the legal process is an important value in democratic societies. This raises the question, how can federal and state decision-making, with its limited capacity for public involvement, be made more transparent and accountable to the general public?

**KEY QUESTIONS:**

**DO WE NEED A NEW INTERGOVERNMENTAL AGREEMENT ON THE ENVIRONMENT TO TAKE ACCOUNT OF CHANGING PRIORITIES, ISSUES AND THINKING?**

**ARE THERE BETTER, MORE OPEN AND DEMOCRATIC, WAYS IN WHICH ENVIRONMENTAL POLICIES AND STRATEGIES CAN BE DEVELOPED?**

### 2.3 APPROACHES TO FEDERALISM FOR ENVIRONMENTAL MANAGEMENT

The current arrangements for environmental federalism are the product of compromise between governments within Australia about the scope of respective spheres of environmental management. They do have advantages, such as being based on political consensus and established cooperative mechanisms. There can be significant drawbacks, such as delays and unnecessary complexity in administration and fragmentation in responsibility. Conflicts of interest and lack of leadership in environmental protection can persist, such as where states manage both environmental laws and the economic development of natural resources. The result can be a drive towards lowest common denominator outcomes for environmental management.

The current policy platform of cooperative federalism is not the only possible model for environmental management in a federal system. Alternative federal systems, such as the United States’ experience, provide for different distributions of roles, responsibilities and powers over environmental affairs. The US arrangements allow for a more centralised federalism model where national rules and standards are set by federal authority and operate as a minimum performance standard, with the states able to adopt more stringent standards if they wish. This system also allows for considerable delegation to the states (regions) for implementation and enforcement.
Further, it is not always necessary that the same federal model of roles and functions be applied across all areas of environmental management within a country. A combination of different federalism arrangements may be appropriate. Thus, another factor to be considered in best practice environmental federalism may well be that some areas of environmental management may work better with strong centralised arrangements and others work better with more decentralised features.

Variations on the distribution of federal, state and local responsibilities can also include dynamic models, in which there are overlapping local, state and federal measures, such as in relation to environmental assessments and approvals. These may favour competitive dynamics across jurisdictions toward better systems or standards.

**KEY QUESTIONS:**
- IS THE CURRENT, DECENTRALISED FEDERALISM MODEL IN AUSTRALIA THE MOST APPROPRIATE FOUNDATION FOR THE NEXT GENERATION OF ENVIRONMENTAL LAWS?
- DOES IT FIT ALL TYPES OF ENVIRONMENTAL MANAGEMENT PROBLEMS?
- SHOULD THE COMMONWEALTH GOVERNMENT PLAY A GREATER ROLE?

### 2.4 ACCOMMODATING REGIONAL AND LOCAL DIMENSIONS OF ENVIRONMENTAL MANAGEMENT

Many environmental matters cross state and territory boundaries. The current state and territory boundaries result from historical factors and administrative convenience unrelated to environmental processes. Regional environmental governance based on ecological scales has been adopted in some countries (e.g., the New Zealand Resource Management Act and catchments). Ideally, environmental management should reflect the trans-boundary nature of environmental issues. Further, many environmental issues are complex and require integrated approaches. Regional and urban planning should allow for cross-sectoral integration so that natural resource management, energy, transport, services and biodiversity corridors are well coordinated in a new generation of environmental laws. Review and rationalisation of the existing regions across Australia are important to that outcome.

**KEY QUESTION:**
- WHAT ARRANGEMENTS ARE NECESSARY FOR EFFECTIVE REGIONAL ENVIRONMENTAL MANAGEMENT?

Local governments are not formally given a role in the Australian Constitution. Local governments derive their powers of environmental management from state governments. However, local governments are very significant actors in environmental governance, particularly in planning and environmental approvals and in the local implementation of environmental laws concerned with heritage, waste management, environmental health, native vegetation, tree preservation and threatened species protection. Local government is also often the vehicle for expression of local community environmental values.

**KEY QUESTION:**
- WHAT IS THE BEST WAY TO ENSURE THAT THE SIGNIFICANT ROLE OF LOCAL GOVERNMENT IN ENVIRONMENTAL MANAGEMENT IS RECOGNISED AND EFFECTIVE?

### 2.5 ENVIRONMENTAL INSTITUTIONS

Law and governance cannot work or achieve objectives without effective institutions to support them. Institutions comprise organisations, their legal and policy frameworks, established and accepted practices, and powers and rules to give effect to the law. In this discussion we are focused mainly on the organisations needed to ensure that the law is effective and is implemented with integrity.

Constitutional and political arrangements have led to various legislative cooperative schemes (e.g., uniform laws, referrals-based laws and applied law schemes) to achieve environmental objectives. Through such cooperative schemes and supporting legislation, administrative agencies or authorities have been established by the Commonwealth and the states to implement environmental legislation.
Unlike many countries, Australia's national environmental laws are not supported by strong, independent governance organisations. Under the EPBC Act, Australia's principal national environmental law, key powers and responsibilities reside with the federal environment minister, not a politically independent institution. We do not have a federal Environment Protection Authority such as exists in the US, or a separate national environment commission. Cooperative schemes establishing agencies and authorities include the Australian Energy Regulator under the National Energy Market, while the Commonwealth has established statutory authorities to govern some environmental matters, such as the Great Barrier Reef Marine Park Authority.

An independent national environmental body could provide greater confidence in rule-making, assessments and approvals, monitoring and enforcement, and the overall integrity of the environmental law system. The existing functions of the National Environment Protection Council (NEPC) include making national standards on a range of matters, including air and water quality and dealing with contaminated sites or hazardous materials. In practice, however, the powers, influence and independence of the NEPC are very limited.

Our preliminary view is that there is a case for a strong, independent national environmental body, with broad powers, including oversight of the achievement of environmental goals and effective implementation of environmental law. In economic matters, the Reserve Bank or Australian Competition and Consumer Commission serve similar independent functions to that which we think should be considered for the environment. Such bodies are able to act independently of day to day government decision-making, and have substantial powers and expertise to carry out their duties. In turn, these institutions should be subject to effective transparency and accountability mechanisms.

**KEY QUESTION:**
WHAT SORT OF GOVERNANCE ORGANISATION(S) DO WE NEED TO ENSURE THAT OUR ENVIRONMENTAL LAWS ARE CREATED AND IMPLEMENTED EFFECTIVELY, EFFICIENTLY, FAIRLY WITH INTEGRITY AND TRANSPARENCY?

