DEMOCRACY AND THE ENVIRONMENT

TECHNICAL PAPER 8

APEEL

The Australian Panel of Experts on Environmental Law

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About APEEL

The Australian Panel of Experts on Environmental Law (APEEL) is comprised of experts with extensive knowledge of, and experience in, environmental law. Its membership includes environmental law practitioners, academics with international standing and a retired judge of the Federal Court. APEEL has developed a blueprint for the next generation of Australian environmental laws with the aim of ensuring a healthy, functioning and resilient environment for generations to come. APEEL's proposals are for environmental laws that are as transparent, efficient, effective and participatory as possible. A series of technical discussion papers focus on the following themes:

1. The foundations of environmental law
2. Environmental governance
3. Terrestrial biodiversity conservation and natural resources management
4. Marine and coastal issues
5. Climate law
6. Energy regulation
7. The private sector, business law and environmental performance
8. Democracy and the environment

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Summary and Recommendations

Executive Summary

Democratic engagement in environmental governance is essential to achieving a healthy flourishing environment which can support both nature, and the health and wellbeing of society. Environmental democracy requires the active engagement of an informed citizenry with the processes of government, but it also includes participation in the governance of environmental commons – the 'common wealth' of the Earth, including air, biodiversity, water, ecosystems, and the human cultures and norms that depend on them. In order to reap the benefits the environment provides such as health, culture, prosperity, justice and indeed life, humankind should see itself as trustees of these essential common resources, requiring both engagement and care.

This *Technical Paper* outlines a framework and argument for such a conception of environmental democracy, – and proposes a set of legal and policy approaches that Australia should adopt over the next decade to improve governance of the environmental commons and increase environmental democracy in Australia.

Specific recommendations include:

8.1 Environmental democracy must have as a foundation, respect for fundamental human rights and, in particular, an enforceable right to a clean and healthy environment. This is a standard that needs to extend the piecemeal rights that are currently protected within Australian laws and which are of limited effectiveness. Environmental rights are inspired by international developments, and driven by the desire for legal interventions in the face of environmental injustices and declining environmental conditions.

8.2 Australia needs improved procedural environmental rights, including rights to information, to public participation, and to accessible and just remedies in circumstances of demonstrated environmental harms and/or breaches of environmental laws. These improvements would extend the effectiveness of environmental protections and facilitate the involvement of communities in advocacy for clean and healthy environments.

8.3 To achieve realisation of fundamental human rights, there must be better integration of the operation of environmental laws with the exercise of Aboriginal and Torres Strait Islander peoples' rights and the achievement of justice for Aboriginal peoples. The relationship between Aboriginal peoples' rights and the environment is a distinctive and unique one, based on ancient but violently disrupted connections to Country. Environmental laws and governance have a role in recognising and advancing those connections. This role should include procedures and practices that contribute to the functioning of free, prior and informed consent by Aboriginal communities in matters that affect them, or their attachments to land and resources, in significant ways.

8.4 Models of legal personality for the protection of nature should be explored. Rights-based approaches to the protection of ecological integrity can be based on the attachment of the rights of a legal person to natural places or objects directly, such as rivers or threatened species or forests. These are new and emerging approaches to environmental management which Australian jurisdictions should consider implementing.

8.5 Public integrity mechanisms, such as Environmental Commissioners, should be established to ensure that environmental decision-making is made accountable through appropriate oversight

of the performance of environmental administration. Weaknesses in environmental laws can often be attributed to inadequate oversight of governance and practice, as much as more glaring problems such as corruption or under-enforcement or the absence of enforceable laws. Integrity institutions can provide tools of 'good practice' or 'best practice' alongside accountability and public scrutiny.

HOW TO CONTRIBUTE TO THE APEEL PROJECT

APEEL invites you to provide your responses to the ideas and recommendations presented in this paper. This will assist the development of our final proposals for the next generation of Australian environmental laws.

We look forward to your engagement on specific reform options as the APEEL journey progresses.

Please send your responses to: admin@apeel.org.au or go to www.apeel.org.au where you can do so online.

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1. Introduction

This *Technical Paper* is concerned with practices and rules associated with environmental democracy in Australia. Democratic participation in environmental governance is necessary because environmental challenges are ongoing, ubiquitous, and often unanticipated. Many key environmental indictors continue to trend downwards.[1] Special objects and places that communities value as part of our natural and cultural heritage need to be protected through good environmental management. In 2010, approximately 21% of the 6.1 million people who volunteered did so for the environment, arts and heritage and animal welfare.[2]

Strengthening democratic norms and conduct in relation to the environment can be significant in responding to a decline in public confidence in representative democracy,[3] and the intensifying inequalities of wealth and social outcomes.[4] The environment is a source of human benefits, well-being, needs and, indeed, existence. Democracy informs its governance, in the form of rights and obligations, procedures, the distribution of benefits, models of conduct, the representation of 'voices', and the protection of vulnerable subjects both animal and human.

This *Technical Paper* approaches the question of environmental democracy in four ways. First, it looks briefly at theoretical and principled bases for environmental democracy. Then, it considers the right to a safe and healthy environment and a series of procedural rights underpinning environmental justice. Next, it considers two emerging subjects of environmental democracy – Aboriginal and Torres Strait Islander peoples' (Aboriginal peoples') rights in relation to the environment, and the concept of 'rights of nature' or 'wild law' which prioritises an environment-centred law rather than human-centred law. Finally, it looks at how integrity in public practices and institutions is and should be applied to the sphere of environmental governance.

1 State of the Environment 2011 Committee, *Australia State of the Environment 2011 - Independent Report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities* (DSEWPaC, 2011); Places You Love Alliance, *The Australia We Love: A Report on Key Issues Affecting Nature and Society in Australia* (Places You Love, 2014); Australian Government, Department of Infrastructure and Regional Development (DIRD), *State of Australian Cities 2014–15* (DIRD, 2015).

2 Volunteering Australia, *Key facts and statistics about volunteering in Australia*, (Information Sheet, 16 April 2015).

3 Gareth Griffith, 'Integrity in Government: issues and developments in New South Wales 2011–2015' (Briefing Paper No 1, NSW Parliamentary Research Service, 2015).

4 David Richardson and Richard Denniss, 'Income and Wealth Inequality in Australia' (Policy Brief No 64, The Australia Institute, 2014).

2. Democracy

Contemporary understandings of democracy involve elected, accountable and responsible government, an informed civil society where social groups enjoy equality and non-discrimination, reasonable freedom of communication and association, and checks and balances on power. Citizens exercise sovereignty over political processes through representative institutions, notably Parliaments, to which executive governments are accountable, and through good governance within civil society and the private sector. Political parties have environmental policies and law and policy programs, and many environmental non-government organisations (NGOs) express views about those. Hundreds of NGOs also engage members of the public in activities that range from on-ground environmental works at local and catchment scale to global engagement and advocacy.

Democracy, good governance, the rule of law, and the protection of human rights are foundations of just and sustainable societies. Democracies permit non-violent collective action to effect social, political and economic change, through civil and lawful channels.[5]

Democratic norms now span three generations of rights. First generation human rights protect civil and political freedoms, such as democratic elections and freedoms of speech and association, and equality and non-discrimination.[6] Second generation human rights are social, economic and cultural rights, such as the right to express national identity, rights to education, housing and a decent living.[7] Third generation rights, including self-determination and non-discrimination for indigenous peoples and the right to live in a safe and healthy environment, continue to evolve.

2.1 Is there a need for environmental democracy?

Environmental democracy establishes more than a contest over representation and engagement with government. It presupposes engagement with a broader object of human needs and experience – that which might be termed the environmental 'commons'. 'Commons' refers to the 'public good' or 'public interest' character of environmental systems, objects, places and processes. Many natural and cultural resources have the property of common resources. The 'commons' is 'not merely 'goods', but a social practice that generates, uses and preserves common resources and products'.[8] Biodiversity, water, air, minerals, climate and ecological systems all have the underlying characteristics of the environmental 'commons'. On a global scale, the atmosphere, outer space, and high seas are each recognised as a distinctive 'commons'. Places of world heritage are recognised as part of the common heritage of humanity. Juridical and political expression of those commons has ancient as well as modern doctrinal form, including the distinction between the governance of common resources (*res communes* in Roman law) and public or state resources and property (*res publicae*).[9] One expression of the environmental commons is given in the concept of 'common pool resources'.[10]

The environmental commons are often managed, regulated and, indeed, formally owned by the state or protected by intergovernmental bodies, in a manner akin to a trusteeship,[11] for the benefit of the wider society or community.

5 United Nations Human Rights Council (UN HR Council), *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies: note by the Secretariat*, UN Doc A/HRC/31/66 (4 February 2016). See generally John Keane, *The Life and Death of Democracy* (WW Norton & Co, 2009) 849, 853, 855, 860, 864, 867–8.

6 As exemplified in protections under the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

7 As exemplified in *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

8 Stefan Meretz, 'The structural communality of commons' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market and State* (The Commons Strategy Group, 2012).

9 This distinction also has been identified in contemporary economic literature, between common-pool resources and public goods: see for example, Elinor Ostrom, 'Beyond markets and states: polycentric governance of complex economic systems' (2010) 100 *American Economic Review* 641, 644–5.

10 Although it has been argued that the model of common-pool resources is distinguishable from the commons: Burns Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013) 125–131, where the former is conceived as a form of 'open access' regime rather than a model of 'self-determined norms, practices, and traditions that commoners themselves devise for nurturing and protecting their shared resources' 125.

11 Ibid 124.

Writing in 1975, the then Chief Justice of Australia, Sir Garfield Barwick articulated a principled analogy of trusteeship over the environment:

> In the idealism which trained minds are wont to display, there is room for a very strong sense of the trusteeship or guardianship of the environment, a sense of obligation or duty which, in my view, each generation should feel. If that sense of trusteeship is present, the requirements of conservation will constantly be in mind: and all the restraints for which it calls will more readily be observed. That trusteeship is of a particular and perhaps unusual order, for the trustee has the usufruct of the resources of the country in respect of which on this view it has fiduciary obligations … It must be conceded at the outset of any such consideration that some use of these resources is a right of each generation, what I have called the usufruct. It may be expected that the permitted extent of that use would reflect the state of development of each generation, and fairly reflect the just needs of that generation. But in the consideration of that extent the overriding fact of trusteeship for the benefit of succeeding generations must ever be a factor.[12]

Common environmental resources are intrinsic to human existence. Equally, they are shaped and modified by human practices and experience. Democratic governance of common resources requires participation and accompanying rules and institutions. In the context of environmental management, this governance may occur through informal or vernacular rules.[13] But mainly it occurs through formal law, including environmental law, enacted by Parliaments and governments. Representative democracy is important to environmental governance, but participatory democracy is also necessary, especially because of this relationship of trusteeship over the environmental commons. Participation is not solely founded on the idea of the 'social contract' between state and citizen, as in representative democracy, but also involves *trust-like* relationships between those authorities governing environmental resources and the communities and subjects who are the beneficiaries of common environmental resources.

Building on ideas of the beneficial character of the environment, relationships of trust, and best practices of representative democracy, APEEL suggests the next generation of environmental laws should include the following:

- Environmental democracy should be underpinned by a general, broad rights-based framework and, in particular:
  - the right to a safe and healthy environment, and
  - key procedural environmental rights, including the right to information, to public participation and to access to justice in environmental matters.
- The unique circumstances and special attachments of Aboriginal peoples to land and resources require environmental laws to give effect to principles of free, prior and informed consent by Aboriginal communities in matters and actions that affect them.
- Environmental democracy needs to consider further the role and nature of legal frameworks that shift the focus of law from human subjects to those of nature itself. This is the so-called 'rights of nature' or 'wild law' approach to environmental law.
- Environmental democracy should entrench institutions and practices of public integrity. This includes accountability, monitoring, and transparency in environmental performance, decision-making and conduct.

12 Sir Garfield Barwick, 'Problems in Conservation' (1975) 1 *UNSW Law Journal* 3, 3–4.
13 See Weston and Bollier, above n 10.

3. The right to a safe and healthy environment

Law provides form and structure to environmental democracy through protections, controls and enforceable rights, through legal institutions, and through direction and guidance to government, business, communities and citizens. There is a strong and basic connection in democratic societies between democratic practices and legal protections and rights. Those protections and rights are embedded in the law through constitutional arrangements, legislation, and judge-made (common) law. Precisely what protections and rights exist and how the law gives expression and protection to them will vary across countries and jurisdictions. Because of the basic role of legal protections and rights in democratic society, APEEL proposes that environmental rights should be a foundation for environmental democracy. The first of these rights proposed is the right to a safe and healthy environment. APEEL recommends that this right should be incorporated into the next generation of environmental laws.

3.1 Environmental rights may be protective or restorative

Environmental rights may be protective in nature. For example, the law of private nuisance (a tort) has long protected individuals from pollution or harmful emanations from neighbouring property where they are of a nature likely to impair that individual's enjoyment of their property. Statutory pollution control laws provide wider public interest protection against the contamination of air, water and land. Conservation laws, such as those creating national parks or managing threatened species, have been enacted to protect biodiversity for the broad public good.

Environmental rights may also be restorative, such as those aimed at conservation and improvement of environmental conditions or the restoration of ecological functions. For example, water laws imposing limits on water extraction and new models of environmental water entitlements establish restorative rights for 'the environment'.

3.2 International law: an important source of norms underpinning the right to a clean and healthy environment

International law and society are important sources of environmental and democratic norms, informing national experiences, including in Australia. Currently more than 280 multilateral environmental agreements (MEAs) are dedicated to environmental protection.[14] Other areas of international law, including multilateral trade agreements and the *United Nations Convention on the Law of the Sea*, are also relevant.

Since the *Universal Declaration of Human Rights* (UDHR) was adopted in 1948, the right to life and a standard of living adequate for personal and family well-being, and access to justice to protect recognised rights, has been part of international law.[15]

The concept of rights and responsibilities in relation to a healthy environment, a 'third generation' development, was recognised nearly 45 years ago at the first global environmental conference in June 1972, in the '*Stockholm Declaration*':

> Man [sic] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[16]

14 Achim Steiner and Mikhel Oviir, 'Foreword' in United Nations Environment Programme (UNEP) Division of Environmental Law and Conventions, *Auditing the Implementation of Multilateral Environmental Agreements (MEAs): A Primer for Auditors* (UNEP, 2010), iii.

