

ENVIRONMENTAL GOVERNANCE

TECHNICAL PAPER 2

APEEL



The Australian Panel of Experts
on Environmental Law

The principal contributions to this paper were provided by the following Panel Members: Adjunct Professor Rob Fowler (principal author), with supporting contributions from Murray Wilcox AO QC, Professor Paul Martin, Dr. Cameron Holley and Professor Lee Godden.

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

This Technical Paper addresses the subject of environmental governance by examining the constitutional, political and legislative arrangements that govern the management of the environment in Australia. This paper is a condensed version of a fuller and more technical treatment of this subject that is presented in a separate *APEEL Environmental Governance Background Paper (Background Paper)*. Those who wish to explore more fully the legal and policy dimensions of the recommendations presented in this *Technical Paper* should refer to the *Background Paper* for a detailed analysis of the current environmental governance arrangements, a deeper set of rationales for the recommendations proposed and a fuller description of how the proposed new approach to what APEEL has called 'environmental federalism' could be pursued in practice.

Both this *Technical Paper* and the *Background Paper* conclude that Australia has an environmental federalism system which is of a highly de-centralised nature in which the Commonwealth performs a relatively limited role. APEEL believe that this system, whilst it has achieved a number of beneficial outcomes, has been far from fully effective in practice. APEEL therefore urges a fundamental change to the current environmental federalism system to empower the Commonwealth to perform a strong national leadership role of a strategic nature in relation to environmental matters under the next generation of Commonwealth environmental laws. APEEL makes this recommendation because it believes the adoption of such a change will lead to improved and more dynamic outcomes than have been achieved to date under the current, decentralised system of 'cooperative' environmental federalism.

In urging this substantial reform, APEEL suggests there is ample constitutional authority for the performance of such a role by the Commonwealth and argue that long-standing political bargains that have resulted in the current, highly de-centralised system should be abandoned. In their place APEEL proposes a system in which a Commonwealth Environment Commission (CEC) would be responsible for developing strategic environmental instruments of both a national and regional character and for supervising the implementation of these instruments by both state governments and Commonwealth agencies. To ensure the effective implementation of these instruments at the state level, APEEL suggests the use of two mechanisms: first, the provision of direct financial assistance to the states to support their implementation of specific instruments; and second, the use of conditional pre-emption to allow for certain Commonwealth environmental laws to over-ride corresponding state laws on the same subject-matter, where states have not acted sufficiently to implement particular strategic environmental instruments. APEEL also suggests some mechanisms to ensure that the Commonwealth pursues the new strategic role proposed herein.

In advancing APEEL proposals for strategic leadership by the Commonwealth on environmental matters, APEEL have emphasised at the same time that these do not involve a substantial transfer of regulatory functions from the states to the Commonwealth and should not stifle innovative action on the environment at the state, regional and local levels. APEEL envisages that Commonwealth leadership will be essentially at the strategic level, with the states retaining their traditional regulatory functions concerning environmental and natural resources management. However, a part of the Commonwealth's enhanced role would involve stimulating the reform of state laws and administrative arrangements where this appears desirable to achieve effective implementation of Commonwealth strategic environmental instruments. APEEL also envisages continued Commonwealth involvement in some aspects of environmental regulation and, in particular, recommends that it continues to be directly involved in the environment assessment and approval of activities involving matters of national environmental significance (MNES).

Alongside these federalism-related reforms, APEEL have canvassed some possibilities with respect to the establishment of several new Commonwealth environmental institutions. These might include a high-level CEC to administer the proposed system of Commonwealth strategic environmental instruments and a Commonwealth Environmental Protection Authority (CEPA) to perform a range of regulatory functions, including administration of the Commonwealth's environmental assessment and approval (EAA) measures.

Finally, APEEL have also canvassed in a preliminary manner various options for the resourcing of environmental management in this country, including the many reforms advocated in both this and the other *APEEL Technical Papers*. In particular, APEEL raises the idea of establishing an Environmental Futures Fund (EFF) and also of creating a limited-term Commonwealth Environmental Investment Commission to identify strategies to generate the funds that would be allocated to this special purpose Fund.