### 2.6 SHARED GOVERNANCE

Is environmental management solely the province of governments? Environmental problems and opportunities can be complex, involve many different actors or parts of society, and span communities and borders. Governance of the environment is increasingly being viewed as a multi-faceted task, involving many actors, of which government is one, although usually with a leading or steering role. Governments have responsibilities to set legal frameworks, develop policies and provide key resources, but there are trends within environmental management that indicate the need for direct, participatory involvement of other interests. Those interests may include community, private sector and/or non-governmental (civil society) sectors as partners in shared governance.

Trends toward these shared governance approaches may arise as governments seek to bring a range of interests and groups into environmental decision-making. In other cases, agitation, lobbying or activism effectively demonstrate the need for more inclusive participation in decision-making. Advocacy for greater participation has played an important role in environment movements at local, regional and national levels in Australia. It has highlighted the need to have robust and representative participation in decision-making, including a seat directly at the decision-making table.

Environmental law has been progressively amended to bring non-government interests and groups into decision-making, such as through consultative bodies or deliberative processes. Consultation rarely involves a distribution of power to community or non-governmental interests to shape decisions. Generally, government bodies retain control over decision-making even where deliberative arrangements are used. There may also be real disparities in the funding and resources available to citizen participants in processes of consultation in comparison to government or large industry actors. Can we genuinely talk of shared governance between key interests or constituencies without delegation of power or community control of decision-making process and outcomes?

Another approach to environmental management of shared governance is collaboration across private, nongovernmental and government sectors to establish and operate environmental projects and programs.
Examples of this approach may include landscape-scale land and biodiversity restoration projects (see Chapter 3), which bring together government agencies, private landowners and NGOs, usually with small backbone organisations supporting these initiatives. Co-management of Country with Aboriginal and Torres Strait Islander communities provides another example of shared governance, although more equitable sharing arrangements need to be developed in many instances of environmental and natural resource management. Other examples may emerge from the management of resource supply chains which might bring together private industry, the NGO sector and government, aiming at the sustainable and transparent regulation of agricultural supply chains or fisheries or forestry (see Chapter 5).

Governance of supply chains from extraction of natural resources to processing to delivery to consumer markets can be the subject of overall shared approaches to policy, standard-setting, oversight and codes of practice. Do such initiatives fully equate to effective and inclusive shared governance in the management of the environment? An increasingly significant opportunity for better collaboration to protect and restore the environment is the role of non-government environmental initiatives, such as industry voluntary stewardship programs, responsible consumer initiatives, consumer or voter activism, and environmental or socially responsible branding.

These initiatives partly replace or complement the actions of government, and are becoming more and more important around the world. Hybrid governance including co-regulation is likely to be an important part of the future of environmental governance. A key requirement is to find ways to ensure that such arrangements do have integrity and are effective.

**KEY QUESTIONS:**

**ARE SHARED GOVERNANCE APPROACHES A SOUND BASIS FOR BETTER ENVIRONMENTAL GOVERNANCE? WHY/WHY NOT?**

**IF THESE MODELS OF GOVERNANCE ARE TO BE ADOPTED WHAT SHOULD THEY LOOK LIKE?**

### 2.7 IMPLEMENTATION AND EFFECTIVENESS IN ENVIRONMENTAL MANAGEMENT

Good environmental law achieves its objectives (effectiveness) in a way that is fair, and it does so with a minimum waste of resources of government, citizens and industry (efficiency). For law to be effective more than good legal instruments are required. A law that has confused or compromised objectives will be hampered in achieving meaningful environmental outcomes. A law cannot work effectively if those who are responsible for implementing it or who are meant to comply with it, simply cannot do what is expected of them. Therefore, sufficient resourcing of environmental governance and environmental action is a significant aspect of more effective law. It is established sound practice that governments should provide transparent accountability to the community for the governance work that they do, and that citizens should have the power to hold government to account. Environmental governance can be strengthened with regular independent reviews of the performance of our environmental laws, and of the agencies charged with implementing them. Governments would also be made more accountable if citizens had better access to justice to seek reviews of administrative and political decisions that affect the quality of the environment.

Our system of environmental law and governance has grown up piecemeal as new issues have arisen, and consequently, national, state and local governments have adopted arrangements that are poorly coordinated and unnecessarily complex. This may be an argument for rationalising laws and roles, but that should not be done in a manner to avoid compliance or reduce protections and citizen rights. If governments and industry want a less complicated and more efficient system, while still retaining environmental protection, a better approach to consensus building for reform is needed.

In relation to fairness, good environmental law should be equitable in its formulation and implementation, and pay special attention to the interests of the less powerful. The law tends to reinforce structural inequalities that allow some people to advance their interests in the environment over others. There is a need to address the disadvantages of Indigenous and less privileged Australians in dealing with the legal system, or in managing their own environmental stewardship duties, if we are to design and implement world’s best practice environmental laws.

**KEY QUESTION:**

**HOW DO WE DESIGN AND IMPLEMENT ENVIRONMENTAL LAWS SO THEY ARE MORE EFFECTIVE, EFFICIENT, EQUITABLE AND TRANSPARENT?**
CHAPTER 3: LAND-BASED CONSERVATION AND NATURAL RESOURCE MANAGEMENT

This chapter asks what the next generation of environmental law needs to do to address issues around the management of the terrestrial environment, land and water. We identify key challenges of natural resource management and environmental stewardship and pose questions relating to the key themes of balancing private property rights and nature conservation, managing landscapes, dealing with the need for adaptation and change, offsetting, and financial resourcing.

A key focus of environmental law is the management of land, biodiversity, habitat, water, and how these elements and systems interact. These aspects of environmental governance are referred to as natural resources management. The language of managing land, water and environment has also tended to shift toward notions of stewardship rather than domination or exploitation of natural resources. APEEL is examining how to make our land and natural resource laws and institutions more coherent, how to use innovative approaches to secure the resources needed to achieve sustainability, and how to build stronger relationships between government, industry and the broader community to manage our terrestrial resources.