15 *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) arts 3, 8, 25(1).

16 United Nations Conference on the Human Environment, *Report of the United National Conference on the Human Environment: Declaration of the United Nations Conference on the Human Environment* (*Stockholm Declaration*), *UN Doc.* A/Conf.48/14/Rev.1 (16 June 1972) Principle 1.

This principle has been recognised in the judgments of eminent international jurists,[17] and in several regional instruments.[18] The current United Nations (UN) Special Rapporteur on Human Rights and the Environment, John Knox, has affirmed that states are obliged under international human rights law to take reasonable and justifiable measures to protect environment-related human rights, acknowledging that 'environmental degradation can and does adversely affect the enjoyment of a broad range of human rights'.[19] When Knox was the Independent Expert on Human Rights and the Environment, he produced several overview reports on environmental rights.[20] This continues an initiative that the UN member states did not progress in the 1990s, despite a promising start,[21] but returned to in the 2000s.

Other UN initiatives also relate to environmental rights,[22] including the 2011 Human Rights Council's endorsement of the *Guiding Principles on Business and Human Rights*,[23] General Assembly and Security Council resolutions on environmental rights, global security and climate change,[24] and rights-based approaches to the implementation of the *World Heritage Convention*.[25]

The proposed *United Nations Declaration on Climate Change and Human Rights*[26] is an initiative that may gain traction given states' shared responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond national borders.[27] This proposed *Declaration* would recognise that environmental duties extend to protection against harm caused by private actors and harm in a transboundary context.[28]

Procedural rights have long been recognised in international law such as rights to participate in matters of national affairs. These can be beneficial for the environment. Other ways of expressing environmental protections and conservation have been recognised in international law. For instance, environmental protection for current and future generations is recognised as a common concern for humanity.[29] States and non-state actors have a responsibility to work with others in the international system in accordance with common, but differentiated responsibilities to conserve, protect and restore the health and integrity of the Earth's ecosystems.[30] These developments are indicative of a strong momentum toward a human rights approach to environmental matters at the international level.

17 See for example, *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* (Danube Dam Case) *(Judgment)* [1997] ICJ Rep 7 (Separate Opinion of Vice-President Weeramantry):

'The protection of the environment is … a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment'.

18 *African Charter on Human and Peoples' Rights* (*Banjul Charter*), adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, adopted 17 November 1988, (1988) OASTS 69 (entered into force 16 November 1999); Association of Southeast Asian Nations (ASEAN) Secretariat, *Human Rights Declaration* (ASEAN, 18 November 2012).

19 UN HR Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox, Mapping Report*, UN Doc A/HRC/25/53 (30 December 2013) [17], [79]–[80].

20 UN HR Council, *Human Rights and the Environment*, Res 28/11, UN Doc A/HRC/28/L.19 (26 March 2015); UN HR Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox, Preliminary Report*, UN Doc A/HRC/22/43 (24 December 2012); UN HR Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox: Compilation of Good Practices*, UN Doc A/HRC/28/61 (3 February 2015).

21 United Nations, Economic and Social Council Commission on Human Rights, *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment: Final Report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur*, UN Doc E/CN.4/Sub.2/1994/9 and Corr.1 (6 July 1994).

22 See for example, UNEP, *High Level Expert Meeting on the New Future of Human Rights and Environment*, Nairobi 2009; UN HR Council, *Analytical Study on the Relationship between Human Rights and the Environment, Report of the United Nations Commissioner for Human Rights*, UN Doc A/HRC/19/34 (16 December 2011).

23 United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN, 2011).

24 C Werrell and F Femia, 'Climate Change as a Threat Multiplier for Global Security' on The Centre for Climate and Security, *Climate and Security* (8 July 2015) <https://climateandsecurity.org/2015/07/08/un-security-council-meeting-on-climate-change-as-a-threat-multiplier-for-global-security/>.

25 See for example, United Nations Educational, Scientific and Cultural Organisation (UNESCO) World Heritage Committee, *World Heritage and Sustainable Development*, Doc WHC-15/39.COM/5D (15 May 2015); International Union for Conservation of Nature, International Council on Monuments and Sites International Centre for Study of the Preservation and Restoration of Cultural Property, *World Heritage and Rights-based Approaches* (Norwegian Ministry of Climate and Environment, 2014).

26 The *Global Network for the Study of Human Rights and the Environment (*GNHRE*) released a* 'Draft Declaration on Human Rights and Climate Change' *in November 2014, and the* 'Declaration' *in June 2016;* GNHRE, *Declaration on Human Rights and Climate Change* <http://gnhre.org/declaration-human-rights-climate-change/>.

27 *Trail Smelter Arbitration (United States v Canada)* (1938 and 1941) 3 UN Reports of International Arbitral *Awards* 1905.

28 UN HR Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*UN Doc A/HRC/25/53, above n 19 [58]–[68].

29 *Stockholm Declaration*, above n 16; UNESCO *Declaration on the Responsibilities of the Present Generations toward Future Generations*, UNESCO Res (12 November 1997) 69–71.

30 United Nations General Assembly, *Rio Declaration on Environment and Development,* UN Doc A/CONF.151/26 **(Vol I)** and Annex I (14 June 1992) principle 7**;** *Convention on Biological Diversity*, opened for signature 5 June 1992 1760 UNTS 79 (entered into force 29 December 1993) art 6; *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 33 ILM 1328 (17 June 1994) arts 4–6; *United Nations Framework Convention on Climate Change* (*UNFCCC*), opened for signature 09 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 4.

3.3 Environmental rights and protections have various legal sources

As indicated above, the sources of environmental rights can be found in a number of legal forms, and this will vary across jurisdictions.

3.3.1 Common law

In Australia, the common law provides an important backdrop and context for protective environmental rights. This is to be found, in particular, in private rights available to relieve or remedy harms caused by environmentally damaging activities. The law of torts, including actions in the form of nuisance, trespass and negligence, is important in this regard. Judicial review, non-statutory administrative law, the common law of standing, rules of statutory interpretation and the early common law recognition of native title are also essential aspects of environmental law.

3.3.2 Legislation

As significant as the common law is to the fabric of Australian law in general, the main influence of law on environmental governance is through legislation.

Federal statutes have established environmental protections since at least the 1970s, and there are currently more than 70 federal Acts dealing with environmental matters, ranging from biodiversity conservation, fisheries and nuclear actions to quarantine, climate change and water management.[31] Few of these laws are framed as laws providing expressly for environmental rights, or more precisely, environmental benefits as human rights. Rather than taking a rights-based approach, most environmental legislation manages harmful activities[32] and resources in a manner that considers principles of ecological sustainability,[33] or, in the case of environmental financing legislation, establishes programs aimed at environmental repair.[34] Consistent with the norms of ecologically sustainable development (ESD), the emphasis in environmental law is more on qualifying or controlling development and the use of resources.[35]

The prevailing approach in Australian environmental law is not to focus on rights directly, but to impose duties and obligations, whether in the form of duties on public authorities to regulate activities, duties on individuals or corporations not to cause harm, or duties to undertake particular activities in accordance with environmental rules or norms.[36] Rights are a part of this approach – such as the right to enforce such duties – but they tend to be ancillary to the imposition of duties and the language of human rights is not dominant. In some Australian jurisdictions, environmental laws establish wider, general environmental duties,[37] with provisions for enforcement alongside those duties, but even in Victoria and the ACT with rights charters in place, the right to a safe and healthy environment is not recognised expressly.[38]

Australia has ratified the seven main global international human rights Conventions and partially discharges its obligations in domestic law through a range of Acts, administrative practices and overlapping scrutiny mechanisms.[39] Australia is accountable to international treaty bodies for its human rights implementation. There has been extensive

31 See Australian Panel of Experts on Environmental Law, *Environmental Governance* (Technical Paper 2, 2017).
32 See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*); *Ozone Protection and Synthetic Greenhouse Gases Management Act 1989* (Cth); *Environmental Protection (Sea Dumping) Act 1984* (Cth).
33 See for example, *Water Act 2007* (Cth); *Fisheries Act 1991* (Cth); *Regional Forests Agreement Act 2002* (Cth).
34 See for example, *Natural Heritage Trust of Australia Act 1997* (Cth).
35 For a detailed discussion of the ESD concept and its limitations, see Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).
36 For proposals regarding appropriate environmental duties of a general nature, see Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017) and see Australian Panel of Experts on Environmental Law, *The Private Sector, Business Law and Environmental Performance* (Technical Paper 7, 2017).
37 See for example, *Environmental Protection Act 1994* (Qld) s 319.
38 Hanna Jaireth, 'Human rights cities – how does Australia fare?' (2015) 20 *Local Government Law Journal* 240, 248–50.
39 For a recent overview see Australian Law Reform Commission (ALRC), *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws,* (ALRC Interim Report 127, Sydney, 2015) ch 2; Federal implementing laws include the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), *Australian Human Rights Commission Act 1986* (Cth), and *Native Title Act 1993* (Cth).

debate around further implementation of human rights in Australian domestic law.[40] This has included consideration of recommendations by official bodies regarding environmental rights and basic economic and social rights related to environmental rights. However, broad-based rights for environmental protection, health and integrity, deriving from a human rights approach, have not been incorporated within the body of Australian law.

Establishing a general right to a clean and healthy environment in national law would serve a number of purposes. It would strengthen environmental law generally; it would provide an environmental safety net; it would facilitate improved environmental accountability and performance; it would help prevent rollback in environmental protections; and it would help to level the playing field of competing environmental and economic considerations.

There is evidence that the positive legal expression of environmental rights does contribute to better environmental outcomes than where those rights are absent.[41]

APEEL's view is that the right to a clean and healthy environment should give rise to an enforceable cause of action. A starting point might be the model of the 1993 *Environmental Bill of Rights* in Ontario Canada. There an actionable right arises in relation to causing (or imminently causing) significant harm to a 'public resource'. A public resource includes air, public waterways, unimproved public land, and public land used for various public purposes if larger than five hectares, and associated plants, animals and ecological systems.[42]

The apparent reluctance in Australia to enact broad-based rights protections, such as a 'Bill of Rights' or 'Charter of Rights and Freedoms', should not necessarily deter the pursuit of environmental rights protections. The common law protects some rights, and broader human rights protections have been enacted in Victoria and the ACT. Further, environmental rights can be conceived as positive expressions of environmental duties, now well-established.

3.3.3 Constitutional law

A right to a safe and healthy environment has been recognised in more than 90 national constitutions.[43] The *Australian Constitution* provides some democratic safeguards for citizens engaging with environmental issues such as representative and accountable institutions. But there are no express constitutional protections for the environment or environmental rights. Federal constitutional power for the Australian Parliament to legislate on environmental matters has derived from powers to make law on matters such as external affairs, corporations and foreign trade.

In 2009, the National Human Rights Consultation recommended that a new national Human Rights Act create rights of action for breaches of civil and political rights initially, with non-justiciable protection for several economic and social rights. This led to a strengthened *Human Rights Framework*.[44] These initiatives have not led to sustained campaigns for constitutional reform. During the National Consultation, 15 focus groups recommended that basic amenities, essential healthcare, and equitable access to just and personal safety be included as unconditionally protected rights.[45] This outcome is suggestive of popular support for human rights protections consistent with a broad right to a safe and healthy environment.

In Australia, national constitutional reform is very difficult to achieve. Constraints on change include 'double majority' requirements for constitutional amendment.[46] Constitutional adoption of a right to a clean and healthy environment is unlikely to be a preferred or likely approach.

40 The National Human Rights Consultation recommended in 2009 that a new national Human Rights Act create rights of action for breaches of civil and political rights initially, with non-justiciable protection for several economic and social rights. The Australian Government did not accept this recommendation, but did agree that the Executive would introduce statements of human rights compatibility when introducing Bills to the Parliament, introduce a program of human rights education, and establish a Parliamentary committee on human rights. That committee became the Parliamentary Joint Committee on Human Rights (PJCHR), which has raised environmental rights questions.

41 David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012); Chris Jeffords and Lanse Minkler 'Do constitutions matter? The effects of constitutional environmental rights provisions on environmental outcomes' (2016) 69 *Kyklos* 2, 294.

42 *Environmental Bill of Rights*, SO 1993, c 28, ss 82, 84.

43 David Boyd, 'The Constitutional Right to Healthy Environment' (2012) (June-July) *Environment Magazine* <www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>.

44 Commonwealth of Australia *Australia's Human Rights Framework* (2010), https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf; see also, for example, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

45 Frank Brennan SJ AO, *The Practical Outcomes of the National Human Rights Consultation* (Address to Judicial Conference of Australia Colloquium, Sir Stamford, Circular Quay, Sydney, 12 October 2013) 3.

46 *Australian Constitution* s 128.

3.4 Recommendations on a national right to a safe and healthy environment

Australia's mosaic of environmental laws creates obligations to refrain from causing harm to the environment, and to act in a manner that mitigates harm. In the international sphere, conduct and debate has moved increasingly toward the establishment of rights-based environmental norms and approaches.

The Panel recommends that the next generation of Australian environmental laws include the right to a safe and healthy environment. This would preferably be contained in national human rights legislation, but may alternatively be contained within national environmental legislation. It would establish an underpinning legal norm under Australian federal law, providing a legal baseline broadly consistent with protections in most other liberal democracies.[47] The right should encompass protection of the environment for present and future generations. The right should give rise to an enforceable cause of action.

As noted above, APEEL supports, as a starting point, the model of the 1993 *Environmental Bill of Rights* in Ontario, Canada.[48] Under the Ontario statute, an actionable right arises in relation to causing (or imminently causing) significant harm to a public resource.[49] Yet the right to a safe and healthy environment should also be informed by the important work undertaken by the UN Human Rights Council's Special Rapporteur on Human Rights and Environment, who has taken the position that the right refers to (state) obligations to protect against, and respond to, environmental harm interfering with the enjoyment of human rights.[50] Informed by the Special Rapporteur's approach, 'heightened duties' and hence special consideration of the right would apply to vulnerable groups, such as women, children and indigenous communities.[51] The right would extend to protection against harm caused by private actors and harm in a transboundary context.[52]

A principal rationale for establishing an enforceable right to a safe and healthy environment is that it elaborates other basic human rights protections, such as the right to life, health, and culture under the main human rights instruments. To put this another way, it is derivative of those basic rights. In several cases overseas, environmental harm has been found to have violated the right to life, for example, in *Yanomami v Brazil*[53] concerning an indigenous community's rights to life and health, *Oneryildiz v Turkey*[54] concerning the right to life of slum-dwellers living near a rubbish tip, *Lopez Ostra v Spain*[55] concerning pollution from a waste-treatment plant, and in *Guerra*[56] where the right to private and family life was held to be violated by local authorities' failure to contain chemical plant pollution.