Recommendations

RECOMMENDATION 2.1

The Commonwealth should define the nature and extent of its own role and responsibilities in relation to environmental matters; in doing so, it should:

- (i) acknowledge its responsibility for providing national strategic leadership on the environment; and*
- (ii) recognise that the states will continue to be involved in environmental regulation under state environmental laws and regulatory processes.*

RECOMMENDATION 2.2

*The Commonwealth should develop a **Statement of Commonwealth Environmental Interests (SCEI)** comprised of three broad components:*

- (i) a statement of the **functions related to the environment** that it will perform in the future, including:

*the provision of strategic leadership on environmental matters;

specific aspects of environmental regulation, including environmental assessment and approval; and

the environmental regulation of activities undertaken by Commonwealth entities (whether on or outside Commonwealth land) and by other parties on Commonwealth land;**
- (ii) a statement of the **environmental matters** in which the Commonwealth has an interest, comprised of two elements:

*first, a revised list of matters of national environmental significance (MNES) that will serve as triggers for the Commonwealth's environmental assessment and approval process; and

second, a revised list of additional matters besides the listed MNES with respect to which the Commonwealth could pursue a strategic leadership role; and**
- (iii) a declaration that Commonwealth leadership on environmental matters extends to the adoption of responsible and progressive negotiating positions in international negotiations on various environmental matters.*

RECOMMENDATION 2.3

The Commonwealth, in pursuance of a national leadership role on environmental matters, should assume responsibility for the development of the following types of **Commonwealth Strategic Environmental Instruments (CSEIs)**:

- (i) **National Environmental Measures (NEMs)**, comprising strategies, programs, standards and protocols; and
- (ii) **Regional Environmental Plans (REPs)**, comprising terrestrial landscape-scale plans and marine regional plans.

RECOMMENDATION 2.4

The next generation of Commonwealth environmental legislation should spell out the process for the development of Commonwealth strategic environmental instruments and provide for such instruments to be treated as 'legislative instruments' under the Legislative Instruments Act 2003 (Cth).

RECOMMENDATION 2.5

The implementation of each Commonwealth strategic environmental instrument should be addressed at first instance by the development of an **implementation plan** by each state (and also any affected Commonwealth agency) for approval by the relevant Commonwealth environmental institution, which should also have the power to:

- (i) develop such a plan for states that fail to do so; and
- (ii) to accredit state environmental legislation and administrative arrangements through an approved implementation plan.

RECOMMENDATION 2.6

The Commonwealth should pursue state cooperation with respect to the development and implementation of national strategic environmental instruments by:

- (i) providing financial assistance to the states to support their implementation efforts, and
- (ii) using the mechanism of conditional pre-emption of state regulatory powers, in particular with respect to environmental assessment and approvals, where states fail to cooperate in the implementation of national instruments or to attain the goals, targets or standards established by such instruments.

RECOMMENDATION 2.7

The Commonwealth should adopt specific financial assistance legislation under section 96 of the Australian Constitution that would:

- (i) tie the provision of grants to the states in relation to particular Commonwealth strategic environmental instruments to the provision by the states of acceptable State Implementation Plans (SIPs) and the carrying out of any reform initiatives prescribed therein; and
- (ii) provide for the establishment of an Environmental Future Fund, the income from which would be used to support such grants to the states.

RECOMMENDATION 2.8

The next generation of Commonwealth environmental legislation should provide that, where the Commonwealth considers a state has not acted sufficiently to implement a Commonwealth strategic environmental instrument, regulations may be made pursuant to the legislation to conditionally pre-empt (cf., over-ride) the operation of state environmental laws concerning:

- (i) the approval/licensing of new activities involving matters of national environmental significance (MNES);
- (ii) the approval/licensing of other prescribed kinds of new activities; and
- (iii) the environmental regulation of existing activities of a prescribed kind, including with respect to requiring improved environmental performance, wherever any such activity is considered by the Commonwealth to be likely to impact significantly upon the implementation of the relevant Commonwealth strategic environmental instrument.