3.1 THE CHALLENGES FOR ENVIRONMENTAL STEWARDSHIP AND NATURAL RESOURCE LAWS

Ongoing ecological losses are a widely shared concern and a reason to work together to make things better. Biodiversity loss and damage to land and water systems, such as through over-use or extraction, are issues of ongoing importance. In earlier times environmental stewardship mostly meant managing specific harms that had easily identified consequences (such as soil erosion harming farming productivity), using fairly straightforward approaches. Nowadays, we also have to deal with complicated environmental threats that demand sophisticated, costly, well coordinated and long-term management (for example, harm to water resources associated with coal seam gas extraction, or the management of increasing numbers of harmful invasive species across the landscape).

A fundamental challenge is fragmented land and resource management. Natural resource management involves many subject-matters (land, biodiversity, water, invasive species) across diverse property tenures, affected by various interests, impacts and activities (for instance, Indigenous, agriculture, conservation, urban, forestry, mining, and coal seam gas). Governance regimes are characterised by many agencies having resource-specific roles and rules, conflicts over roles, and multi-layered government responsibilities (see Chapter 2). The operation of different laws, administered by many agencies at three levels of government, and the diversity of land use, all limit effectiveness and can cause inefficiency.

It is clear that in Australia we do not invest enough in protecting and restoring the environment. This is partly because few environmental goods and services have a market value, partly because some Australians do not value the environment enough to take the necessary actions, and partly because people do not have the resources to do what is needed.

There are ways to create a better system to govern the use and protection of the unique Australian environment. We can make our laws and institutions more coherent. We can use innovative approaches to obtain financial resources to address sustainability. We can build stronger collaboration between government, industry and the broader community to reduce the harm that we are doing, and restore environmental health. We can reach a better balance between consumptive uses and conservation. The questions we pose in this chapter are intended to stimulate a discussion about how we can create more effective laws and institutions that better suit changing conditions.

3.2 BALANCING PRIVATE PROPERTY RIGHTS AND PUBLIC RESPONSIBILITIES IN NATURE CONSERVATION

The balance between private property rights and public duties inherent in property ownership and management is central to natural resource governance, but it is a very politically charged issue and raises complicated questions of feasibility and fairness, for citizens and the government.
Legal controls on the clearing of native vegetation particularly highlight tensions between rights to manage private land, especially farmland, and the need to manage habitat loss and avoid land degradation.

A key vehicle for delivering nature conservation has been the National Reserve System (NRS). This recognises at a national level areas protected by legal and other effective means to achieve the long-term conservation of nature with associated ecosystem services and cultural values. There are limits to the NRS. For instance, it has not achieved the goal of being truly representative of national ecosystems.

Protected areas such as national parks have traditionally been located on public land. Recent expansion of the NRS has come from privately owned land and Indigenous Protected Areas on land controlled by Aboriginal and Torres Strait Islander communities. This trend will need to continue if the NRS is to achieve its goals. In addition, the need for landscape-scale connectivity between protected areas means that we will need to explore feasible and fair options for higher levels of conservation management on privately-owned land that is not part of the NRS.

On land that is set aside for conservation, and on land that is used for economic production, active management will increasingly be required, for example to control weeds and pests and remediate land degradation. Many land managers have embraced this notion as good management practice, but it has also been framed in some jurisdictions as a duty of environmental care (see Chapter 1).

Such a duty can include obligations on landowners to control invasive species and pests, to avoid polluting water resources, and to manage erosion. Voluntary standards and some purchasing requirements also incorporate active management of these issues as standard practices, but involvement in these schemes is far from universal. Laws in a number of states such as in the Victorian Catchment and Land Protection Act, include this type of duty. Legislating for such a duty has met with limited success, in part because such an active environmental role requires resources and perhaps also the clear identification of the beneficiaries of active conservation management.

Payments for land management are increasingly proposed by state and Commonwealth governments, such as by concluding voluntary agreements with landowners and paying incentives for active conservation management. There are financial limits, however, to how far government payments can extend.

KEY QUESTIONS:
HOW CAN WE ACHIEVE AN EFFICIENT AND EQUITABLE BALANCE BETWEEN PROTECTION OF THE PUBLIC ENVIRONMENTAL INTEREST AND PRIVATE PROPERTY INTERESTS?
SHOULD WE HAVE A GENERAL ENVIRONMENTAL DUTY OF CARE AND, IF SO, WHAT SHOULD IT CONSIST OF?

3.3 MANAGING LANDSCAPES

Currently the Commonwealth plays a limited and predominantly reactive role in the management of land and other natural resources, such as water, minerals and coal seam gas. Commonwealth environmental assessment and approval must be obtained where a development proposal is likely to have a significant environmental impact on matters of national importance. This includes species and ecological communities listed as being nationally threatened, as well as certain coal and coal seam gas developments that have a significant impact on water resources.

This limited and reactive role of the Commonwealth means that there is little system-scale planning for how we want our landscapes to look and function. This is particularly important because many fundamental processes in nature must operate at a landscape scale. This highlights the need for more coordinated and integrated approaches to environmental management, spanning land tenures and diverse land uses. Effective strategic action across landscapes requires planning and acting proactively to achieve landscape scale goals.

A more holistic approach to landscape scale stewardship at the bioregional level, could ensure that activities undertaken on one parcel of land do not undermine those done nearby. Such an approach could help protect the ecological functions of the system, and ensure that productive land uses are consistent with ecological, social and economic needs.
Integrating the needs of diverse stakeholders and resource sectors is a complex task that demands proper representation of interests, including all three levels of government. To be effective, landscape scale environmental planning would need to be underpinned by adequate information about system needs, and be funded to ensure long-term implementation. Important initiatives in landscape scale planning have emerged in Australia, including early attempts at regional planning under the National Heritage Trust and National Action Plan for Salinity and Water Quality.

More recently, it has brought together governments, communities, the private sector and nongovernment organisations such as Midlandscapes in Tasmania and the Great Eastern Ranges project. In addition to the NRS, Commonwealth proposals for this type of strategic planning have included the 2012 National Wildlife Corridors Plan. Properly coordinated landscape scale stewardship is still a long way off.

Strategic planning at a regional level is currently done by the states (and to a lesser extent by Commonwealth strategic assessments and bioregional assessments) through poorly integrated strategic land use, regional development and regional conservation plans which should flow through into development approval processes or land use plans at the local government level. Strategic planning is often undertaken in response to large-scale development frameworks and proposals, such as development in the Perth and Peel region or the expansion of Melbourne’s urban growth corridors.