The right to a safe and healthy environment might be said to be analogous to the right to a safe and healthy workplace under labour law. It also establishes a standard in conformity with ideas of environmental prudence in the face of powerful anthropogenic forces.[57]

47 Consistency in this respect would not necessarily include parity of legal status of such a right under Australian law, where, for example, other states have adopted rights-based environmental protections under constitutional or 'basic' national laws. Where such rights do exist in other states' national constitutions they are likely to be accompanied by procedural protections against removal, such as super-majority requirements for constitutional amendment. Should Australia adopt rights-based environmental protection it is, as suggested here, likely to be contained in ordinary statute law.

48 *Environmental Bill of Rights*, SO 1993, c 28.

49 The concept of a 'public resource' under the *Environmental Bill of Rights* is analogous to 'environmental commons' or 'public goods' and includes air, public waterways, unimproved public land, and public land used for various public purposes if larger than 5 hectares, and associated plants, animals and ecological systems: *Environmental Bill of Rights*, SO 1993, c 28, s 82. A right of action is established – s 84.

50 UN HR Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/31/52, (1 February 2016) [65]–[67] and UN Doc A/HRC/34/49, 19 January 2017. The title and status of the 'Independent Expert' was changed to that of a Special Rapporteur in 2015 by Resolution of the Human Rights Council.

51 UN HR Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* UN Doc A/HRC/25/53 above n 19 [69]–[78].

52 Ibid [58]–[68].

53 (Inter-American Commission on Human Rights) Case 7615 (Brazil) OAE/Ser.L/VII.66 Doc 10, rev.1 (1985).

54 (48939/99) [2002] ECHR 491.

55 [1995] 20 EHRR 277.

56 [1998] 26 EHRR 357.

57 Johan Rockström, Will Steffen, Kevin Noone, Åsa Persson, F Stuart Chapin, III, Eric F Lambin, Timothy M Lenton, Marten Scheffer, Carl Folke, Hans Joachim Schellnhuber, Björn Nykvist, Cynthia A de Wit, Terry Hughes, Sander van der Leeuw, Henning Rodhe, Sverker Sörlin, Peter K Snyder, Robert Costanza, Uno Svedin, Malin Falkenmark, Louise Karlberg· Robert W. Corell, Victoria J Fabry, James Hansen, Brian Walker, Diana Liverman, Katherine Richardson, Paul Crutzen and Jonathan A Foley, 'A safe operating space for humanity' (2009) 461 *Nature* 472.

4. Procedural rights of environmental democracy

Procedural environmental rights – to information, public participation and justice – enable the benefit or protection of more substantive human rights to be exercised and realised. Procedural rights are a crucial conduit between environmental protections and democratic experience – such as in providing the tools for enforcement of environmental protections and to participate in decision-making. Indeed, one dimension of the right to a safe and healthy environment is having access to functional tools for protecting against environmental harm.[58]

Procedural, process-based rights are basic to participation. For environmental law, these include the right of the public to be informed, to participate in environmental decision-making processes, to express political opinions and enjoy freedom of association, and to access means of redress and dispute resolution. Each of these dimensions corresponds to the key 'pillars' of the *Aarhus Convention*.[59] That *Convention* gives effect to Principle 10 of the *Rio Declaration on Environment and Development*.

Although a European-based instrument, the *Aarhus Convention* contains principles and rules appropriate to Australian circumstances. In a comparative light, Australia's performance at the national level is patchy.[60]

The 'pillars' of the *Aarhus Convention* – access to information, public participation, and access to justice – represent a valuable model and standard against which Australian environmental law can be evaluated. Detailed guidance on the *Convention* can be found in *The Aarhus Convention: An Implementation Guide*.[61] The Ontario *Environmental Bill of Rights* is an earlier legislative instrument also addressing these pillars and, as such, is instructive from a procedural rights perspective. The *Environmental Bill of Rights*[62] provides the right to:

- comment on environmentally significant government proposals;
- ask a ministry to review an existing law, or the need for a new one;
- ask a ministry to investigate harm to the environment;
- seek permission to appeal a ministry decision on permit, approval or other instrument;
- use courts or tribunals to protect the environment; and
- whistle-blower protection.

4.1 Access to information

To participate effectively in environmental affairs, information about the environment held by public and private authorities must be accessible in an open and transparent way. Freedom of Information (FoI) laws are only a starting point.[63] Administration of FoI legislation generally is under-resourced, resulting in delays and expenses for applicants.[64]

58 See UN HR Council, *John H Knox: Preliminary Report*, UN Doc A/HRC/22/43 above n 20, [17]; Weston and Bollier, above n 10, 33–34; The Preamble to the *Aarhus Convention* states that its procedural standards are guided by the right of 'every person… to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

59 *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters* (*Aarhus Convention*), adopted 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

60 Guy Dwyer, Judith Preston, Frances O'Brien, Luke Salem, Rachel McNally, Erin Turner-Manners and Jennika Woerde, *Environmental Democracy Index: Australia* <http://www.environmentaldemocracyindex.org/>; Victoria Lambropoulos, 'What can Australia learn from the Europeans about public participation? Article 6 of the Aarhus Convention and environmental impact statements' (2010) 27 *Environmental and Planning Law Journal* 4, 272.

61 United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2014 2nd ed) <http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf>; see also Zen Makuch *Guidance Note on the Aarhus Convention for the General Public, NGOs and Local Councils* (Malta Environment & Planning Authority, 2009). This Note explains how to implement the Convention in respect of land use planning matters in Malta.

62 *Environmental Bill of Rights*, SO 1993, c 28.

63 Australian Government agencies subject to the *Freedom of Information Act 1982* (FoI Act) are required to publish a range of information on their websites as part of the Information Publication Scheme (IPS): Office of the Australian Information Commissioner (OAIC), *Our Information Publication Scheme* <www.oaic.gov.au/about-us/access-our-information/our-information-publication-scheme>.

64 In 2014–15 the Department of the Environment received 98 requests under the FoI Act; 17 involved notification of charge; $14,772 was notified and $6,913 collected. See Office of the Australian Information Commissioner, *Annual Report 2014-15: Chapter Eight - Agency freedom of information* (2015) <www.oaic.gov.au/about-us/corporate-information/annual-reports/oaic-annual-report-201415/chapter-eight-agency-freedom-of-information>.

Further, FoI only applies to government, it has exceptions and complexities, and its independent administration has been progressively weakened.[65]

There are a range of frameworks, reporting regimes, and systems in place (both at national and sub-national levels), in relation to matters such as pollutants, greenhouse gas emissions, biodiversity assessments and impacts, and water resources management. Various tools for information provision are used, including databases (online or otherwise), registries, and periodic reporting. Additionally, at the national policy level, Australia has produced *National Principles for Environmental Information*[66] and a review of environmental information management occurred in 2012.[67] Mechanisms such as the *National Pollutant Inventory* have arguably commenced the task of a 'fully integrated environmental information system'.[68] This type of architecture is practically important and necessary to the functioning of access to information as a procedural right.

In some circumstances, public provision of information, such as public notices concerning environmental assessments under federal laws, is well managed.[69] Under Australia's intergovernmental water management arrangements, extensive work has been undertaken on developing water information systems, such as registries, water accounts and assessments.[70] Australia also undertakes periodic 'state of the environment' reporting at national and state levels.

A positive development is the Australian Government's commitment that Australia will participate in the global Open Government Partnership (OGP) and engage civil society in the development of an *Open Government National Action Plan* (NAP),[71] although this initiative does not yet appear to be linked to greater private sector disclosure. A significant amount of important environmental information is acquired and held by the private sector. In certain fields, such as pollution management and greenhouse gas emissions regulation, there are duties on the private sector to provide environmental information, but this is the exception rather than the rule.[72]

4.1.1 Conclusions and recommendations

A positive duty on the Australian Government to collect and publish information, facilitate public access and use of it, and maintain appropriate infrastructure to manage this duty is consistent with the *Aarhus* principles. This duty implies a rigorous obligation on the part of government to monitor, analyse and report on environmental matters that fall within the functions of government or of particular government agencies.[73]

Establishing a regime for the collection and dissemination of environmental information should occur over and above reform of FoI laws, where this reform can also contribute to the greater availability and accessibility of environmental information. Initiatives aimed at harmonising FoI legislation nationally, in particular reducing complexity and exceptions and expanding scope for disclosure in the public interest, would be consistent with a more open and transparent approach to the collection and provision of environmental information. Shifting the policy approach of FoI laws more robustly and uniformly toward proactive disclosure – or a so-called 'push' approach – would also be consistent with improved practices in managing environmental information. The *Freedom of Information Act* 2016

65 Richard Mulgan, 'The slow death of the Office of the Australian Information Commissioner', *The Canberra Times*, (Australia), 1 September 2015.
66 Australian Government, *National Principles for Environmental Information* (2015) <www.environment.gov.au/system/files/resources/d78e712c-6d80-417f-b482-77b0c4ed9a22/files/national-principles-environmental-information.pdf>.
67 Stephen Morton and Anthea Tinney, *Independent Review of Australian Government Environmental Information Activity: Final Report* (DSEWPaC, 2012) <www.environment.gov.au/system/files/resources/06e5e5b5-4584-4bd9-b2fd-05a790d0b2c4/files/eia-review-final-report.pdf>.
68 Ibid, xi; See Department of Environment and Energy, *National Pollutant Inventory* <www.npi.gov.au> and *National Environment Protection (National Pollutant Inventory) Measure 1998 (Cth).*
69 See for example, Department of the Environment and Energy, *Public notices and invitation to comment* <www.environment.gov.au/epbc/public-notices>.
70 The Commonwealth Bureau of Meteorology has been important in improved programs for the collection and dissemination of information regarding water resources and might represent a model in this respect: see Bureau of Meteorology, *Improving Water Information* (Australian Government) <http://www.bom.gov.au/water/>.
71 This National Action Plan is expected to be completed by November 2016: Department of the Prime Minister and Cabinet, *Open Government Partnership – Australia* (Australian Government) <http://ogpau.pmc.gov.au/>. Some of the modest initiatives that Australian Government agencies have proposed under the OGP include, for example, a centralised annual report discovery portal, a digital marketplace, more data-driven digital report publishing, an ICT Project dashboard, the redesign of the open data request process, and transforming high volume services.
72 See for example, *National Greenhouse Gas and Energy Reporting Act 2007* (Cth); see also Australian Panel of Experts on Environmental Law, *The Private Sector, Business Law and Environmental Performance* (Technical Paper 7, 2017).
73 For an example of the interactions between environmental information and public participation in the case of managing toxic waste, see Karen Bubna-Litic and Marianne Lloyd-Smith 'The role of public participation in in the disposal of HCBs – an Australian case study' (2004) 21 *Environmental and Planning Law Journal* 264.

(ACT) provides a state-of-the-art model for best-practice FoI legislation, consistent with this 'push' model and strong positive obligations to provide information publicly.[74]

The aims of the OGP and engagement of business and civil society in greater transparency are welcome. It is consistent with international initiatives such as the *Guidelines on Business and Human Rights*.[75] Proposals to make information more accessible on portals are also to be welcomed. A 'one-stop-shop' for environmental information is not yet in place. If information is made easily accessible through a central registry, portal or online source that hosts information from multiple portfolios and international comparative information about similar projects and applicable regulatory frameworks, this would improve public trust, responsibility and accountability, and reduce the risks of corruption and human rights violations that often include environmental dimensions.

APEEL recommends:

- All public authorities progressively make available to the public by electronic means all environmental information that they hold, and take reasonable steps to organise the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.[76]
- Clear national measures or standards in legal form are established requiring the proactive collection and dissemination of environmental information, its acquisition from public and private sources, and expedient measures for the request of environmental information. All other things being equal, environmental information falling within this scope should include:
  - information relevant to the functioning of public authorities and
  - information reasonably necessary to the management of current and future environmental issues.[77]

4.2 Public participation and deliberative democracy

Public participation in decision-making about environmental matters refers to participation, individually or through organised or representative bodies, in decision-making processes, whether at the formative or implementation stages. This may occur at the level of individual projects, developments, or activities. It may concern decision-making about plans, programs and policies. It may concern participation in the making of regulatory instruments.[78]

Common techniques of deliberative environmental governance are at the lower impact end of the public participation spectrum. These include consultation processes, which may be mandated in relevant environmental or natural resources legislation, especially at the planning or investigation stages of management. There are circumstances in which community or civil society groups will be involved in consultation and deliberation over extended timeframes through advisory or stakeholder bodies. Some of these ongoing participatory arrangements are required or established by law, such as high level consultative committees intended to bring together key interest groups.[79] Other arrangements are *ad hoc* or discretionary on the part of public agencies. While there is an extensive body of theory on public participation in governance or public administration,[80] public participation in environmental matters can be classified as falling generally into three categories:

- A *'notice and comment'* type of procedure, through which citizens are made aware of the relevant issues and are provided with information and given opportunity to make submissions on them.

74 Australian Capital Territory Legislative Assembly, Shane Rattenbury MLA, *Freedom of Information Bill 2016*, introduced 5 May 2016 <http://www.legislation.act.gov.au/b/db_53833/default.asp>. The Act commences 1 July 2017.
75 UN HR Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011).
76 See *Environmental Information Regulations 2004* (UK) SI 2004/3391, reg 4(1).
77 This particular issue is also addressed in Australian Panel of Experts on Environmental Law, *Environmental Governance* (Technical Paper 2, 2017).
78 See for example, *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, adopted 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001), arts 6, 7, and 8 respectively.
79 See for example, the Basin Community Committee established as an advisory body under the *Water Act 2007* (Cth) s 202.
80 See generally Mark Reed, 'Stakeholder management for environmental participation: a literature review' (2008) 141 *Biological Conservation* 2417; Andrew Cornwall, 'Unpacking "participation": models, meanings and practices' (2008) 41 *Community Development Journal* 3 269.

- A *public inquiry* model of procedure, through which citizens can provide written comments or submissions, and may make oral submissions and/or call and test evidence in a hearing.
- A *deliberative* procedure, through which citizens and interested actors debate and even negotiate or decide on environmental matters.