RECOMMENDATION 2.9

To ensure that the Commonwealth performs its responsibilities with respect to the development and implementation of national strategic environmental instruments, the following safeguards should be incorporated within the next generation of Commonwealth environmental legislation:

- (i) vesting power in a new Commonwealth Environmental Auditor to monitor the implementation by Commonwealth agencies of Commonwealth strategic environmental instruments and to make recommendations for action by such agencies where this appears necessary;
- (ii) to allow interested parties to request the Federal Court to order the relevant Commonwealth institution (see Recommendation 2.14 (i)) to:
 - (a) undertake the preparation of a particular strategic environmental instrument;
 - (b) undertake the preparation of an implementation plan where a state has failed to do so with respect to a particular strategic environmental instrument;
 - (c) activate the conditional pre-emption powers where the Court is satisfied that a state has failed to perform the tasks required of it under a State Implementation Plan (SIP); and
- (iii) to allow parties to request the Federal Court to order non-complying Commonwealth agencies to develop implementation plans with respect to their own activities that are affected by a Commonwealth strategic environmental instrument, or to substantially perform obligations arising from their implementation plans.

RECOMMENDATION 2.10

The next generation of Commonwealth environmental legislation, in addition to providing for mechanisms to enable the Commonwealth to pursue a strategic leadership role on environmental matters, should include the following types of other legislative arrangements, as appropriate to the particular context:

- (i) The operation of **complementary legislative schemes** (for example, through uniform legislation or an applied law scheme) where the best environmental outcomes are likely to be achieved by apportioning roles and responsibilities between the Commonwealth and the states (for example, with respect to various risk regulation processes related to chemicals, genetically modified organisms, etc.);

- (ii) The operation of **an overlapping legislative scheme for environmental assessment and approval (EAA)** of activities that may impact significantly on matters of national environmental significance (MNES) (see also Recommendation 2.12); and
- (iii) The adoption of an **over-riding (pre-emptive) regulatory scheme** by the Commonwealth in the limited circumstances where the best environmental outcomes and market stability are likely to be achieved by such an approach (for example, in relation to motor vehicle emissions and ozone regulation).

RECOMMENDATION 2.11

The Commonwealth should review all of its existing administrative structures and regulatory functions to determine where opportunities exist to consolidate these within a new Commonwealth Environmental Protection Authority (CEPA) (see also Recommendation 2.14(ii)).

RECOMMENDATION 2.12

The Commonwealth should continue its involvement in the assessment and approval of activities that may impact significantly on matters of national environmental significance (MNES) alongside corresponding state processes, with the following reforms to the current process to be adopted:

- (i) that consideration be given to all environmental impacts (including cumulative impacts) associated with the proposed activity, not just those related to the relevant MNES;
- (ii) that the current list of MNES be expanded;
- (iii) that responsibility for the key decisions whether to trigger the process and to approve activities made subject to the Commonwealth process be transferred from the Environment Minister to a new, independent Commonwealth environment authority.
- (iv) that the exemption for operations covered by a regional forestry agreement be removed; and
- (v) that the exclusion of offshore petroleum activities from the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) process be terminated.

RECOMMENDATION 2.13

That the next generation of Commonwealth environmental legislation, in providing for a Commonwealth environmental assessment and approval (EAA) process, should include provision for the following measures:

- (i) a mandatory requirement to conduct a public inquiry whenever a full environmental impact statement (EIS) is required by the Commonwealth, such inquiry to be conducted by a panel of hearing commissioners selected from a pool of scientific and other experts appointed for this purpose;
- (ii) for access to independent expertise to be provided to selected community representatives to assist them to present submissions to an EIS-related public inquiry;
- (iii) a mandatory requirement upon proponents to undertake monitoring and reporting of the environmental impacts of projects approved under the Commonwealth EAA process, together with an adaptive management approach whereby conditions attached to a project approval may be revised to address any unforeseen impacts that are disclosed by such monitoring and reporting; and

- (iv) *an audit of previous Commonwealth-managed EISs be undertaken by a newly-established Commonwealth environmental institution to provide a contemporary evaluation of the reliability of the impact predictions made therein (see also Recommendation 2.14(ii)).*

RECOMMENDATION 2.14

To ensure the effective implementation of the next generation of Commonwealth environmental laws, the Commonwealth should establish one or more new statutory authorities to perform functions that will complement, replace and expand upon the functions currently exercised by the Minister and Department for Environment and Energy and other existing Commonwealth statutory environmental authorities, with the following possibilities in mind:

- (i) *a high-level (cf. Reserve Bank) **Commonwealth Environment Commission (CEC)** that would be responsible for: (a) administration of the system of Commonwealth strategic environmental instruments (see Recommendations 2.3-9); (b) a nationally coordinated system of environmental data collection, monitoring, auditing and reporting (including with respect to environmental sustainability indicators and trends); (c) the conduct of environmental inquiries of a strategic nature (akin to those conducted by the former Resources Assessment Commission); and (d) the provision of strategic advice to the Commonwealth government on environmental matters, either upon request or at its own initiative;*
- (ii) *a **Commonwealth Environment Protection Authority (CEPA)** that would be responsible for: (a) administration of the Commonwealth's environmental assessment and approval system, including where conditional pre-emption of equivalent state legislation has occurred (see Recommendation 2.8); (b) the regulation of activities undertaken by Commonwealth authorities or by other parties on Commonwealth land; (c) the auditing of Commonwealth-required environmental impact statements (EIS) (see Recommendation 2.13(iv)); and (d) any other environmental regulatory functions that may be appropriately assigned to the CEPA (see Recommendations 2.2 and 2.4); and*
- (iii) *a **Commonwealth Environmental Auditor** that would be responsible for (a) monitoring and reporting on the performance of CEPA, the Minister and Department for Environment and Energy and other Commonwealth bodies in relation to their performance of their statutory environmental responsibilities; and (b) providing recommendations to the CEC on the need to develop new strategic environmental instruments (see Recommendation 2.9(i)).*

RECOMMENDATION 2.15

*That the Commonwealth establish a **Commonwealth Environmental Investment Commission** that would be responsible for addressing fundamental challenges to the effective resourcing of environmental management in Australia by identifying strategies to generate increased private and public sector funding and to maximise community investment and by also establishing an **Environment Future Fund**.*

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

The concept of environmental governance has many dimensions. The Panel has taken the view that it is necessary to focus in this *Technical Paper* on those dimensions that are most directly relevant to the design of the next generation of Australian environmental laws. Accordingly, this paper is devoted primarily to examining the roles and responsibilities for the environment across the different tiers of government that exist within the Australian federal constitutional system. In particular, this Paper explores the avenues through which greater strategic leadership on environmental matters could be achieved and the role of environmental law in providing the settings for such leadership. This will involve a critical assessment of the current 'cooperative' federalism model which this paper suggests has produced an essentially de-centralised system of environmental governance in Australia that has largely failed to deliver effective outcomes. This paper will also examine related questions concerning the institutions and resources that are required to deliver effective environmental governance.¹

¹ In the *APEEL Background Paper on Environmental Governance (Background Paper)* The Panel briefly considers at the outset other dimensions of environmental governance, including the concepts of 'new environmental governance' and 'shared environmental governance', noting that these have been taken into account at various points in other *APEEL Technical Papers*.

2. Environmental federalism - establishing a new strategic role for the Commonwealth

Federalism has been widely adopted as a form of constitutional government around the globe. Besides Australia, there are currently 24 other countries that have federal constitutional systems, including the USA, Canada, Germany, Brazil, Mexico, Nigeria and Pakistan; collectively, these represent about 40% of the world's population.² In addition, the European Union (EU) involves a loose federalism model that shares elements of both a federation and a confederation. In many of these countries, and also in the EU, the question of how best to divide roles and responsibilities concerning the environment between the central (viz., federal) government and regional governments (often called states or provinces) has been the subject of considerable debate. This paper has adopted the term 'environmental federalism' to describe this topic.³

Debates concerning the most appropriate form of environmental federalism have been pursued with particular vigour in both political and academic circles in countries such as the USA and Canada, just as they have been for many years in Australia. In the USA, where the scholarship on environmental federalism is possibly the most extensive, it has been noted that:

'...environmental law is uniquely prone to federalism discord because it inevitably confronts the core question with which federalism grapples - *who gets to decide?* - in contexts where state and federal claims to power are simultaneously at their strongest'.⁴

This core question is essentially a political rather than a constitutional or legal question, although the latter context must always be borne in mind when framing political responses to it. The way in which it is answered in any particular country will depend ultimately on how much authority the central or federal level of government is able to exercise of its own accord over environmental matters, and the extent to which it is willing to exercise such authority.