This type of strategic planning becomes a proxy for development management, and often pays limited attention to longer term environmental issues, national cultural heritage routes and landscape scale connectivity. A nationally-led, arms-length program of landscape planning that pays more attention to the need for protecting landscape-scale environmental processes and values might be a more effective approach.

**KEY QUESTIONS:**
- HOW CAN WE ACHIEVE MORE STRATEGIC, LANDSCAPE-SCALE MANAGEMENT APPROACHES RECOGNISE THE INTERCONNECTEDNESS OF TERRESTRIAL AND OTHER NATURAL RESOURCE SYSTEMS?
- HOW MIGHT THIS BE ACHIEVED ORGANISATIONALLY?
- IS IT NECESSARY FOR THE COMMONWEALTH GOVERNMENT TO TAKE A LEADERSHIP ROLE IN ENSURING THE INTEGRITY OF THESE TYPES OF PROCESSES?

### 3.4 OFFSETTING

Environmental offsets, particularly for biodiversity, are increasingly being used at a site and landscape scale as a mechanism of last resort, to try and ameliorate the impact of damaging activities after avoidance, minimisation and reversal options have been exhausted. Offsets are legally enforceable requirements to undertake protective (for example, prohibit removal of native vegetation) or restorative (for example, removing weeds or invasive species) actions intended to compensate for environmental damage. Offsetting attempts to balance the loss of environmental condition in one area or from one activity with compensating savings elsewhere. Salinity offsets may be easier to quantify (for example, we can measure the discharge of salt in a river), but biodiversity offsetting is more problematic. While there may be potential benefits of strategically-located permanent offsets (e.g. in wildlife corridors), there may also be the ecological costs and a net loss of biodiversity at the development site, with no guarantee of equivalence in preservation values.

**KEY QUESTIONS:**
- WHAT ROLE, IF ANY, SHOULD OFFSETTING, OR COMPENSATORY MEASURES, PLAY IN ENVIRONMENTAL LAW AND MANAGEMENT?

### 3.5 DEALING WITH THE NEED FOR ADAPTATION AND CHANGE

Natural systems are dynamic and subject to constant processes of change. Conventional legal approaches to conservation and resource management tend to lock in current uses of land. They assume that ecosystems are stationary and should be managed for their current characteristics. The combination of climate change impacts and other social, economic or demographic drivers of land use change will create new dynamics and arguably reduce the usefulness of current approaches. A key challenge is in designing laws that can better accommodate change and address new circumstances.
KEY QUESTION:
HOW CAN LEGAL ARRANGEMENTS ALLOW FOR THE ADAPTIVE MANAGEMENT OF RESOURCES AND ACTIVITIES, WHILST AFFORDING SUFFICIENT PROTECTION AND A LEVEL OF LEGAL CERTAINTY TO PROPERTY OWNERS AND RESOURCE USERS?

3.6 MONEY AND RESOURCES

Without adequate resources to fund protection and restoration, and to implement existing or new laws, it is unlikely that significant improvement will be achieved in Australia’s biodiversity and natural resource track record. New laws and institutional arrangements are likely to be necessary. There are options that might contribute to better resourcing of land stewardship.

There is a range of financing tools and sources that have been used for these purposes over the last several decades, including:

- funding from general government revenues (appropriations);
- funding from the sale of public assets, such as the establishment of the National Heritage Trust from the sale of Telstra;
- private and philanthropic funding, often with the assistance of tax benefits;
- the use of revolving funds from the sale of land;
- the goodwill and self-investment of private landowners;
- revenues from voluntary as well as compulsory carbon offset markets; and,
- funds from biodiversity offset markets, where damage and loss of biodiversity is intended to be compensated by funding protection and restoration elsewhere.

As this mix of funding sources and vehicles suggests, we are faced with a complex and fragmented set of options when it comes to resourcing landscape protection and rehabilitation. The source of revenues can be disparate. They may have disjointed or overlapping timeframes and reporting requirements. Funding may relate to parts of landscapes, and some features rather than others. Achieving sustainable landscape use and restoration is likely to require far more human capital and funds than are currently available, and our current sources do not seem to be sufficient, or sufficiently co-ordinated, to deliver this.

KEY QUESTION:
HOW MIGHT WE SECURE AND ALLOCATE MORE RESOURCES MORE EFFICIENTLY, FOR ENVIRONMENTAL PROTECTION AND RESTORATION?
CHAPTER 4: CLIMATE LAWS AND ENERGY

This chapter examines the role of climate and energy laws in the next generation of environmental laws. We pose questions relating to the key themes of responding to the emissions challenge, in terms of emissions reduction targets, complementary measures and the role of non-government actors. In relation to the energy challenge, we identify possible options for the regulatory and complementary measures needed to achieve a decarbonised energy sector.

On our current trajectory, the world is moving inexorably towards dangerous climate change and a world of extreme climate events in which sustainable development goals, and in some places human survival itself, are threatened. According to the science, deep cuts in carbon emissions have to be made in the relatively near future if this dire situation is to be turned around. Most countries, including Australia, have made laws to assist the process of reducing emissions. An entire body of climate law has emerged in recent years. These laws are generally closely integrated with more general environmental laws.

Climate change law today consists of a dense network of measures stretching from the international to the local level and involving a multitude of different actors. From an Australian perspective, key elements include international treaties, in particular the UN Framework Convention on Climate Change, Australian federal legislation such as that establishing the Emissions Reduction Fund, state legislation, and other initiatives and measures that interact with these laws. These range from voluntary and private carbon markets to renewable energy schemes, court actions raising climate change issues, consumer action, and mass activism on climate issues.

Australia’s record on climate law is, to say the least, mixed. Commonwealth governments have established and then repealed clean energy laws. They have baulked at ambitious national targets on emissions reductions. At the same time, there has been a major grassroots movement to embrace renewable energy and energy efficiency. There is also considerable potential to link biodiversity conservation and ecological restoration with climate change mitigation efforts.

4.1 RESPONDING TO THE EMISSIONS CHALLENGE

Challenges and gaps exist at both the international and domestic levels of climate law and policy relating to greenhouse gas reduction. These challenges are outlined below, along with possible areas where reforms might be considered.