The distribution of decision-making power and control to citizens and communities can vary considerably across all categories.[81] These categories are not necessarily exhaustive, but represent broad models of policy tools for citizen-state engagement on environmental questions.

4.2.1 'Notice and comment' consultation

Government and public agencies commonly consult on plans, policies, programs and regulations. Many environmental laws, as well as other laws impacting on the environment (from mining laws to transport), include requirements for officials to provide notice of the preparation of such instruments, making drafts of instruments available for public scrutiny, and allow scope for public comment. These types of procedures are analogous to rules of procedural fairness in decision-making, and they are required to be exercised *bona fide*, which can mean that comment must at least be genuinely considered.[82] A duty to consult or take comment into account does not mean the views of those consulted are binding on a policy-maker, planner or regulator.[83] Nor does it imply a right to a hearing. A duty to report on the outcome of consultations, or how comment was considered, may be part of the overall duty to consult.

4.2.2 Public inquiries

Public inquiries are a type of deliberative mechanism that can establish independence or political distance between a decision-maker and a consultation process. They involve the calling and assessment of evidence and the production, and usually publication, of reasoned reports justifying recommendations.[84] Public inquiry bodies include statutory and *ad hoc* panels, internal and external reviews, parliamentary committees, or commissions. In the environmental management context, the public inquiry typically involves a form of hearing procedure, expert participation on the hearing body, and advisory rather than binding outcomes. The participatory character of the public inquiry is based on processes of public hearing. Although not ordinarily producing a binding outcome, public inquiry hearings are a form of adjudicative process; one informed by submissions and evidence provided to the inquiry, leading to a reasoned report.[85] Models of public participation can vary, although scope for participation through submissions or evidence is usually broad. On a cautionary note, the public inquiry model can be used to side-step the scrutiny and review provided for in administrative appeals.[86]

4.2.3 Deliberative processes

More sophisticated forms of deliberative practice, such as citizen juries, caucuses and conferences are used in Australian environmental management, but they are typically more marginal and/or experimental.[87] Overarching legal

81 This does not discount tendencies to the use of participatory processes for manipulation or co-optation: see Sherry Arnstein, 'A ladder of citizen participation' (1969) 35 *Journal of the American Institute of Planners* 216.

82 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591, 44 (Logan J); *TVW Enterprises Ltd v Duffy (No 2)* (1985) 7 FCR 172, 179 (Toohey J).

83 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591, 44.

84 Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 4th ed, 2007) 111–12; see eg, *Resource Assessment Commission Act 1989* (Cth) (repealed); *Planning and Environment Act 1989* (Vic) pt 8; Peter Williams, 'The "Panelization" of planning decision-making in Australia' (2014) 29 *Planning, Practice and Research* 4 426; John Woodward, 'Environmental inquiries in New South Wales' (1984) 1 *Environmental and Planning Law Journal* 317; Ben Richardson and Ben Boer, 'Contribution of Public Inquiries to Environmental Assessment' (1995) 2 *Australian Journal of Environmental Management* 2 90.

85 See Denis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996).

86 Environmental Defenders Office (NSW), *Merits Review in Planning in NSW* (Report, July 2016) <https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2998/attachments/original/1467777537/EDO_NSW_Report_-_Merits_Review_in_Planning_in_NSW.pdf?1467777537>.

87 For statutory models, see for example, *Environment Protection Act 1970* (Vic) s 20B; *Catchment and Land Protection Act 1994* (Vic) s 19J; see generally Cameron Holley and Darren Sinclair, 'Deliberative participation, environmental law and collaborative governance: insights from surface and groundwater studies' (2013) 30 *Environment and Planning Law Journal* 32; Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Routledge, 2012).

and policy models for deliberative practice are maturing.[88] Model legislative instruments advancing these techniques as an expansion of administrative law are available.[89]

In both law and practice, governments and public agencies have increasingly turned to consultative and deliberative tools to engage the community and NGOs in environmental decision-making. Drawing from wider experience of participatory governance, such as in municipal budgeting[90] and in open government initiatives,[91] deliberative approaches to environment governance can range from general and targeted consultation procedures through to delegation of decision-making to citizen-based bodies or institutions.

A modern, deliberative and 'democratic experimentalist' approach to participation involves the dispersal of power, distributed methods of information gathering, and shared systems of monitoring and problem-solving.[92] It may require what is termed in US environmental management 'negotiated rule-making', which emerged as a response to the rise of administrative rule-making and judicial challenge.[93]

In principle, under deliberative approaches, organisations and institutions become continually learning organisations, with iterative processes building local, operational learning-by doing experience into adapted processes, following iterative evaluations and ongoing assessment of results, goals and outcomes.[94] Lessons are shared with others through regional and national coordinating bodies.[95] This is necessary because in environmental resource management there is always a level of uncertainty about outcomes, so stakeholders should continuously gather and integrate appropriate ecological, social, and economic information with the goal of adaptive improvement.[96]

4.2.4 Conclusions and recommendations

It has been argued in academic[97] and other literature[98] that Australian standards for public participation in environmental impact assessment are similar to those operating under key international instruments, such as the *Aarhus Convention*. Shortcomings exist however, such as a general failure in Australian procedures to provide for public participation early in the formative stages (that is, at the options and scoping stage) and to require targeted engagement of key public actors, especially civil society organisations.[99] The effects of these limitations in Australian processes can be that well-resourced, thoughtful, organised and balanced assessment processes, in which community sectors and all affected interests are engaged, do not occur. Consequently, the current approach can affect the legitimacy of outcomes.

In Australia, public participation in environmental matters has been cautious, at best. A future approach to public participation needs to proceed from a paradigmatic shift – one that facilitates more than 'notice and comment' procedures and 'consultation' with community and civil society actors toward at least a qualification, if not displacement, of concentrations of power over decision-making.

Greater facilitation and embedding of community and civil society organisations in the making of environmental policy and regulation, and in planning and programme-development, would represent an important point of alignment with the *Aarhus* approach. More extensive and systematic use of tools such as public inquiries should also be part

88 Holley, Gunningham and Shearing, above n 87.
89 Lisa Blomgren Bingham 'The next generation of administrative law: building the legal infrastructure for collaborative governance' (2010) *Wisconsin Law Review* 297; David Fontana 'Reforming the Administrative Procedure Act: Democracy Index Rule-making' (2005) 74 *Fordham Law Review* 1 81.
90 See for example, Elizabeth Pinnington, Josh Lerner, and Daniel Schugarensky 'Participatory budgeting in North America: The experience of Guelph, Canada' (2009) 21 *Journal of Public Budgeting, Accounting and Financial Management* 3, 455.
91 Bingham, above n 89.
92 Shane J Ralston, 'Dewey and Hayek on Democratic Experimentalism' (2012) 9 *Contemporary Pragmatism* 2 93, 97.
93 See for example, Lawrence Susskind and Gerard McMahon, 'The theory and practice of negotiated rule-making' (1985) 3 *Yale Journal on Regulation* 1 133; Cary Coglianese, 'Citizen participation in rulemaking: past, present and future' (2006) 55 *Duke Law Journal* 943.
94 Mark Tushnet, 'Reflections on Democratic Experimentalism in the Progressive Tradition' (2012) 9 *Contemporary Pragmatism* 2, 255, 258.
95 Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 2, 267.
96 *Lisbon Principles for Sustainable Governance,* principle 4; discussed in Robert Costanza, Francisco Andrade, Paula Antunes, Marjan van den Belt, Don Boesch, Dee Boersma, Fernando Catarino, Susan Hanna, Karin Limburg, Bobbi Low, Michael Molitor, Joao Gil Pereira, Steve Rayner, Rui Santos, James Wilson and Michael Young, 'Commentary: Ecological economics and sustainable governance of the oceans' (1999) 31 *Ecological Economics* 171.
97 See Lambropoulos, above n 60, 272–295.
98 Dwyer et al, above n 60.
99 Lambropoulos, above n 60, 290–295.

of reforms to public participation in environmental matters,[100] provided appeals and adjudicative reviews are not foreclosed as a result – a principle that should be applied to all participatory and deliberative processes. Procedures for consultation and deliberation serve distinct purposes from those for administrative or judicial review: to inform and influence decision-making and implementation, on the one hand, and accountability, improved decision-making and legality, on the other.

Noting that the *Aarhus Convention* provisions on public participation in environmental matters represents an exemplary standard,[101] the direction for law reform in this area should contain clear legal standards, including:

- application of participatory procedural rights to decision-making in respect of particular activities impacting on the environment, relevant plans, policies and programs, and the preparation of regulatory instruments; and
- taking a proportionate approach, require the nature, extent and intensity of public participation to reflect potential impacts and significance, complexity, controversy, uncertainty and scope for interrogation, and the nature of public interests affected. Scrutiny and consideration of options at an early stage, a clear mandate and support for the role of civil society and community organisations, and more expansive use of public inquiries of a quasi-judicial character, are measures to be endorsed. Formulation of model 'tracks' for public participation should be developed taking these points into account. Any public interest exemptions to participation, such as for emergency or public safety reasons, should be strictly exceptional and in conformity with international and domestic law.[102]

4.3 Access to just remedies

Access to fair, efficient and responsive legal remedies is a cornerstone of democratic practice. Access to justice in environmental decision-making encompasses judicial review (review for legality), administrative or merits review (review for a correct or preferable decision), and civil enforcement of environmental laws against individuals, corporations and governments where they are failing to comply with obligations. Procedural mechanisms, such as the right to seek a remedy and the financial capacity to do so, are integral to the concept of an environmental rule of law. The importance of accessible remedies is heightened by the continuing downward trend in environmental indicators and weaknesses in the enforcement of environmental laws.[103]

4.3.1 Review and remedies

Jurisdiction to review and, as necessary, correct environmental decisions is essential to the proper administration of environmental law and justice. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*), as the main national environmental law, currently provides for various types of review of decisions made under it, including reconsideration of matters,[104] judicial review in the Federal Court of Australia,[105] and administrative (merits) review in some circumstances in the Administrative Appeals Tribunal (AAT).[106] Scope for administrative review is

100 See Department of the Environment, Heritage and the Arts, The *Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999 (Hawke Review) (Australian Government, 2009)* [2.61], recommendation 4, [7.27]; see also Richardson and Boer, above n 84.

101 See for example, United Nations Economic and Social Council, Economic Commission for Europe, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: The Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, Addendum to the Report of the fifth session of the Meeting of the Parties*, Un Doc ECE/MP.PP/2014/2/Add.2 (29 January 2015); United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2nd ed, 2014); United Nations Environment Program, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters,* UNEP Governing Council Dec SS.XI/5 (26 February 2010) <www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf>.

102 Note also the recommendation for greater public involvement with the application of the precautionary principle, in Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

103 See State of the Environment 2011 Committee, above n 1; Andrew Macintosh, Amy Constable, Isabella Comfort, Fathimath Habeeb, Mhairin Hilliker, Mandy Liang and Anna-Claudia Oliveros Reyes, *Environmental Citizen Suits in the New South Wales Land and Environment Court: Working Paper* (The Australia Institute, 2016).

104 For example, in relation to fees, referrals, controlled action decisions and remediation determinations: *EPBC Act* ss 75, 78–79, 514Y, 74C(3)(c), 480J.

105 *EPBC Act* s 487; or by way of declaratory or injunctive relief under the *EPBC Act* s 473.

106 For example, review of decisions about permits to kill or take protection species: *EPBC Act* s 206A, 221A, 243A, 263A; review of advice regarding compliance with conservation orders: *EPBC Act* s 473.

relatively confined under this Act. For instance, key decisions such as those concerning controlled actions are not reviewable in this way.[107]

These different mechanisms of review are related to the different purposes and functions of review jurisdictions, and to remedies and relief that can flow from the exercise of those jurisdictions. These purposes and functions include ensuring the legality of decisions, the quality of decisions, or the consistency of outcomes and reasoning. Review jurisdictions are also closely related to constitutional distinctions of the role of courts and of the executive in the administration of government. While not all mechanisms of review under the *EPBC Act* involve public hearings or adjudicative procedures, for current purposes, review is understood as a form of 'individualised justice' through hearing procedures, whether in courts or tribunals. This facility of review in environmental governance safeguards the practice of decisions being made in accordance with the rule of law, contributes to quality in decision-making, ensures decision-makers are accountable in an open forum, develops environmental jurisprudence, and highlights problems and issues to be the subject of reform.[108]

Despite these benefits, recourse to review has been limited, if not symptomatic of the poor performance of environmental law at the national level. Less than 1% of the more than 5,500 matters referred for assessment under the *EBPC Act* have been challenged.[109] The 2009 Hawke Review of the *EPBC Act* made a series of recommendations about broadening access to merits review under the Act, while also shortening the time period within which applications can be made.[110] It noted that decisions made under the *EPBC Act* are complex, and necessarily involve weighing the environmental social and economic considerations inherent in ESD.

4.3.2 Specialist jurisdictions

Jurisdiction to grant remedies ensuring the proper and effective administration of justice in environmental matters also raises the issue of those institutions and bodies best equipped to exercise those jurisdictions. Specialist environmental courts and tribunals operate in several states in Australia. The first such jurisdiction was the Land and Environment Court in New South Wales (NSW). It is equivalent in status to the Supreme Court of NSW. Such bodies were instituted to rationalise and improve environmental decision-making and develop specialised judicial and, as appropriate, non-judicial expertise in these matters.[111] Over time, specialist environmental courts have also brought a series of other beneficial elements with respect to accountability for decision-making and the administration of justice in the environmental sphere, including authority, independence, visibility, a multi-faceted approach to disputes, the development of environmental jurisprudence, public confidence, problem solving, issue and remedy integration, and more expedient and efficient decision-making than might otherwise be the case. Part of the 'multi-door' approach of this type of specialist jurisdiction is the competence to deal with disputes in different ways, including judicial review, administrative review and alternative dispute resolution (ADR), as appropriate, but within the one institution.

Specialised courts and tribunals may be criticised on grounds that their expense is not warranted, other areas of law have higher needs for specialised expertise, environmental cases may be marginalised, general law expertise is diminished by fragmenting and isolating environmental matters, environmental law can be captured by powerful

107 See generally Chris McGrath 'Flying foxes, dams and whales: using Federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324, 353–355.