In Australia, there has been a substantial and long-running debate on environmental federalism that dates back to the mid-1970s, when the Commonwealth first legislated on a range of environmental matters, including environmental impact assessment (EIA), national parks, national heritage and the Great Barrier Reef. Debates in this context have covered both the extent of the legislative capacity of the Commonwealth over the environment and the appropriateness from a policy and political perspective of Commonwealth involvement in environmental matters. This paper will examine the environmental federalism system in Australia from three distinct, but inter-connected, dimensions:

First, the **constitutional dimension**: the underlying foundation of environmental federalism is the distribution of legislative powers between the Commonwealth and the states and territories (hereinafter referred to collectively as 'states' for simplicity). In particular, this paper examines the constitutional capacity of the Commonwealth to legislate with respect to environmental matters and whether the *Australian Constitution (Constitution)* should be amended to afford greater capacity to the Commonwealth in this context;

Second, the **political dimension**: there is a distinction between the constitutional capacity of the Commonwealth to legislate for the environment and the political will to exercise this capacity. Political accords in the form of intergovernmental agreements between the Commonwealth and the states (for example, the *Intergovernmental Agreement on the Environment 1992*) have sought over many years to define their respective roles and responsibilities in a manner that limits Commonwealth involvement and recognises that the states have primary responsibility in this area. This paper critiques this 'cooperative' form of environmental federalism and suggests that the Commonwealth should assume a stronger, strategic leadership role with respect to the environment in the future, whilst also allowing the states to continue to exercise their traditional regulatory functions (provided this is done in a manner that gives effect to strategies developed by the Commonwealth); and

² *Federalism by Country*, Forum of Federations: The Global Network on Federalism and Devolved Governance, < <http://www.forumfed.org/countries/> >.

³ This term has been adopted in the same context in the United States. For a detailed survey of the experience with environmental federalism in the USA and several other countries, including Australia, see RJ Fowler, 'The Australian Experience with Environmental Federalism: Constitutional and Political Perspectives' in K Robbins (ed.), *The Law and Policy of Environmental Federalism – A Comparative Analysis* (Edward Elgar Publishing, 2016) 271–303.

⁴ E Ryan, 'Environmental Federalism's Tug of War Within' in Robbins, K. (ed.), above n 3, 358.

Third, **the practical dimension:** whatever political agreements may have been reached in relation to the respective roles and responsibilities of the Commonwealth and the states, these will need to be implemented through various legal mechanisms that are deployed or reflected in Commonwealth and state environmental legislation. As noted above, these mechanisms range under the current environmental federalism system from the adoption of uniform legislation and the pursuit of complementary legislative schemes to Commonwealth legislation based upon a referral of powers by the states to the Commonwealth.⁵ This section of the paper will advance the ideas concerning how other legal mechanisms could be used by the Commonwealth to pursue a stronger strategic leadership role that would ensure effective and efficient environmental outcomes nationally.

In presenting the recommendations on the reform of the current system of environmental federalism, this paper will refer simply to 'the Commonwealth' at relevant points, without seeking to specify a specific authority or agency of the Commonwealth that would be responsible for whatever action is being recommended. This is done in order to not pre-empt the discussion that is undertaken in the next section of this paper on the need for a new Commonwealth environmental institution, or possibly more than one such institution. The paper seeks to relate that discussion to the recommendations in this section by canvassing a range of functions that APEEL believes might be vested in a new institution, or institutions, including those arising from these recommendations.

2.1 The constitutional dimension

The question of the constitutional capacity of the Commonwealth to address environmental matters has a long and contested history. Inevitably, expert opinions on this subject have changed over time, particularly in the light of High Court decisions that have tended generally to give an expansive interpretation to the powers vested in the Commonwealth Parliament to legislate on specified matters. Alongside questions as to Commonwealth legislative capacity, there also has been a question raised more recently as to the extent of the Commonwealth's ability to spend moneys for environmental and other purposes. It is necessary therefore to examine the extent to which the *Constitution* affords to the Commonwealth the capacity both to make laws and spend moneys on environmental matters.