**Ambition of emissions reduction targets**

A key area of concern both internationally and in Australia has been the adequacy of current emissions reduction targets. International targets are being formulated with the intention of keeping global warming below 2°C, although it is recognised that this will be insufficient to prevent climate-related harms to ecosystems such as the Great Barrier Reef and vulnerable communities such as those resident in low-lying island states. Domestically, Australia’s target is to cut emissions by 26–28% from 2005 levels by 2030. This target sits at the lower end of developed country targets and is well below international scientific recommendations.

**KEY QUESTION:**

WHAT IS OUR COUNTRY’S ‘FAIR SHARE’ OF THE GLOBAL EMISSIONS REDUCTION EFFORT AND HOW SHOULD THAT BE REFLECTED IN DOMESTIC CLIMATE LAW?

**Effective legal measures to achieve targets**

Targets are ineffectual without clear measures to implement them and deliver the promised emissions reductions. The current government’s Emissions Reduction Fund is designed to subsidise emissions reductions through grants. This approach has been widely criticised as inadequate to achieve even Australia’s weak 2030 target, given problems in scaling it up to deliver deeper emissions cuts in a cost-effective fashion.
Targets are ineffectual without clear measures to implement them and deliver the promised emissions reductions. The current government’s Emissions Reduction Fund is designed to subsidise emissions reductions through grants. This approach has been widely criticised as inadequate to achieve even Australia’s weak 2030 target, given problems in scaling it up to deliver deeper emissions cuts in a cost-effective fashion.

Options to strengthen implementation measures for emissions reduction include: direct regulation of emissions (for example, carbon pollution standards for power plants and industry as in the United States); a market-based emissions trading scheme as in the European Union; or strengthening of the existing Direct Action/Emissions Reduction Fund approach by introducing stringent safeguard measures to limit the amount of emissions polluters are able to produce. To exceed these limits, polluters would need to buy credits from other businesses that have reduced their emissions or from international carbon credit programs.

**Complementary measures**

To be effective, national measures for emissions reduction should ideally complement those taken in other countries and by other levels of government in Australia. Before its repeal, it was envisaged that Australia’s carbon pricing mechanism could be linked to overseas schemes, such as that in the European Union, to increase its reach, cost-effectiveness and scope to contribute to global emissions reduction. It would be difficult to link the Emissions Reduction Fund in its current form to other emissions reduction programs internationally. National measures in Australia should also operate in a complementary fashion with state and local initiatives. There is a role for federal, state and local measures to deliver emissions reductions in ways tailored to their different circumstances.

**Role of sub-national and non-governmental actors**

While national governments remain responsible at the international and domestic level for determining emissions reduction targets, they are not the only actors that can contribute to emissions reduction and the development of effective legal measures for climate change mitigation. Around the world, many effective climate mitigation programs have been initiated by local governments and cities, for instance, by promoting energy efficiency measures or increasing use of renewable energy.

Non-governmental organisations – from indigenous communities to environmental groups – have also been active in the sphere of climate change mitigation. These organisations have lobbied governments to improve emissions reduction policies, developed local and voluntary programs for encouraging low carbon practices, pressured businesses to reduce their carbon footprint and taken governments to court to oppose carbon intensive developments like the Adani Carmichael coal mine. As Chapter 5 discusses further, businesses and the private sector also have an important role to play in reducing emissions and contributing to climate change mitigation; a role increasingly recognised in practices of corporate social responsibility and socially responsible investing though less formally in legal structures.

**KEY QUESTIONS:**

WHAT IS THE BEST PACKAGE OF CLIMATE CHANGE MITIGATION LAWS TO MEET THE EMISSIONS TARGETS NEEDED?
WHAT SHOULD BE THE ROLES OF THE PRIVATE SECTOR, GOVERNMENT AND THE NONGOVERNMENTAL SECTOR IN ACHIEVING AMBITIOUS TARGETS AND EFFECTIVE IMPLEMENTATION MEASURES?
4.2 THE ENERGY CHALLENGE

The imperative of emissions reduction to avoid or mitigate dangerous climate change has spawned recognition of the need for an 'energy revolution', policies that facilitate a rapid transformation to a low-carbon, efficient and environmentally benign system of energy supply. Since energy production and consumption accounts for approximately 65% of all carbon emissions, such a transformation is a key pillar of an emissions reduction strategy. This is an area of opportunity for Australian jobs and economic activity. Australia has world class renewable energy resources but is in the lowest quartile of developed countries when it comes to harnessing these resources. How can we do better?

4.3 OPTIONS FOR ENERGY REFORM

A number of options are available for improving energy regulation. These should be seen as additional to, but consistent with, those regarding climate change mitigation discussed above.

The Renewable Energy Target

The Australian Renewable Energy Target (RET), like similar measures in other jurisdictions, has substantially facilitated efforts to shift towards a low-carbon economy. Yet the RET was recently downgraded. Should the previous, higher RET be reinstated and locked in to safeguard renewable energy investment plans, current and future?

Fossil Fuel Subsidies

Fossil fuel subsidies such as the diesel fuel rebate increase demand for fossil fuels by keeping their prices artificially low. The effect is to encourage more carbon emissions. Is it desirable to reduce or remove such subsidies? What impact would this have on ensuring a reliable supply of energy, on carbon emissions and air pollution and what would be the economic costs and benefits?

The Role of the Clean Energy Finance Corporation

By 30 June 2014, the Clean Energy Finance Corporation (CEFC) had financed a diversified portfolio of clean energy initiatives with the potential to abate an estimated 4.2 million tonnes of carbon dioxide equivalent annually. In 2015 a decision was taken to limit the ability of the Corporation to finance wind power and to invest in small-scale solar projects. The Turnbull government has refused to endorse a continuing role for the CEFC. Should the corporation be abolished, should its present role be retained or should that role be expanded?

Enhance Company Disclosure Requirements:

Australia, unlike the US, lacks any requirement mandating climate change disclosures in financial filings of public companies. Such a requirement would enable investors to make informed decisions as to whether a company holds fossil-fuel assets that may become stranded in a low carbon economy. Is the introduction of such informational regulation desirable?