108 See Brian Preston and Jeff Smith 'Legislation Needed for an Effective Court' in Nature Conservation Council of NSW, *Promise, Perception, Problems and Remedies: The Land and Environment Court and Environmental Law 1979–1999* (Nature Conservation Council of New South Wales, 1999) 103–121; Brian Preston 'Characteristics of successful environment courts and tribunals' (2014) 26 *Journal of Environmental Law* 365.

109 See C McGrath, above n 107; see also Chris McGrath, Submission no 96 to Senate Standing Committee on Environment and Communications, *Inquiry into Environment Protection and Biodiversity Conservation (Standing) Bill 2015* (11 September 2015); Jess Feehely, 'Standing up for standing' (2016) 31 *Australian Environment Review* 4, 106; Chris McGrath 'Myth drives Australian Government attack on standing and environmental "lawfare"' (2016) 33 *Environment and Planning Law Journal* 1, 3.

110 *Hawke Review*, above n 100, ch 15, recommendations 47–50, 303–316; The Review recognised that Ministers are accountable for their decisions 'either through judicial review in the Federal Court or public opinion': at 278. The Australian Government responded that ministers were accountable to the Parliament for their decisions and that merits review of preliminary decisions can frustrate an otherwise efficient and timely process: Department of Sustainability, Environment, Water, Population and Communities *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Australian Government, 2011) <https://www.environment.gov.au/resource/australian-government-response-report-independent-review-environment-protection-and>.

111 Brian Preston 'Benefits of judicial specialization in environmental law: The Land and Environment Court of New South Wales as a case study' (2012) 29 *Pace Environmental Law Review* 396.

interests, and perceptions of specialist bodies as inferior jurisdictions.[112] However, the benefits of specialisation that lie, for example, in expertise, the capacity to take multiple approaches to controversies and disputes, efficiency, and the weight accorded to environmental matters, are important considerations and, overall, outweigh drawbacks.

Nationally, Australia has no specialist environmental court or tribunal, whether a distinct environmental court or a jurisdiction within another body. On the other hand, both the Federal Court of Australia and the AAT – the bodies currently responsible for hearing environmental challenges – have undergone significant internal reform since 2014. In the Federal Court, national practice areas and judicial panels have been developed to improve efficiency and consistency in decision-making. The AAT includes members with specialised expertise and on 1 July 2015 became an enlarged amalgamated tribunal.

A case can be made for the adoption of a Federal Court national practice area with a panel of specialist environmental law judges broadly similar to Hawai'i's Environmental Court, with similar reforms in state Supreme Courts where specialist courts and tribunals do not yet exist. This is needed because of the complex multiparty, multidisciplinary, public nature of most environmental disputes.

As there are great financial risks and disincentives to public interest environmental litigation, costs orders on public interest grounds and public subsidies for cases in the environmental sphere are also needed.

The significant constraints on accessing justice in environmental controversies are perhaps exemplified in the relatively small number of public interest cases brought under key laws such as the *EPBC Act*.[113]

4.3.3 Standing and 'citizen suits'

Obtaining a remedy or relief from a court or tribunal may be moot if a person has no right to seek it in the first place. Whether the law will permit a court or tribunal to recognise a person as having sufficient interest in an environmental decision to commence proceedings can be an important point of contention early in environmental proceedings. These rules on the right of 'standing' are intended to regulate access to courts or tribunals.[114] At common law, the right of standing is restricted to a person whose rights or interests are affected, but they must have more than a 'mere emotional or intellectual' interest.[115] Federal legislation has extended that right generally to simply a 'person aggrieved',[116] and, under the *EPBC Act*, environmental organisations and persons with a record of involvement in environmental issues are expressly brought within the scope of standing to seek judicial review.[117] Standing rights under the *EPBC Act* have, however, been the subject of controversy.[118]

In some states, such as NSW, there have been long-standing rights for 'any person' to challenge government decisions made or to undertake enforcement proceedings under planning and environmental laws. This is sometimes referred to as 'open standing'[119] or 'citizen suits'.[120] A recent study of environmental litigation in NSW has found that 'the main concern is not a flood of environmental citizen suits, but a drought'.[121]

There are variations on these liberal standing rights, depending on the type of legal proceedings. For instance, in administrative (merits) review actions, it may be that a person seeking review must have made a written objection

112 See Preston, above n 108; George (Rock) Pring & Catherine (Kitty) Pring *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009).
113 Chris McGrath 'Myth drives Australian Government attack on standing and environmental 'lawfare'' (2016) 33 *Environmental and Planning Law Journal* 1 3. See also Macintosh, et al, above n 103, noting the comparative 'drought' of litigation at the subnational level in which access to justice provisions are relatively strong.
114 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 11.50: 'The principal function of any standing rule is to limit access to the courts. It operates as a formal filter managed by judges, in addition to the informal filters confronting any would-be litigant, such as costs'.
115 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.
116 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5.
117 *EPBC Act* ss 475, 487.
118 See for example, Senate Standing Committees on Environment and Communication, *Environment Protection and Biodiversity Protection (Standing) Bill 2015* (Australian Senate, November 2015).
119 See for example, *Planning and Environment Act 1987* (Vic) s 82; *Protection of the Environment Operations Act* 1997 (NSW) ss 252–253.
120 Liberal rights of standing under 'citizen suit' provisions in US environmental laws have been a critical tool in the efficacy of those legal protections, as well as a source of innovation in environmental management across areas of water, biodiversity, and air quality: see for example, Barton Thompson, 'The continuing innovation of citizen enforcement' (2000) *University of Illinios Law Review* 185; Susan Daggett 'NGOs as lawmakers, watchdogs, whistleblowers, and private attorneys-general' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 99.
121 Macintosh et al, above n 103.

to the original decision.[122] If this has occurred, then standing to seek review before an appropriate tribunal or court is available. Elsewhere, third party rights to seek review or enforcement of environmental decisions is complicated by standing requirements.[123] Also, at common law, any person may undertake a private prosecution against a person who is alleged to have committed a criminal offence.[124] Often under environmental or natural resources statutes this common law right is displaced and only particular authorities can commence criminal prosecutions.[125]

The Australian Law Reform Commission (ALRC) has reviewed the law of standing a number of times. In 2015 it restated its 1996 recommendation in favour of open standing, with certain, limited exceptions.[126] The ALRC has repeatedly dismissed 'floodgate' arguments against liberal standing. As noted above, for environmental matters the problem appears to be the other way.

Rights to take legal action in environmental matters are not consistent across Australia and they are not necessarily grounded on consistent bases. Other inquiry bodies have highlighted the lack of national consistency in standing provisions and impacts.[127] Harmonised standing criteria for judicial and administrative review processes have been suggested elsewhere.[128]

4.3.4 Costs arising from litigation

Even if 'standing' is established, access to justice in environmental cases can be illusory if the financial risks and costs of challenging decisions or pursuing legal remedies are a strong disincentive. Breaches or failures of the law will not be remedied, and the valuable perspectives of civil society, private citizens and communities will not effectively be engaged in environmental review. Legal and associated costs (such as costs of experts) represent significant 'informal filters'[129] deterring challenges to environmental decisions.

The general rule in Australia is that those who lose court proceedings pay the costs of the case (costs follow the event). There are exceptions to this rule in some tribunals and specialist environmental courts, or in circumstances where a protective costs order or capped costs arrangement is granted for a public interest matter.[130] The latter are rare. Community groups or individuals seeking judicial review or civil enforcement in relation to public interest environmental matters in the courts may face the risk of paying not only court costs, but all legal costs. Even if the case is a strong one, this risk can be a substantial deterrent to using the law to protect the environment.[131] Mechanisms to cap costs, such as protective costs orders, while important,[132] face the problem of legal and practical availability varying widely by jurisdiction. In Europe, the use of ADR has been recommended to reduce environmental litigation costs.[133]

Comparison might be made with the US experience where, across a range of federal environmental, consumer, competition and other statutes, use of the courts and law to achieve public interest outcomes has been encouraged historically. This model of private justice and private attorneys-general[134] is viewed as supplementary to public

122 See for example, *Planning and Environment Act 1987* (Vic) s 82; under which an objector can seek review of a decision of a 'responsible authority' before the Victorian Civil and Administrative Tribunal.
123 See for example, *Environment Protection Act 1970* (Vic) s 33B.
124 See generally Australian Law Reform Commission, *Standing in Public Interest Litigation* (ALRC Report No 27, 1985) ch 7.
125 See for example, *Water Act 1989* (Vic) s 296.
126 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129, 2015) [15.63]; referring to Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies,* (ALRC Report No 78, 1996) rec 2.
127 Australian Law Reform Commission, *Standing in Public Interest Litigation* (ALRC Report No 27, AGPS, 1985). See also Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies* above n 126; Administrative Review Council *What Decisions should be Subject to Merits Review?* (Attorney-General's Department Australian Government, 1999); Administrative Review Council, *Environmental Decisions and the Administrative Appeals Tribunal* (Attorney-General's Department Australian Government, Report No 36, AGPS, 1994); Productivity Commission, *Major Project Development Assessment Processes: Research Report* (Australian Government, 2013); Administrative Review Council, *Federal Judicial Review in Australia* (Australian Government Attorney-General's Department, Report No 50, 2012).
128 Productivity Commission, above n 127, 284–6, citing Administrative Review Council, above n 127.
129 See Aronson and Groves, above n 114.
130 See *Oshlack v Richmond River Council* (1998) 193 CLR 72. The Australian Law Reform Commission (ALRC) recommendations for codifying the grounds for making costs orders have not been implemented and were arguably too vague: ALRC, *Costs Shifting – Who Pays for Litigation in Australia,* (ALRC Report 75, 1995) 13.3–13.4.
131 See for example, Brian Preston, 'The role of public interest environmental litigation' (2006) 23 *Environmental and Planning Law Journal* 337.
132 Nicola Pain 'Protective costs orders in Australia: increasing access to courts by capping costs' (2014) 31 *Environmental and Planning Law Journal* 450.
133 See for example, J Darpo, *Effective Justice? Synthesis report of the study on the implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, (Report 2013–10–11/Final, 2013) 42.
134 See Pamela Bucy 'Private justice' (2002) 76 *Southern California Law Review* 1; William Rubenstein 'On "what a private attorney-general is" – and why it matters' (2004) 57 *Vanderbilt Law Review* 2129.

enforcement and regulation and has been facilitated by 'citizen suit' provisions, favourable costs rules (under which parties generally bear their own costs), and the active reward through costs orders of successful parties bringing actions in the public interest. Significantly, it is not environmental statutes that generate the highest rates of financial recovery to successful parties where harm is demonstrated, but those protecting the federal government from fraudulent conduct.[135]

The notion of private actors being encouraged and actively engaged in seeking enforcement and strong public outcomes from environmental laws, on a substantial scale, would represent a paradigm shift in Australian law and practice – arguably one that builds on and goes beyond facilitative standing and costs rules. It would require a conscious reappraisal – and expansion – of the role of citizens and non-governmental actors in enforcement and administration of environmental laws. Movement toward the public subsidy of public interest environmental litigation is perhaps symptomatic of a trend in the direction of 'private regulation of the public interest', although its extent has been limited and incrementally withdrawn in recent years,[136] as evidenced in the de-funding of the various state-based Environment Defenders Offices and other community legal centres.[137] In the face of a pincer movement of poor national environmental performance and systemic under-enforcement of environmental laws,[138] it is time to reassess how the private and non-governmental enforcement of environmental laws is resourced. This is likely to require a combination of measures, including the restoration of funding to community legal centres, establishment of a sustainable public interest defence fund, maintenance of tax benefits for environmental advocacy focussed on law and policy,[139] and adoption of legislative provisions for penalties or forfeitures arising from the prosecution of environmental harms to be distributed to the public interest defence fund.[140]

4.3.5 Alternative Dispute Resolution

In Australia ADR in the environmental law and sustainability spheres is a growing area of policy and practice, and forms part of the model litigation obligations guiding public legal service providers.[141] ADR provides for an impartial person (that is, a third party) to assist those in a dispute to resolve the issues between them. ADR can include mediation, arbitration, case management conferences, expert determinations, experts' conferences and other non-judicial processes. Early dispute resolution, and negotiated agreements, can be highly beneficial in the resource management and development sector as stability and certainty for investors can be enhanced, and late litigation costs avoided. The Productivity Commission has recognised the benefits of ADR, but not necessarily for all disputes or all parties.[142] ADR is increasingly part of court and tribunal case-management.

In the US, federal agencies including the Environment Protection Agency (EPA) provide access to and use ADR for civil enforcement, claims against the government, contracts and procurement, workplace disputes, and within small agencies. The EPA assessed ADR favourably in 2000.[143] In Europe, ADR approaches to management of environmental disputes have also been assessed favourably.[144]

135 Bucy, above n 134.
136 McGrath, above n 107.
137 ABC News 'Funding cut to Environment Defenders Offices described as barbaric' 19 December 2013 <http://www.abc.net.au/news/2013-12-18/funding-cut-to-environmental-defenders-offices/5164934>.
138 McGrath above n 109; see also Macintosh, et al, above n 103.
139 On proposed changes to tax laws benefiting environmental advocacy, see Peter Burdon, 'Government inquiry takes aim at green charities that "get political"' on *The Conversation* (16 April 2015) <https://theconversation.com/government-inquiry-takes-aim-at-green-charities-that-get-political-40166>.
140 See for example, *Endangered Species Act* 16 USC § 11(d).
141 Office of Legal Services Coordination, *Guidance Note No 12: Use of Alternative Dispute Resolution* (ADR) (Australian Government Attorney-General's Department, re-issued 2015); see also *Civil Dispute Resolution Act 2011* (Cth).
142 Productivity Commission, *Access to Justice Arrangements*, (Australian Government, Inquiry Report No 72, Vol 1, 2014).
143 See the *Administrative Dispute Resolution Act of 1996*, 5 USC § 571; United States Environmental Protection Agency, *ADR Accomplishments Report* (Office of the Administrator, March 2000).
144 See for example, Axel Volkéry, Nicola Tilche, Peter Hjerp, Shailendra Mudgal, Andreas Mitsios, Nejma André, Lidia Wisniewska, Christine Lucha , Gesa Homann, Elizabeth Tedsen *Study on Environmental Complaint – Handling and Mediation Mechanisms at National Level: Final Report* (Ecologic Institute, 2012) *388*.