2.1.1 The sources and limits of the Commonwealth's power to make laws regarding the environment

The vast majority of expert legal opinion supports the view that the Commonwealth has a substantial, almost plenary, capacity to make laws concerning the environment.⁶ This conclusion is based primarily upon the effect of High Court decisions handed down since the 1970s that have given an expansive interpretation to several heads of power contained in section 51 of the *Constitution* - in particular, the external affairs power (s 51 (xxix))⁷ and the corporations power (s 51 (xx)).⁸ The most important limitations that must be borne in mind when considering the exercise of these two, key Commonwealth legislative powers are:

- with respect to the external affairs power, the need for legislative measures to be sufficiently connected to the relevant treaty, and for the measures imposed to be appropriate and adapted to what is required for

5 Whilst these are the legislative tools most commonly used at present to implement 'cooperative' environmental federalism approaches in Australia, there is also the contentious administrative mechanism of accreditation of State assessment and approvals procedures by the Commonwealth via bilateral agreements which is provided for in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).

6 See for example, M Crommelin, 'Commonwealth Involvement in Environmental Policy: Past, Present and Future' (1987) 4 *Environmental Planning Law Journal*; JR Crawford, 'The Constitution and the Environment', 13 *Sydney Law Reform* 11, 25; J Peel and L Godden, 'Australian Environmental Management: A Dam's Story' (2005) *University of New South Wales Law Journal* 668; P Johnston, 'The Constitution and the Environment' in HP Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (The Federation Press, Sydney, 2009) 79; GM Bates, *Environmental Law In Australia* (LexisNexis Butterworths, 8th ed, 2013) 130-155.

7 In the *Tasmanian Dam* case (*Commonwealth v Tasmania* (1983) 158 CLR 1), a narrow majority of the High Court ruled that the external affairs power enables the Commonwealth to pass laws on any subject-matter (in this instance, the protection of world heritage) where they are designed to implement a treaty to which Australia is a party.

8 The High Court's decision in the *Work Choices* case (*New South Wales v Commonwealth* (2006) 229 CLR 1) has confirmed the broad reach of the 'corporations' power, in this instance to enable the Commonwealth to cover extensively the field of industrial relations. This decision has been widely regarded as the most significant in relation to Commonwealth legislative powers since the *Tasmanian Dam* case. It lends support to earlier predictions that section 51(xx) could provide a solid constitutional basis for an expanded legislative coverage by the Commonwealth of environmental matters.

implementation of the treaty;⁹

- with respect to the corporations power, that it is unable to apply to individuals, partnerships or other entities that are not constitutional corporations.¹⁰

In addition to these two powers, there is a range of additional heads of power specified in section 51 of the *Constitution* which the Commonwealth may rely upon to support legislation on environmental matters. These include powers in relation to international and interstate trade and commerce (s 51(i))¹¹; finance and taxation (s 51(ii)); defence (s 51(vi)); quarantine (s 51(ix)); fisheries in Australian waters (s 51(x)); and the 'people of any race' (s 51(xxvi)). Also, the power to provide direct financial assistance to the states under section 96 may be used to achieve environmental objectives, a matter to which is given further attention below. Finally, reliance also has been placed by the Commonwealth more recently on the referrals power (s 51(xxxvii)), whereby the parliaments of the states may refer matters to the Commonwealth Parliament for the purpose of conferring legislative power on the latter.¹² This approach was used, for example, to bolster the constitutional validity of the *Water Act 2007* (Cth), which provided for new, centralised arrangements for the management of the Murray-Darling Basin.¹³

The prevailing academic view as to the extensive reach of Commonwealth legislative powers was reinforced in 1999 by the Senate Environment Committee in its enquiry into Commonwealth environment powers. The Committee received some 367 submissions, reflecting the substantial interest in this matter across the Australian community, and concluded as follows:

'It is the view of the Committee that the Commonwealth Government has the constitutional power to regulate, including by legislation, most, if not all, matters of major environmental significance anywhere within the territory of Australia. The panoply of existing Constitutional heads of power confers on the Commonwealth extensive legislative competence with respect to environmental matters'.¹⁴

Whilst there seems therefore to be a preponderance of expert opinion in support of the view that the Commonwealth has extensive, almost plenary, legislative powers concerning the environment, there is a degree of caution required with respect to this conclusion, given that there are some limitations that also must be taken into consideration. These include the guarantee of freedom of trade and commerce provided by section 92 of the *Constitution* (though this has not proved a barrier to genuine environmental legislation on the part of either the Commonwealth or the states)¹⁵ and the implied prohibition against Commonwealth laws that have the effect of constraining the capacity of the states to function as governments.¹⁶ Whilst this latter doctrine has not been invoked successfully to date for the purpose of challenging a Commonwealth environmental law, a similar doctrine in the United States (the 'anti-commandeering' principle) has been applied to strike down a federal environmental law that had the effect of coercing particular action by a state.¹⁷ It may be necessary, therefore, to bear this prohibition in mind in any attempt to develop legislation that aims to deliver national strategic leadership by the Commonwealth on environmental matters, in particular by avoiding provisions that compel particular action by state governments (see further below).