Increase Energy Efficiency

Energy efficiency offers considerable opportunities for win-win, low cost outcomes. A number of options for encouraging or facilitating energy efficiency are available. These include direct fiscal incentives (energy taxes and energy efficiency subsidies and tax breaks); incentives for load spreading (from peak to off-peak consumption via time-of-use pricing, various forms of informational regulation (for example, mandated product labelling and certification with regard to energy performance); smart grids (via their contribution to distribution automation and demand response); smart metering; more advanced forecasting technologies and in the longer term; distributed storage mechanisms (for example, batteries) and the development of micro-grids. Direct regulation might also play a role, such as in regard to energy efficiency in buildings where there are opportunities for major energy efficiency gains but builders lack incentives to realise them. Which of these options should be pursued in order to increase energy efficiency?
Other Incentives

A carbon price alone may not be sufficient to achieve a transformation of the energy sector in the constrained time period which the science suggests remains available for effective mitigation. Additional incentives to reduce emissions include feed-in tariffs, tradeable certificates documenting the amount of energy being saved in tandem with an obligation to achieve a specified level of energy savings (white certificates) and low intervention incentives such as securities listing disclosure of material climate risks, or other information that facilitates company rankings regarding greenhouse gas emissions reductions.

Complementary combinations of policy tools

Complementary combinations of policy instruments are likely to work better than stand alone tools. Consumers may have insufficient information with regard to the energy-saving capacity of a particular appliance in which case, informational regulation via energy labelling, may usefully complement tax instruments which reduce the cost of such appliances. How important is it to consider the overall package and its internal coherence, in designing energy regulation?

Policy Stability for Increased Investment

Many investors place a premium on longevity and certainty, and in the absence of these, investor enthusiasm has shifted elsewhere. How should Australia restore a stable and incentivising investment environment for the long term? Is such stability essential to ensure Australia’s potential economic advantage in the development of renewable energy technologies, and associated job creation opportunities that may follow?

**KEY QUESTION:**
In addition to the particular questions noted for each option above, what might be the most effective package of complementary measures to help us achieve a de-carbonised energy sector?
CHAPTER 5: BUSINESS, LAW AND ENVIRONMENTAL PERFORMANCE

This chapter considers what the role of the private sector should be in environmental protection and management and how this should be embedded in environmental law reform. We identify key challenges and pose questions relating to the theme of integrating environmental principles and standards into other laws relating to corporations, financial investment, tax, consumer protection, and trade. We also consider the role of law in incentivising voluntary environmental initiatives.

Environmental decision-making in Australia is often influenced by laws, codes and other governance mechanisms that have little to do with the natural environment. The areas of business law of most environmental significance are: corporate law (which influences the goals of business enterprises and to whom they are accountable), financial investing regulation (potentially requiring investors to consider financially material environmental risks and opportunities), consumer law (relevant to ensuring truthful advertising about environmental services and products), trade law (trade agreements influence economic activity and may limit environmental standards) and taxation law (provides incentives or disincentives for environmentally responsible behaviour).

Some elements of the business sector have shown considerable environmental awareness and improved their performance beyond legal requirements (for example, by developing voluntary codes and standards for companies and investors). A fundamental weakness of Australia’s approach to environmental governance is that the agenda of ESD has never been fully disseminated into economic governance, such as through corporate law, financial markets and the tax system. The system that drives economic decisions that have environmental impacts – production, trade and consumption – is largely outside the ESD framework. The result is that significant cumulative and incremental environmental damage from economic activity is often never closely scrutinised.

A number of interesting reforms or proposals offer the potential to address these challenges. These include new corporate models in the US and the UK, known as benefit corporations or community contribution companies. There are options to redefine the fiduciary and trust law responsibilities of financial investors to encourage long-term, sustainable investing. Mandatory corporate environmental reporting is another area of potential legal reform that might help. Recent reviews of the Australian tax system have highlighted the potential to greatly improve tax concessions for private nature conservation.

5.1 INTEGRATING ENVIRONMENTAL PRINCIPLES AND STANDARDS INTO ECONOMIC AFFAIRS

The business sector is a crucial partner in achieving Australia’s environmental goals. Environmentally relevant decisions, whether they be the development of new green technologies or investment in coal mines, are shaped by business law, as well as by the practices and policies of the business sector. We need to acknowledge how environmental legislation may conflict with the structure or purpose of business law.

Through better understanding of the interplay between business law and environmental law, we can generate ideas for a more holistic and comprehensive system for governing environmental activities in which environmental standards and rules are embedded more broadly in economic relations rather than confined to a discrete set of specialist environmental laws.

We need to consider how ideas such as shared environmental governance might work in order to achieve positive outcomes for both the economy and the environment. Next generation laws must foster win-win solutions in which improved environmental performance dovetails with economic success for business.
The interface between business law and environmental law is complex, so this chapter focuses on a selection of the most important issues. The following key points are suggested as a focus for public discussion.

5.2 CORPORATIONS LAW

Corporations law largely omits environmental considerations. This may encourage corporate directors and managers to consider their primary role as being to further the short-term business success of their company regardless of environmental consequences. To address this gap we may need legislation embedding environmental performance duties and corporate environmental reporting obligations in corporations law. A less ambitious reform would be to legislate a green corporate model that any business could choose to adopt, as already available in the US and UK.

5.3 FINANCIAL INVESTING LAW

The financial sector now rivals the productive sector in economic significance. This means financiers have a major influence on economic growth and its environmental impacts. Legislation governing financial institutions such as superannuation funds and banks is largely silent on their environmental role. This is problematic given that investors have the capacity to play a constructive role by funding environmental innovations and brokering trade in environmental goods and services. To address this challenge we need to review fiduciary and trusts law, and other legal frameworks that shape the goals and methods of financial investors.

5.4 TAX LAW

Tax law has long been recognised as a powerful tool to shape environmental behaviour. It can generate incentives for corporations, farmers and other economic actors to be more environmentally responsible. It can also create perverse incentives that ‘reward’ harmful activities, such as existing tax concessions for fossil fuel industries (see Chapter 4). In addressing this challenge, we may need to overhaul the Australian tax system, including income taxes, property taxes and consumption taxes, to support environmentally responsible behaviour.

5.5 CONSUMER PROTECTION LAW

The market can help change the environmental practices of business if consumers demand more environmentally sound products and services. The emerging green consumer market (for example organic foods and ecotourism) depends on integrity mechanisms that ensure that companies do not mislead consumers. The recent global scandal of VW misleading the public about the pollution emissions of its vehicles highlights this risk. Consumer law can strengthen green consumerism, but the current absence of a positive duty to disclose environmental performance limits the scope of consumer law in effecting positive change.