4.3.5.1 Restorative justice

Restorative justice is an emerging theme in environmental dispute resolution and law enforcement. It is particularly suited to providing a remedy for localised environmental damage where a guilty plea has been entered in relation to an environmental offence, which can be negotiated during the penalty determination process. The *Protection of Environment Operations Act 1997* (NSW) as amended in 2015, enables the Land and Environment Court to make orders for restoration and prevention, for the payment of the costs of investigations, remediation, expenses and compensation, and for the publication of the offence and its consequences, such as in a report to shareholders. It also provides for a payment to the Environmental Trust or another environmental organisation to enable the offender to attend a relevant training course or to establish a relevant training course for employees or contractors or others to attend. A party's undertakings are enforceable. This type of approach can educate offenders, reduce recidivism, achieve restorative outcomes and enable a social licence to operate to continue. Multi-party community conferences may be involved.

4.3.6 Conclusions and recommendations

Access to just legal remedies in environmental matters is consistent with the environmental rule of law and also with best practice in decision-making and governance. To this extent, this pillar of procedural environmental rights is an essential component of environmental democracy. Effective access to justice also comprises an integrated architecture of rights, procedural tools and institutional arrangements. Civil society organisations, as well as concerned individuals, play important roles in ensuring decisions are made in accordance with law and best practice. However, access to justice arrangements under Australian environmental laws vary – by jurisdiction and the mechanism in issue.

Reform of environmental law nationally and via harmonisation across jurisdictions would be conducive to expanded environmental access to justice, which in turn would facilitate stronger environmental governance and a more effective contribution of law to the task of arresting indicators of environmental decline. In so doing, Australia might rise beyond the lacklustre, or 'fair', performance of its national environmental laws in relation to access to justice.[145]

Noting this situation, the directions for law reform in respect of access to justice should include:

- extending administrative (merits) review mechanisms to key environmental decisions where they currently do not apply, such as those under Parts 7–9 of the *EPBC Act*,[146] and instituting standard criteria for expanding administrative review arrangements under other national environmental legislation;[147]
- the incorporation of 'open standing' or 'citizen suit' provisions within Commonwealth environmental legislation, and the harmonisation of 'citizen suit' provisions across Australian jurisdictions as the principal approach to legal standing;
- legislating for public interest costs protection, so that a court is required to provide for protection from costs for a person bringing or maintaining legal action in the public interest in environmental matters;[148]
- establishing a national public interest environmental defence fund; and
- establishing specialist environmental law practice areas and/or judicial panels, as appropriate, within Australia's federal courts (the Federal Court and Federal Circuit Court) and the AAT.
- establishing a national judicial education body on the environment, consistent with global initiatives in this area.[149]

145 Dwyer et al, above n 60.
146 See McGrath, above n 107, 353–355.
147 Administrative Review Council, *What Decisions Should Be Subject to Merit Review?,* above n 127, 1.3; cited in McGrath, above n 107, 353–4.
148 See Environment Defenders Office (Victoria), *Costing the Earth? The Case for Public Interest Costs Protection in Environmental Litigation* (2010); compare the obligation that costs should not be prohibitively expensive as provided for under the *Aarhus Convention*, art 9(4); for detailed consideration of how that concept applies to protective costs mechanisms, see Economic Commission for Europe, *Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, (Compliance Committee, 24 September 2010).
149 See World Environmental Law Congress, *Charter of the Global Judicial Institute for the Environment* (Brazil, 29 April 2016).

5. Aboriginal and Torres Strait Islander peoples'[150] rights related to the environment

Expansion of models of citizenship to encompass greater democratic involvement in environmental matters, such as the *Aarhus* 'pillars', may not be sufficient to achieve just and equitable outcomes for communities who have been historically or structurally marginalised from citizenship. The relationship of Aboriginal peoples to the democratic state and governance, is such an example. Aboriginal communities' relationships to land and natural resources – that is, to Country – are unique, not only because of dispossession and disruption, but also because of their ancient nature and ontological significance to Aboriginal cultures and societies. Reform of environmental law needs to come to terms with these issues, in such a way that builds on gains, such as those achieved through native title, Indigenous Protected Areas (IPAs), land rights legislation, and cultural heritage protection. The interaction between environmental and these other areas of law is important and distinguishable on the basis that its functions are not solely protective or restorative of ecological processes and benefits, but moreover of cultural, social and political outcomes.[151] As a result of the particular circumstances of colonisation and the unique relationship of Aboriginal peoples with the environment, environmental law needs to continue to evolve to come to terms with these realities.

5.1 International norms and their adoption

International norms are an important source for developing Australian environmental law in relation to Aboriginal communities. Great strides have been taken in international law, including in MEAs and human rights treaties, to recognise the rights of Aboriginal peoples. This includes recognition in relation to natural and cultural resource management. *The International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* protect various relevant rights, although these tend to be interpreted in a moderate way, as do most other human rights instruments that proscribe racial discrimination.[152]

International environmental law instruments recognising indigenous peoples' rights or democratic aspirations have not been fully implemented in Australian domestic law. Those instruments include the *International Labour Organization Convention 169* (ILO-convention 169),[153] and the *Convention on Biological Diversity* (*CBD*).[154] The *Akwe:Kon Guidelines*,[155] adopted under the *CBD* in 2004, provide guidance for the conduct of impact assessments in respect of developments proposed to take place on or to impact on indigenous communities' sacred sites or lands and waters they traditionally occupied or used.

The leading international instrument on Aboriginal peoples' rights is the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*),[156] which recognises a broad range of rights including:

- rights protective of indigenous peoples' land, territories and resources, including their ownership, use and control;
- rights to redress in circumstances of the interference with their rights;
- rights to conservation and protection of the environment and productive capacity of lands, territories and resources;
- rights protective of cultural heritage and traditional knowledge;
- rights to determine priorities and strategies for development.

150 The term 'Aboriginal' is used generally in this paper to encompass comparable terms such as 'indigenous', 'Aboriginal and Torres Strait Islander', 'First Nations', or 'First Peoples'. Other terms are used where appropriate in the context.

151 This is exemplified in, for example, articles 25–32 of the *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295 (Annex 1), (13 September 2007) as considered below.

152 See for example, Human Rights Committee, *Views: Communication No 197/1985,* UN Doc A/43/40 (27 July 1988) (*Kitok v Sweden*); Human Rights Committee, *Views: Communication No 167/1984*, UN Doc CCPR/C/38/D/167/1984 (26 March 1990) (*Lubicon Lake Band v Canada*'); Human Rights Committee, *Views: Communication No 511/1992,* UN Doc CCPR/52/D/511/1992 (26 October 1994) (*Ilmari Lansman v Finland*); Human Rights Committee, *Views: Communication No 671/1995,* UN Doc CCPR/C/58/D/671.1995 (30 October 1996) (*Jouni E Lansman v Finland*).

153 International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention,* adopted 7 June 1989, Convention No 169, 76th sess (entered into force 05 September 1991).

154 *Convention on Biological Diversity* adopted 5 June 1992 1760 UNTS 79 (entered into force 29 December 1993); see especially art 8(j).

155 Secretariat of the Convention on Biological Diversity, *Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, (CBD Guidelines Series, Montreal, 2004).

156 *United Nations Declaration of the Rights of Indigenous Peoples* (*UNDRIP*), GA Res 61/295 (Annex 1), (13 September 2007).

The *UNDRIP* framework articulates rights for indigenous peoples in relation to land and/or natural resources. Its soft law character means *UNDRIP* contains no binding obligations on states, but it is nevertheless a key expression of internationally-recognised norms.[157] One of the most important norms *UNDRIP* affirms is the principle that indigenous peoples are entitled to the exercise of free, prior and informed consent (FPIC) in relation to actions affecting them. This right is given a variety of expressions, including as an obligation on states to 'take effective measures to ensure… free, prior and informed consent',[158] 'to consult and cooperate in good faith…in order to obtain free, prior and informed consent,'[159] and that such consent is 'freely agreed'.[160] It is the second of these formulae that is perhaps most relevant, as it bears on legislative and administrative measures and development actions. While *UNDRIP* traverses a wide range of topics and matters, for present purposes, APEEL emphasises the principle of FPIC as a critical concept of the role of Aboriginal communities and organisations in environmental governance and decision-making.

This is because of Aboriginal communities' special attachments to land and resources, deriving from cultural, traditional, customary or historic connections. The integrity and vitality of Aboriginal communities and well-being of their members can depend fundamentally on such connections. Those attachments may have expression in legal or beneficial rights, interests, entitlements, allocations or reciprocal obligations on other actors. Furthermore, through mechanisms of environmental governance, such as planning or approvals, Aboriginal peoples' rights and interests interact (and may inter-operate) with environmental law. This interaction is not without complexity nor does it signify inevitable trajectories of benefit for the environment or for Aboriginal communities.[161] Use of lands and exploitation of natural resources owned, controlled or occupied by Aboriginal communities, or the subject of traditional or cultural attachment, can give rise to competing or conflicting uses, claims, preferences and actions. Activities concerning mining, water resources management, land management, infrastructure development, biodiversity and cultural knowledge are particularly significant in this regard.

5.2 Distinctive principles for environmental law – free, prior and informed consent (FPIC)

The right to FPIC is an aspirational norm in the governance of natural and cultural resources. It has relevance in two broad sets of circumstances. One of these is where Aboriginal communities have access to and can exercise legally-cognisable rights, entitlements, allocations, interests or title to land, territory and/or resources. Ranging from rights to exclusive control, veto rights,[162] statutory rights to negotiate and make agreements,[163] and rights to co-management,[164] this 'entitlement or allocation' approach to Aboriginal involvement in land and resources management can be compared to enforceable rights to FPIC in relation to acts, projects, decision-making or governance.

Another set of circumstances is associated with procedures for consultation or engagement with Aboriginal communities where they are likely to be impacted by actions, such as resource projects, regulatory action, public land management or infrastructure projects. This 'procedural' approach equates more to a formal condition on exercises of power, such as where a decision may be made only subject to consultation, consent or a similar qualification, and perhaps more directly corresponds to formal provisions expressed in *UNDRIP*. An example of procedural approach is the duty on Basin States to consult with Aboriginal organisations in preparing water planning instruments under the Basin Plan.[165] There is a limited analogy also to Canada's constitutionally-based 'duty to consult' with Aboriginal communities, including in the form of so-called 'deep consultation' and requirements for accommodation as well as consultation.[166] This 'duty to consult' entails forms of conduct on the part of the Canadian Crown that may be

157 See Megan Davis, 'To bind or not to bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.
158 *UNDRIP*, above n 156, art 29(2).
159 Ibid arts 19, 32(2).
160 Ibid art 30(1).
161 Benjamin Richardson 'The ties that bind: indigenous peoples and environmental governance' in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009).
162 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) pt IV (which includes legislative machinery for negotiation and agreement over mining in the Northern Territory).
163 *Native Title Act 1993* (Cth) pt 2 div 3 subdiv P.
164 See for example, *Conservation, Forests and Lands Act 1987* (Vic), pt 8A.
165 *Basin Plan 2012* (Cth), Ch 10, Part 14. Consultation requirements under that part include regard to an identified, broad set of matters (for example, indigenous 'uses' and 'values'), as well as to legally cognisable interests, such as native title or registered cultural heritage.
166 *Haida v British Columbia (Minister of Forests)*, 2004 SCC 73; ; *Gitxaala Nation v Canada*, 2016 FCA 187; Lorne Sossin 'The duty to consult and accommodate: procedural justice as Aboriginal rights' (2010) 23 *Canadian Journal of Administrative Law and Practice* 93.

instructive for Australia in building a right to FPIC. The foundations of the Canadian situation are, however, legally and constitutionally distinct from those operating in Australia.[167]

In practice, these approaches often overlap, and the breadth and strength of rights and interests contained with those approaches may be an important test on requirements to consult and/or obtain consent.

As a normative device, the right to FPIC is an exceptional standard insofar as it includes not only voluntary, early and notified participation by Aboriginal communities but, additionally, agreement or concurrence. As distinct from ordinary concepts of consultation, FPIC includes obligations on the part of actors impacting Aboriginal communities to negotiate, engage in agreement-making, and/or affect forms of co-management of resources. Further to this, the content of FPIC derives from sources such as the right to self-determination.[168] A more pragmatic demonstration of this standard in decision-making can equate to a 'social licence' to operate in key circumstances, such as large resource or infrastructure projects with major impacts on indigenous communities.[169] The concept can apply to private instruments, such as contracts or corporate policies.[170]

The principle of FPIC has not been implemented in Australian environmental legislation. It could represent a standard of general application in circumstances where actions impacting significantly on ecosystems or places concurrently impact on Aboriginal peoples' uses, values, interests, and/or communal fabric. Over and above general norms of environmental democracy, such as rights to information or to participation or to a healthy environment, the right to FPIC is a right attaching to particular and distinctive relationships and attachments of indigenous communities to land and resources.

One of the challenges of incorporating a standard of FPIC into Australian environmental law is that the normative content of a right to FPIC remains at best unsettled and undeveloped. It may appear somewhat straightforward to identify the content to adjectival provisions such as 'free', 'informed' and 'prior' consent. Those standards may borrow from other areas of procedural law, such as a requirement that 'free' consent not include a pyrrhic consent, oppressively obtained; that information includes a basis of full knowledge properly explained; and 'prior' consent is that obtained well in advance of proposed activities proceeding in earnest. Even these standards can be problematic.[171]

Yet the most challenging element of the FPIC model is the obligation of 'consent'. The structure of consent may need to include determination of *whose* consent should be obtained (for example, the community), what procedures of agreement and decision-making are appropriate, the possible role of third-parties, dispute resolution procedures (up to and including arbitration), and potentially rules for abrogating the right (such as in circumstances of over-riding public interest).[172] While it is uncertain whether the concept contains any right of veto, its scope likely includes its ordinary meaning[173] which suggests Aboriginal participation of a particular character – namely, as a *party* to decision-making. The *UNDRIP* obligation to 'consult and cooperate … in order to obtain consent' adds an additional complexity if this formula is adopted. Given its prominence within the *UNDRIP*, it is a formulation to be considered for national laws. That formulation establishes consultation and cooperation as procedures conditioned by achievement of consent as an obligatory outcome. The purpose of consultation and cooperation is to acquire consent – the converse side of this obligation is arguably Aboriginal communities' right to consultation and cooperation in anticipation of an exercise in agreement-making.

167 The Canadian duty is grounded in constitutional recognition of Aboriginal communities and a fiduciary relationship of the Canadian Crown to Aboriginal Nations. Recognition of treaty rights and broad forms of Aboriginal title are also critical to procedural obligations in respect of First Nations under Canadian law: see Sossin, n 166 above; Kent McNeil 'Aboriginal rights, resource development, and the source of the Provincial duty to consult in *Haida Nation* and *Taku River*' (2005) 29 *Supreme Court Law Review* 447.

168 See Brant McGee 'The community referendum: participatory democracy and the right to free, prior and informed consent to development' (2009) 27 *Berkeley Journal of International Law* 2 570, 571: 'The concept of free, prior and informed consent is based on the rights of participation and consultation, self-determination, and indigenous property rights'.

169 UN General Assembly, *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli–Corpuz: Conservation and Indigenous Peoples' Rights*, UN Doc A/71/150 (29 July 2016); Susan Bass, *Prior Informed Consent and Mining: Promoting Sustainable Development of Local Communities* (Environmental Law Institute, 2004) 2.

170 See for example, Amy Lehr and Gare Smith, *Implementing a Corporate Free, Prior and Informed Consent Policy: Benefits and Challenges* (Foley Hoag eBook, 2010).

171 McGee, above n 168, 589–91.

172 See Bass, above n 169; the overriding public interest proviso operates for instance under *UNDRIP*, art 29 in relation to military activity on indigenous lands.

173 See McGee, above n 168, 591: 'The major focus of disputes over the meaning of FPIC is the definition of "consent." The dictionary definition, "capable, deliberate, and voluntary agreement or concurrence in some act or purpose...", also includes several synonyms - agreement, assent, and approval. The original treaty source of FPIC, *Convention 169* of the ILO, does not state that FPIC gives communities absolute veto power over a proposed project'.

The gap between concept and practice of a right to FPIC, by governments, international institutions and corporations, often remains substantial, although examples of good practice exist.[174] Concepts of FPIC can be infected by political expediency, leading to circumstances in which actual practices fall short of any recognisable norm of consent, or consent itself is reduced to concepts of 'consultation'.[175]

Clarifying the content of FPIC does not necessarily resolve the issue of how provisions giving effect to a right to FPIC should and/or can function through environmental statutes. Aboriginal peoples' involvement in environmental governance across Australia is occurring through various mechanisms, such as agreement-making under land rights laws, native title, land and resource use legislation,[176] and alternative legal mechanisms.[177] While Aboriginal consent and agreement-making operates under certain existing legal frameworks, access to procedural rights and agreement-making through the vehicle of national environmental laws remains highly variable. IPAs and 'co-management' under environmental and natural resources laws are important frameworks.[178] But they are limited, incremental measures. Communities most severely and extensively affected by colonisation processes are likely to have connections to land, resources and places most disrupted and/or modified and hence the scope for recognition of Aboriginal interests through entitlement, allocation or procedural right is weakest.

Operation of the FPIC principle through the vehicle of environmental legislation suggests that norms of FPIC should apply, in a graduated manner, to Aboriginal interests concurrently with features of environmental protection or conservation. This 'dual character' of places or objects would be a basis for the right of FPIC to be exercisable by an Aboriginal community.

It has been suggested that the operation of FPIC, as distinct from other standards of participation, properly applies to major actions, projects of activities, likely to have substantial disruptive effects, and a dual (or potentially multi) track approach and that 'dynamic understanding of FPIC' might be emerging.[179]

APEEL recognises that there are circumstances where environmental or natural resources management and indigenous participation coincide and need to be 'inter-operable'.

5.3 Conclusions and recommendations

The recognition within Australian law of the rights and interests of Aboriginal communities in relation to land and resources has evolved along a number of key tracks, such as property law and heritage laws, which have major influences on environmental governance.[180]

Precise expression of the right to FPIC consistent with international law needs still to be developed. However, the provisions of the *UNDRIP* should be a starting point for that development. Similarly, precise circumstances in which such a right should apply would need to be the product of further work and discussions.

174 See for example, Bass, above n 169.
175 McGee, above n 168.
176 There are discrete state-based agreement-making regimes, such as under the *Traditional Owner Settlement Act 2010* (Vic), which can provide for land-use agreement as well as agreements relating to particular natural resources. The number of these agreements remains limited.
177 For example, *Kungun Ngarrindjeri Yunnan Agreement* 2009 <environment.sa.gov.au/files/sharedassets/public/cllmm/cllmm-gen-kungunngarrindjeriyunnanagreement.pdf>, which establishes obligations under a common law agreement between the South Australian Government and Ngarrindjeri representative organisations in South Australia.
178 See for example, in relation to water resources, Christina Son 'Water reform and the right of Indigenous Australians to be engaged' (2012) 13 *Journal of Indigenous Policy* 3; Poh-Ling Tan and Sue Jackson 'Impossible dreaming – does Australian water law and policy fulfil Indigenous aspirations?' (2013) 30 *Environmental and Planning Law Journal* 132.
179 See M Barelli 'Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead' (2012) 16(1) *International Journal of Human Rights* 1; citing the opinion of the Inter American Court of Human Rights in *Saramaka People v Suriname* [2007] Inter-Am Court HR (ser C) No 172.
180 See for example, Rosalind Bark, Marcus Barber, Sue Jackson, Kirsten Maclean, Carmel Pollino and Bradley Moggridge 'Operationalising the ecosystem services approach in water planning: a case study of indigenous cultural values from the Murray-Darling Basin, Australia' (2015) 11 *International Journal of Biodiversity Science, Ecosystem Services and Management* 3 239. The integration of Aboriginal and non-Aboriginal paradigms in legal and policy systems has been progressed, in particular, in relation to water resources law. That phenomenon arguably has been stimulated by water reform initiatives in the Murray Darling Basin. It is also a sphere of law now influenced significantly by environmental considerations given, for instance, the influences of international environmental agreements on the federal water laws (*Water Act 2007* (Cth)) that now governs the Basin.

APEEL considers that Australian environmental law should include the principle of FPIC by Aboriginal communities in actions significantly affecting them or their interests. The operation of that right might be framed in the following manner:

- The right of FPIC should be framed as deriving from:
- an obligation 'to consult and cooperate…in order to obtain consent';
- an obligation properly grounded on voluntary and fully informed participation, commenced early in the planning or proposal-making stages of the relevant actions; and
- an obligation operating along a spectrum from consultation to accommodation or veto, depending on the circumstances (such as the nature of rights and interests affected, the scale of actions, and so on).
- A right attached to environmental actions at key points of decision-making cycles, such as the referral stage of proposals, the bioregional assessment and planning stages of landscape management, or nomination for heritage listing.
- A right attached to those stages where an Aboriginal community can show their interests are likely to be affected significantly, specifically as those interested are expressed in impacts on connections to land or resources. 'Connection' should be understood in a wide, rather than narrow, sense.181
- The right to FPIC under national environmental legislation is a 'reserved' right where other forms of legal rights or interests, such as recognised through title, agreement or allocation, are not available to an Aboriginal community who seek participation in environmental or natural resources governance and decision-making.

181 See in particular the recommendations of the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report 126, 2015) concerning s 223(1) of the *Native Title Act*. The ALRC report also contains important consideration and recommendations on other matters relevant to FPIC models, such as around 'authorisation' provisions and establishment of who is entitled to participate in (determinative) processes.

6. 'Rights of nature'

There is a second emerging subject which may be considered as a paradigmatic 'voice' or source of the exercise of environmental rights and duties: that is nature itself. This idea is not solely a hypothetical or abstract one. Rather, it is a principle on which legal models and procedures can and have been developed. However, it is likely that the 'rights of nature' approach to environmental governance will remain, to the extent it is part of the environmental law armoury, selective and specialised, attached, for example, to entities (such as places or natural objects) bearing particular and highly significant values.

The centre of rights and duties can shift from a notional human emphasis or focus to make nature itself the legal subject. Although law is an inherently human construct, there is an emerging school of thought seeking to affix legal rights and duties to natural objects or places themselves rather than the human 'beneficiaries' of nature's values and services.[182] This 'earth jurisprudence' or 'wild law' approach was famously expressed in Christopher Stone's disquisition on whether 'trees have standing'[183] and its imparting influence on the dissenting judgment of Justice Douglas in *Sierra Club v Morton*:

> Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes…So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes – fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents and which are threatened with destruction.....The voice of the inanimate object, therefore, should not be stilled.[184]

Although of limited influence currently in Australia, 'rights of nature' models have garnered support in jurisdictions such as New Zealand, where there is strong connection with Maori roles in governance.[185] Elsewhere the concept of investing rights in nature has received recognition in rather celebrated circumstances such as in the *Constitution of Ecuador* where again there is a strong indigenous link with the approach.

Certain common themes operate in the 'rights of nature' approaches to the design of legal tools and mechanisms. First, the investment of legal rights in natural places or objects is founded on the idea that those places or objects are themselves directly invested with legal, or juridical, personality.[186] That personality is a deemed legal fiction useful for the purposes of recognising the values, character, requirements and faculties of those places or objects. Legal personality is not, for the purposes of this approach, invested in a natural or other person (such as a body corporate or the Crown) who is empowered or obliged to protect those values and characteristics or to act to preserve them. So, in principle, it is 'nature' itself, not the citizen or state, who can use the law to take protective or restorative action.[187]

Secondly, the place or object needs to be recognised in an instrument of law under which rights can be recognised and enforced. In New Zealand, legal protection of the Whanganui River via settlement processes under the *Treaty of Waitangi* was achieved through a Deed of Settlement made under legislation.[188] The legal instrument allows the place or object to be protected and gives it legal status.

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182 Although the paradigm might more correctly be identified as rights *for* nature: see Anne Shillmoller and Alessandro Pellizon 'Mapping the terrain of Earth Jurisprudence: landscape thresholds and horizons' [2013] 3 *Environmental and Earth Law Journal* 1.

183 Christopher Stone 'Should trees have standing? – toward legal rights for natural objects' (1972) 45 *Southern California Law Review* 450.

184 *Sierra Club v. Morton*, 405 US 727 (1972).

185 See James Morrison and Jacinta Ruru 'Giving voice to rivers: legal personality as a vehicle for recognising Indigenous Peoples' relationships to water' (2010) 14 *Australian Indigenous Law Reporter* 49; Linda Te Aho 'Ruruku Whakatupua Te Mana o Te Awa Tupua – Upholding the Mana of the Whanganui River' (2014) (May) *Maori Law Review* <http://maorilawreview.co.nz/2014/05/ruruku-whakatupua-te-mana-o-te-awa-tupua-upholding-the-mana-of-the-whanganui-river>.

186 Stone, above n 183.

187 This can in theory extend to 'nature', such as threatened species, being afforded rights (in effect the right to sufficient habitat) analogous to property rights: see John Hadley 'Want to stop biodiversity loss? Give animals property rights' in *The Conversation* (12 April 2011) <https://theconversation.com/want-to-stop-biodiversity-loss-give-animals-property-rights-582>.

188 *Whanganui Iwi (Whanganui River) Deed of Settlement* (2014) <www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary-5-aug-2014> to be given effect in legislation: see *Te Awa Tupua (Whanganui Claims Settlement) Bill 2016* (NZ). See also *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (NZ).

Thirdly, a key purpose of legal personality invested in nature is to protect and, as necessary, restore the health, well-being or integrity[189] of the place or object at issue, to recognise and remedy injury, and/or to restrain conduct causing or likely to cause injury. These are commonplace legal principles extended to nature. In principle, the factual and normative content of the natural object, and hence the basis of its needs, interests and any injury, can be derived from scientific sources, such as ecology or biology as relevant, or cultural sources, such as Aboriginal values and epistemic models. Recognition of the right of a natural place or object to health or integrity does not operate as an absolute right, but rather a right that can be affected by other rights, such as those recognised in natural resources laws to take water, biodiversity, sub-surface minerals or other resources.[190]

Fourthly, the exercise of legal personality cannot be a function of nature itself, but rather proceeds through an appropriately designed vehicle of its legal recognition. The favoured model is a legal and institutional arrangement analogous to guardianship.[191] The notion that a person can act as a substitute for another legal person, specifically in circumstances of the incompetence or incapacity of the latter is expanded under this paradigm to encompass the needs and interests (for example, 'integrity' and 'health') of the natural entity. Certain environmental statutes have enabled community and non-governmental bodies to assume what is often a role of de facto 'guardian' of a place or natural object. One example of that development is the emergence of 'riverkeeper' and 'waterkeeper' organisations throughout the US and their successful use of the Federal *Clean Water Act* of 1972.[192] Integration of indigenous rights and interests with environmental protection laws has been an important stimulus to 'guardianship' and the exercise of the rights on behalf of significant places and objects. There are important alignments between orthodox legal models and indigenous concepts of 'a personified natural world'.[193]

6.1 Conclusions and recommendations

There is a beauty and even simplicity in extending entrenched legal models of personhood to nature, especially places or things of outstanding value or importance. Although proposed more than 40 years ago, the concept in application remains quite radical and under-developed. This is certainly the case in Australia, however the potential for its application in Australia as a tool to give more emphatic voice and expression to the protection and integrity of natural places or objects can be seen. For instance, world or national heritage areas, as places of outstanding significance (often both naturally and culturally), are protected under the *EPBC Act*; the scheme of their values is described, and special institutional management arrangements can be established. The Great Barrier Reef is but one, especially prominent example. Would a formal legal personality and models of 'guardianship', rather than a management plan, a dedicated statutory authority, and liberal enforcement rights – all of which currently exist – add much to the protection of the Reef? Further, would that sort of framework contribute materially to protection of, say, a threatened species, a river basin, or gazetted protected area? The idea of giving the Great Barrier Reef a form of discrete legal personality, reflecting in law its integrity as an ecological system (as informed by science for example), seems intuitively attractive.[194] However, giving that status to the Reef will still only be as meaningful as the objective framework and the practical machinery of the law permits, including the balancing of the inevitable conflicts between human needs and interests and the interest of the ecological integrity and health. The rights afforded to these subjects – nature and human persons – will not inherently be absolute therefore, but will rather give weight to key objectives and purposes attached to them, such as 'ecological integrity' or 'human dignity'.