5.6 TRADE LAW

Australia has long been involved in multilateral free trade agreements. The recently concluded Trans Pacific Partnership agreement highlights the growing international ties and reduced protectionism of the Australian economy. Global trade may heighten environmental threats (for example, by dissemination of invasive species). It may also impose pressure to limit domestic environmental laws on the ground that they inhibit free trade. Conversely, regulation of international trade is an area where the Commonwealth enjoys leverage to impose environmental controls on the states, as it has occasionally done. We need to ensure that Australia’s trading relationships do not compromise domestic environmental action.
5.7 VOLUNTARY ENVIRONMENTAL INITIATIVES

A vibrant global movement is encouraging some corporate managers and investors to be more socially and environmentally responsible regardless of legal requirements. There are many reasons why a business may wish to voluntarily act in this manner, such as for financial advantage or ethical compulsion. Known as corporate social responsibility or socially responsible investing, depending on the context, the movement has spawned numerous voluntary codes and certification schemes that shape the environmental performance of Australian businesses.

At present, our environmental law and business laws do not acknowledge these voluntary initiatives, which diminish their capacity to supplement and enrich official regulation. We need to find ways to incentivise voluntary initiatives, and ensure that they are a supplement rather than an alternative to public environmental regulation.

KEY QUESTIONS:
HOW CAN GREATER ENVIRONMENTAL AMBITION ACROSS SOCIETY BE ACHIEVED THROUGH REFORM TO THESE AREAS OF LAW?
WHAT OTHER AREAS OF LAW AND ECONOMIC ACTIVITY CAN CONTRIBUTE TO ACHIEVING THIS AMBITION?
CHAPTER 6: DEMOCRACY AND THE ENVIRONMENT

This chapter explores how environmental democracy could be embedded in the next generation of environmental law, and what this would mean for individuals and communities. We identify key questions about democratic processes and rights, including the right to participate in environmental decision-making, rights to access information, the right to seek justice in environmental matters, rights for nature, and the right to a safe and healthy environment.

While we ordinarily associate democracy with elections and politicians, it is more than this. Where environmental issues impact on citizens and communities, participatory democracy is an important concern. People should have a right to be heard and to participate in decisions that affect their welfare, or the interests of the next generation in the natural environment and cultural heritage.

The resolution of conflicts and disputes is also an important matter involving community interests. For these issues, it is not only the voices of those who are currently involved that can be considered – it may be desirable to adopt reforms so that the interests of those who inherently voiceless such as future generations, or nature itself, are given appropriate weight.

In most democracies, including Australia, people expect to have the opportunity to debate and contest policies and laws in relation to important issues that affect them with those in power. This is the heart of the democratic ideal, and it goes beyond merely voting at election time.

This democratic practice is important in environmental decision-making. Rules and administrative processes aimed at side-stepping, compressing or unreasonably constraining scrutiny or participation in determining projects that have environmental impacts undermines democratic standards. For example, fast-tracking approvals of large, high impact projects for resources development, public works or projects considered to be of state or regional or national significance often fall into this category.

Decision-making about large, controversial and high impact proposals is precisely when good governance arguably requires greater scrutiny and public participation, not less, and access to justice including rights to seek the review of decisions ought not to be constrained or excluded.

6.1 A VISION FOR ENVIRONMENTAL DEMOCRACY

Some key participatory tools in Australia’s democracy reflect widely accepted rights and responsibilities, such as rights to information, participation and redress. Some tools are institutional, such as access to complaints-handling and dispute-resolution bodies and processes.

By 2025 we should have a reformed system of environmental laws, adequate to the challenges of the 21st century. Our laws will need to reflect the expectations of an advanced democratic society, with high levels of public engagement, and transparent decision making. The circumstances in which we will be asked to meet ongoing environmental challenges and contribute to the restoration of a healthy environment will be different from today. Yet our vision for environmental democracy would still be something like:

A democracy that ensures that every person can act in support of a safe and healthy environment for the benefit of nature, themselves, their children and future generations.

KEY QUESTIONS:
IS THIS AN APPROPRIATE VISION FOR ENVIRONMENTAL DEMOCRACY IN THE 21ST CENTURY?
HOW CAN THE LAW BEST ENSURE THAT THIS VISION IS REALISED?
6.2 THE RIGHT TO PARTICIPATE IN ENVIRONMENTAL DECISION-MAKING AND POLICY-MAKING

Participation in decision-making about environmental matters, as well as the administration of environmental planning and programs, is essential for both democratic and environmental reasons.

Projects, proposals, plans and programs can have major environmental impacts and affect communities in many ways. A proposal to mine in a particular area can have impacts on communities that can last for years, even generations. Legal requirements for public participation range from opportunities to be notified and comment, to more developed forms of consultation, and public hearings and inquiries.

There are few safeguards to ensure that the processes do in fact deliver outcomes to the community, whether in terms of their issues being taken into account, or some capacity to shape the decisions that are taken. There is usually little scope for the community to initiate or compel inquiries, investigations or participatory processes. The decision to require participatory arrangements can be at the discretion of public officials, such as ministers, and the affected community is rarely involved in the choices of who conducts the process. Communities typically do not have the economic power or sophisticated support that is available to big government or industry. Typically, affected citizens do not have any (or very limited) legal power to appeal the processes or decisions, or the quality with which they were implemented.

Various models of consultation, participation and engagement exist. These include surveys and interviews, planning and visioning workshops, team building exercises, submission writing, participatory action tools, lobbying and campaigning, negotiation and conflict resolution processes, and participatory monitoring and evaluation. Innovative models of participation include deliberative and inclusive methods such as citizen juries, future searches, consensus conferences, polls, popular referenda, and open comparison of scientific knowledge and traditional ecological knowledge. There is no standard practice, nor mandatory performance standards for any of these methods. There are few safeguards for the integrity of participatory or engagement processes.

**KEY QUESTIONS:**
WHAT PARTICIPATORY MECHANISMS WILL ENABLE CITIZENS TO FULLY PARTICIPATE IN ENSURING ECOLOGICALLY SUSTAINABLE DEVELOPMENT AND GOOD ENVIRONMENTAL STEWARDSHIP?
WHAT WORKS BEST AND HOW SHOULD EXCELLENT PRACTICE BE ENSURED?