As Douglas Fisher has argued,[195] the system of environmental law and governance may well be moving in any case

189 On the role of 'ecological integrity' as a principal standard and driver for an ecological jurisprudence, the work on Laura Westra is prominent: see for example, Laura Westra, *Ecological Integrity and Global Governance: Science, Ethics and the Law* (Earthscan, 2016); Laura Westra, Peter Miller, James Karr, William Rees, and Robert Ulanowicz, 'Ecological integrity and the aims of the global integrity project' (Global Ecological Integrity Group, n.d.) www.globalecointegrity.net/docs/ProjectAims.pdf; for an example of application of the concept in Australia (to management of the Murray Darling Basin), see Peter Burdon 'Earth jurisprudence and the Murray Darling: the future of a river' (2012) 37 *Alternative Law Journal* 2 82.

190 See Morrison and Ruru, above n 185.

191 Stone, above n 183, 464–73.

192 John Cronin and Robert F Kennedy Jnr, *The Riverkeepers: Two Activists Fight To Reclaim our Environment as a Basic Human Right* (Scribner, 2009).

193 Morrison and Ruru, above n 185, 50.

194 See Environment Defenders Office of North Queensland, *Legal Personality for the Great Barrier Reef: What does it Mean?* (Discussion Paper 1, 2014).<http://www.edonq.org.au/documents/General/Legal%20Personality%20for%20GBR%20(Final).pdf>.

195 Douglas Fisher 'Jurisprudential challenges to the protection of the natural environment' in Michelle Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Routledge, 2014).

toward a sort of synthesis of the human-centred approach to managing nature and the nature-centred approach typified in debates around legal personality and guardianship. The formality of investing in natural places or objects a legal personality and rights akin to human rights, enforceable in a similar manner, may not matter as much as the legal recognition (and enforceability) of values representative of ecological integrity and health: '…recogni[s]ing environment and nature under the law arguably affords to them a form of personality and status'.[196] Yet the 'rights of nature' approach can potentially make certain contributions to a legal framework that 'equali[s]e[s] nature and humans, both parts of the global environment, in the eyes of the law'.[197] One of these is to recognise, in principle, a 'community of subjects' encompassing human and natural subjects, rather than nature being rendered entirely as an object dominated and ordered by humans (for example, as discrete 'resources' and property). This can be facilitated through the tools of legal personality and standards of 'ecological integrity'. At a more practical level, investing enforceable rights in particular places or objects, via their 'guardian', may supply greater coherence and effectiveness to governance arrangements in some circumstances, and provide a powerful moral and rhetorical focus for protection or restoration through moves toward the 'personification' of the place or object.

Noting the potential inherent in the 'rights of nature' approach, but the limited and under-developed character of its application in practice, APEEL recommends:

- Further exploration and consideration of the application of key mechanisms of this approach, including investing legal personhood in nature and wider use of standards of ecological integrity in environmental law. This exploration could include an inquiry by the ALRC.
- That this exploration should include selective and strategic experimentation with this approach in the governance of natural places or objects, especially where there is a consensus to do so or one can be developed. Another criterion for exploring where or how the rights of nature approach should be applied could be to systems of special or outstanding importance.
- That this exploration should include the development of model legislation and legislative projects.

196 Ibid, 110.
197 Ibid, 95.

7. Public integrity mechanisms in the environmental context

Best practice environmental decision making requires not only governmental accountability, transparency and integrity, but also oversight institutions to ensure compliance.[198] Integrity in public administration has been described as 'earning and sustaining public trust by serving the public interest; using powers responsibly; acting with honesty and transparency; and preventing and addressing improper conduct'.[199]

APEEL is of the view that it is critical that Australia have institutions enhancing accountability, transparency and integrity in environmental decision-making. Environmental decisions may be at particular risk of corruption or improper conduct, as those decisions often relate to substantial land use developments that provide significant profits to proponents, such as mining projects, greenfield housing developments, and infrastructure projects. Both the NSW and Tasmanian anti-corruption commissions have reported that a quarter to a third of all corruption complaints they have received related to planning, energy, infrastructure and resources decisions.[200]

Good decision-making is critical to environment protection. Even where outright corruption and improper conduct are not present, poor administration in environmental decision making can lead to bad decisions and distrust of government.[201] Often the last line of defence for the environment is a decision by a minister whether to allow development or not.

A number of integrity bodies currently exist at the federal and state level in Australia, including ombudsmen, auditors-general, commissioners for the environment, human rights agencies and anti-corruption agencies. However, there is no national independent environmental integrity body or authoritative integrity institution for the protection of the environment at arms-length from government,[202] such as a national Independent Commission against Corruption (ICAC).[203] A Select Standing Committee was inquiring into the need for a National Integrity Commission (NIC) in 2016, but ceased to exist when Parliament was dissolved for the 2016 election.[204] APEEL's view is that the committee and that inquiry should be reconstituted.

A national environmental integrity body could play a critical role in enhancing environmental democracy in Australia. By providing systematic review, monitoring and auditing, such a body can further good governance by advancing accountability and transparency. The functions of such a body might additionally include non-exclusive standing to commence or join proceedings on behalf of the environment (including natural and cultural places or objects or species) as one means of seeking environmental protection.[205]

These mechanisms would provide for practical, objective, and rigorous examinations of how environmental decisions, legislation, policies and programs are managed and implemented against their objectives and targets.

Comparative examples of integrity agencies for environmental governance include New Zealand's Parliamentary Commissioner for the Environment,[206] Ontario's Environmental Commissioner,[207] and (until 2012) Hungary's Parliamentary Commissioner for Future Generations.[208] These institutions have strong integrity powers with legislative

198 Tim Jewell and Jenny Steele, *Law in Environmental Decision-making: National, European, and International Perspectives* (Oxford University Press, 1998).
199 Chris Field, 'The fourth branch of government: The evolution of integrity agencies and enhanced government accountability' (2013) 72 *AIAL Forum* 24; see also JJ Spigelman 'The integrity branch of government' (2004) 78 *Australian Law Journal* 11, 724.
200 NSW Independent Commission Against Corruption (ICAC), *The exercise of discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy* (Major Development) 2005 (ICAC Report, 2010) 4; Tasmanian Integrity Commission, *Annual Report 2011–12* (Integrity Commission, 2012) 57.
201 Mal Wauchope 'Integrity in decision making', (2012) 29 *Public Administration Today* 34.
202 Arguably, the closest Australia has come to establishing this type of body was the Resources Assessment Commission under the *Resources Assessment Commission Act 1989* (Cth) (repealed). The Resources Assessment Commission was able to undertake inquiries into matters on reference from the relevant Minister. Its tasks included providing advice on natural resources uses and environmental impacts arising from those uses.
203 Phillip Coorey, 'Voters support a national ICAC', *Australian Financial Review* (Australia) 30 March 2016.
204 Australian Parliament, *Select Committee on the establishment of a National Integrity Commission* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Establishment_of_a_National_Integrity_Commission>.
205 In 2015, the Supreme Court of the Philippines heard a petition brought on behalf of resident marine mammals in the Tañon Strait by two individuals acting as legal guardians and stewards of the marine mammals: *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Secretary Angelo Reyes*, GR No 180771 (21 April 2015).
206 Parliamentary Commissioner for the Environment, *New Zealand Parliamentary Commissioner for the Environment (Te Kaitiaki Taiao a te Whare Paremata)* <http://www.pce.parliament.nz/>.
207 Environmental Commissioner of Ontario, *Environmental Commissioner of Ontario* <https://eco.on.ca/>.
208 See also Wales' Future Generations Commissioner, Welsh Government, *Well-being of Future Generations (Wales) Act 2015* (08 August 2016) <http://gov.wales/topics/people-and-communities/people/future-generations-act/?lang=en>.

backing, including, variously, status as parliamentary officers,[209] and functions and powers underpinned by an *Environmental Bill of Rights*.[210] Although Australia, in particular Victoria and the ACT, has experience with establishing 'sustainability commissioners' and similar bodies, these commissions typically do not have full integrity functions. They are principally reporting and advisory bodies – reporting on the state of the environment and/or environmental programs and provide non-binding advice to government.[211] The ACT Commissioner's integrity functions are more advanced, with the ability to conduct investigations into complaints about the government's management of the environment or the operations of an environment agency.[212] Importantly, there is no such body at the national level in Australia.

An example of a strong environmental integrity body is the Canadian Commissioner of the Environment and Sustainable Development (CESD). The CESD was established in 1995 within the Canadian Auditor-General's office and is responsible for (among other things) monitoring the sustainable development strategies of federal agencies and auditing the government's management of environment and sustainability issues.[213]

Some of the practical benefits from having a body that can conduct independent reviews and audits, include improvement to individual decision-making, public reporting of integrity reviews and audits hold governments to account, and recommendations for systemic reform in decision-making.[214]

The 2009 Hawke Review of the *EPBC Act* called for the establishment of a National Environment Commission, and concluded that the establishment of such an independent advisory and review body would help to ensure the rigour, transparency and accountability of decision-making and more robust administration of the Commonwealth environmental laws.[215] Although some of these functions can be performed by the Australian National Audit Office (ANAO), environmental audits are conducted by that office very rarely – only three audits have been conducted of the *EPBC Act* in 16 years. These were very narrow in scope.[216] Environment and sustainability is such a significant area of law and management that it is not possible for the ANAO to conduct the number of audits and reviews required to ensure full integrity.

7.1 Conclusions and recommendations

Australia can increase the quality and integrity of it environmental decision-making and environmental management by increasing integrity mechanisms specifically aimed at the environment. This could be in the form of a National Environment Commission, which has responsibility for strategic auditing of decisions and actions under national environmental laws (that is, a strategic review of decisions, not a review of every individual decision), audits of plans, policies and procedures to ensure they are meeting their environmental objectives, and audits of the Commonwealth's interaction with states on environmental management to ensure it is effective.

A dedicated National Environment Commission would develop the knowledge and expertise to understand the intricacies of environmental decision making and management and have the capacity to conduct the required number of audits and reviews. A National Environment Commission could also be given a number of other complementary functions to enhance the implementation of Australia's environmental laws.

209 *Environment Act 1986* (NZ) pt 1.
210 *Environmental Bill of Rights*, SO 1993, c 28, pt III.
211 See for example, *National Resources Commission Act 2003* (NSW); *Commissioner for Sustainability and the Environment Act 1993* (ACT); *Commissioner for Environmental Sustainability Act* 2003 (Vic).
212 *Commissioner for Sustainability and the Environment Act 1993* (ACT).
213 Office of the Auditor General of Canada, *Who We Are* <http://oag-bvg.gc.ca/internet/English/au_fs_e_370.html#Commissioner>.
214 Environment Defenders Office Victoria, *A proposal for the establishment of a national environment commission* (2013) <https://envirojustice.org.au/major-reports/our-proposal-for-a-national-environment-commission>.
215 Hawke Review, above n 100.
216 A list of ANAO's audits can be found on its website: Australian National Audit Office, *Australian National Audit Office* <http://www.anao.gov.au>.

8. Conclusions on democracy and the environment

Democratic practice and procedure have a distinct and crucial role in the task of environmental governance. How the relationship of humans and the environment is perceived – and humans with each other and their institutions – is basic to how this democracy should be understood and how it ought to be reformed in order best to meet the goals, objectives and needs of safe and just operating spaces for humanity. In addition to the democratic analogy of the social contract, governance and stewardship of the environment can be considered as much about the common wealth of nature held on trust for the benefit of all humanity and, indeed, for the integrity of nature itself. It is an imperfect analogy – ecological systems do not necessarily sit well with the idea of being property, the object of human use and benefit, as fungible goods and services – but implicit in the analogy are human institutions and actors as fiduciaries, as stewards, as well as citizens, from which flows strict standards and obligations of participation, justice and accountability, and rights to environmental integrity for both the environment itself and for the communities whose well-being, identity and even existence is intimately tied to that integrity. Environmental democracy is a democracy of this common wealth of nature and of the norms and values attached to it.

Australia has taken significant strides over several decades to build democratic practices and institutions around environmental governance. This has included wide-ranging recognition and protection of environmental values and systems. It has included advances in procedural rights and protections, including through use of the law to defend and protect the environment and the establishment of specialist environmental institutions. It has included emerging areas of law and practice for the inter-operation of Aboriginal rights, revision of historic injustices, and improved environmental governance. It has included a progressive, if halting, adjustment in the focal point of environmental management from human disposition and utility to the needs and character of natural systems. But this environmental democracy contains prolific gaps, limits, inconsistencies, questions, silences, and outright failures. If nothing else, the indicators of ongoing, indeed escalating, biodiversity and climate crises present a compelling case for the tools and frameworks of a robust and innovative democratic movement in relation to the environment. Key standards in the form of rights and norms, and accessible mechanisms to facilitate protection and flourishing of the environment, are essential to confronting the insidious spectre of crisis.

Some of the reforms proposed in this *Technical Paper* are not especially radical, but rather represent an expansion and/or rationalising of democratic practices in the sphere of environmental governance. This paper has recommended that the next generation of Australian environmental laws include the right to a safe and healthy environment, embedded in national human rights or in environmental legislation. This would bring Australia into line with most other liberal democracies. The right should encompass protection of the environment and its inherent and perceived values for present and future generations. The right should give rise to an enforceable cause of action. This paper has suggested, for instance, consideration of the Ontario *Environmental Bill of Rights* and it has also recommended broadly bringing Australia's standards of procedural environmental rights, such as access to information, expansion of public participation and access to justice, into conformity with international standards, notably those expressed in the *Aarhus Convention*. This paper has further proposed developing the practices and institutions of governmental integrity in the context of environmental management.

This paper also proposes more innovative development of the interaction between Aboriginal rights, restorative justice and environmental governance. These include *UNDRIP*, statutory land rights, use rights regimes, native title, and requirements for consultation with indigenous communities over natural resources issues.

The concept of giving legally-recognisable rights to nature itself, through a corporate personality or otherwise, appears to be emerging from the realm of hypothesis to practice and legislation in several jurisdictions overseas. If Australia were to explore those innovations and consider how they can be adapted and situated here within the body of environmental law and governance, this could provide a powerful narrative for the protection of natural places or objects, in which the public imagination of nature and the legal mechanisms for its protection could more readily coincide.

Finally, the Australian Government needs to embed and institutionalise public integrity mechanisms within

environmental governance and decision-making on a national level. This paper, and others in this series, propose the establishment of a National Environment Commission with broad oversight duties and powers to undertake and lead this work. Such a model is crucial to delivering accountability and legitimacy in environmental decision-making and performance.

These proposals for reform of democracy and the environment are not intended to be exhaustive of how Australian democracy can best serve the tasks of environmental governance, but perhaps they establish a general framework from which further thinking, debate, experiments, reform and critique can proceed.

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