6.3 THE RIGHT TO KNOW

Accurate, timely and relevant information about environmental matters, whether from government or business or other sources, is essential to ensure accountability and transparent decision-making. Australians benefit from freedom of information laws, but accessing information that governments and others prefer to withhold can be difficult, costly and time-consuming. There is also arguably a need for a duty to collect and disseminate information in a systematic and reliable manner as it relates to the environmental responsibility of governments and the performance of projects affecting the environment.

**KEY QUESTION:**
CAN RIGHT TO ENVIRONMENTAL INFORMATION LAWS BE MADE MORE EFFECTIVE AND EFFICIENT?

6.4 THE RIGHT TO SEEK JUSTICE IN ENVIRONMENTAL MATTERS

Parliaments and political processes can be an effective review and dispute resolution mechanism for environmental laws, but this depends on the level of community concern or mobilisation and the make-up of the elected body. The ongoing disputes over coal seam gas mining throughout eastern Australia is an issue that has involved government policy-making, parliamentary legislation, and litigation in courts and tribunals. It has involved all aspects of law, law-making and political disputation.

Courts and tribunals are one of the major arenas for managing environmental conflicts.
Review of environmental decisions, enforcement of environmental laws obtaining information about environmental actions are all important ways in which challenges and conflicts are dealt with through our systems of justice. Merits reviews in tribunals and specialised environmental courts enable decisions to be reviewed and remade on the merits: the court or tribunal makes the decision afresh. Judicial review, on the other hand, involves courts reviewing decisions only to make sure they were made according to law (including constitutional law, administrative law, environmental law and other laws). Under judicial review the facts and policies are not generally part of a court’s review.

The right to challenge environmental decisions made by government and to seek redress or enforcement of decisions made is fundamental to holding governments accountable, and to the rule of law. The right to challenge decisions will often involve citizens or communities seeking public interest outcomes that benefit the wider community, not only themselves as individuals. The public interest may be served by protection of the environment from contamination or saving a forest or old trees from being cut down, for example.

Accessing courts and tribunals can be difficult. For access to judicial review in the courts this is due to restrictive rules about who can make seek review of a decision (who has legal standing), and because the costs of accessing justice is prohibitive. If you lose in the courts, you will usually have to pay for your opponent’s costs as well as your own. Tribunals can be more accessible as these are generally more informal court-like bodies established only to deal with particular types of disputes, such as an objection to a development application or to a licence to emit pollution. In some states, such as NSW and Qld, specialist environmental courts have also been established to make access to environmental justice more accessible.

**KEY QUESTION:**
**HOW CAN ACCESS TO JUSTICE IN SUPPORT OF ENVIRONMENTAL SUSTAINABILITY BE IMPROVED OR SAFEGUARDED?**

### 6.5 GIVING RIGHTS TO NATURE

Places, natural and cultural heritage features, plants, animals and ecosystems – the essential elements of our environment – cannot have a legal voice or exercise rights to defend themselves. There is a school of legal thought that natural places or things can be legally recognised. This approach has been implemented in a few countries. What seems like a radical idea extends a very commonplace principle in the law – that things can have rights and others can exercise those rights on their behalf. This is the case with, for example, corporations, ships and governments, and even the economy.

There are also analogies with the idea of guardianship – where one person has the legal responsibility and obligation to look after the interests of another. The premise is that the values of nature and natural and cultural places could be argued before a court or tribunal by a person or organisation standing in for them. For instance, that there could be an organisation or person who can act legally as a guardian for nature or for a particular place or species. Some jurisdictions have commissioners for sustainability and the environment that perform this role.

**KEY QUESTION:**
**ARE LEGAL RECOGNITION AND RIGHTS TO NATURE A POSITIVE DIRECTION FOR AUSTRALIAN ENVIRONMENTAL LAW?**

### 6.6 SHOULD THERE BE AN OVERARCHING RIGHT TO A SAFE AND HEALTHY ENVIRONMENT?

In a democratic society the role of government includes the protection of basic rights and freedoms. Some of these are recognised as civil and political rights, such as freedom of speech, freedom of association, and rights to equality and non-discrimination. Others are social, economic and cultural rights and freedoms, such as the right to express national or cultural identity, the right to education and adequate housing, and the right to a decent living. These rights can sometimes be asserted to help protect environment-related interests but Australia does not yet include a right to a safe and healthy environment, unlike many other countries.

**KEY QUESTIONS:**
**SHOULD A RIGHT TO A SAFE AND HEALTHY ENVIRONMENT BE ESTABLISHED IN AUSTRALIAN LAW?**
**IF SO, WHAT MIGHT SUCH A RIGHT LOOK LIKE?**
HOW YOU CAN TAKE PART IN THE CONVERSATION

We are now actively seeking your input, ideas and experiences about how environmental laws and institutions work or could be improved. There are a variety of ways you can contribute. You can join the discussion through social media and the APEEL website, as well as face-to-face forums and workshops.

Share with us your ideas and experiences about how our environmental laws and institutions could be improved. Your feedback will help the panel identify key issues and gaps, and form specific recommendations. This could involve providing us with a response to some of the questions we have posed, or identifying an important issue that needs to be addressed in future laws.

WHERE YOU CAN FIND MORE DETAIL

This Introductory Paper gives an overview of the themes and issues APEEL is considering for the next generation of environmental law. If you would like more detail on a particular theme or issue, we will be publishing longer versions of each of the themed chapters in the form of fully referenced Technical Discussion Papers. These papers will provide more developed and detailed insight into the issues and problems and questions posed.

- HOW YOU CAN TAKE PART IN THE CONVERSATION
- MORE ABOUT THE APEEL PANEL
- MORE ABOUT THE PLACES YOU LOVE ALLIANCE

THIS PAPER WAS PREPARED BY THE AUSTRALIAN PANEL OF EXPERTS ON ENVIRONMENTAL LAW (APEEL)

Adjunct Professor Rob Fowler
Emeritus Professor Ben Boer
Emeritus Professor David Farrier
Professor Lee Godden
Professor Neil Gunningham
Dr. Cameron Holley
Dr. Hanna Jaireth
Bruce Lindsay
Professor Jan McDonald
Dr. Chris McGrath
Professor Zen Makuch
Professor Paul Martin
Professor Jacqueline Peel
Professor Robert Percival
Professor Benjamin Richardson
Nicola Rivers
Rachel Walmsley
Murray Wilcox, AO QC

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