9 There is also the reality that certain environmental matters may not yet be covered by a treaty, or that their coverage by treaty is the subject of lengthy and uncompleted negotiation process, or that some treaties are only 'aspirational' in nature and do not impose obligations of sufficient specificity upon which Commonwealth legislation could be based: see S Pillai and G Williams, 'Commonwealth power and environmental management: Constitutional questions revisited' (2015) *Environmental Planning Law Journal* 395, 398–400.

10 There may be some question also as to whether local councils fall within the reach of the corporations power: see Pillai and Williams, above n 9, 402.

11 The capacity of the trade and commerce power to support environmentally-focussed regulatory measures was settled by the High Court in *Murphyores Pty. Ltd. v Commonwealth* (1976) 136 CLR 1, in which a decision by the Commonwealth to ban the export of mineral sands extracted from Fraser Island in Queensland on environmental grounds was upheld. When combined with the subsequent interpretation of the corporations power, it is clear that a relatively extensive range of activities including manufacturing, mining, forestry and farming are capable of direct regulation by the Commonwealth for environmental purposes.

12 See generally with respect to the use of this power since the early 1990s A Lynch, 'The Reference Power: the Rise and Rise of a Placitum?' in P Kildea, A Lynch and G Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (The Federation Press, Sydney, 2012) 193.

13 A Gardner, 'Water Reform and the Federal System' in P Kildea, A Lynch and G Williams (eds), above n 12, 269–274, suggesting that the primary constitutional basis for the *Water Act 2007* nevertheless was the external affairs power.

14 Commonwealth, *Commonwealth Environment Powers: Report of the Senate Environment, Communications, Information Technology and the Arts Reference Committee*, Parl Paper No. 133 (1999) ix.

15 See *Cole v Whitfield* (1988) 78 ALR 42; but see also *Castlemaine Tooheys Ltd. v South Australia* (1990) 169 CLR 436 for an example of the application of s 92 to invalidate a state measure, where an attempt to use the SA beverage container deposit system to apply a differential deposit to beer imported from outside the state was found by the High Court to be essentially a protective measure rather than genuine environmental regulation.

16 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

17 *New York v United States* 505 US 144 (1992) held invalid a federal law that required states to 'take title' to, and assume liability for, radioactive waste generated within their boundaries, on the ground that it coerced (or 'commandeered') rather than encouraged the required action.

Finally, it is important to note section 51 (xxxi) of the *Constitution*, which empowers the Commonwealth to make laws with respect to the ‘acquisition of property on just terms’. To date, the High Court has interpreted the term ‘acquisition’ in a relatively restrictive manner that appears to allow Commonwealth laws involving environmental regulation to operate without giving rise to a requirement to compensate affected property holders.¹⁸ However, as will be discussed below, this provision may potentially impact on Commonwealth financial schemes that require action by state governments that amounts to an acquisition of property.

2.1.2 The potential for Commonwealth superiority in relation to environmental regulation

The conclusion that the Commonwealth has extensive, though not plenary, powers to legislate on environmental matters raises the possibility that it could override state environmental laws by adopting legislation that essentially ‘covers the field’. This could occur under section 109 of the *Constitution*, which renders inoperative any state laws that are inconsistent with a Commonwealth law on the same subject. In the United States, where this consequence is referred to as the ‘pre-emption’ of state laws, the threat of pre-emption has been used widely in federal environmental legislation to secure state implementation of federal plans, standards and other types of policy measures. Whilst outright pre-emption has been rare in the US, a form of ‘conditional pre-emption’ has been widely adopted and applied which allows state laws to continue to operate provided that they give effect to state implementation plans approved by the federal government.¹⁹ In the examination of the practical dimension of environmental federalism below, this paper urges a new approach to Commonwealth leadership that relies in part on this American model of conditional pre-emption.

2.1.3 The spending powers of the Commonwealth

The capacity of the Commonwealth to pursue environmental objectives through the exercise of its spending powers, in particular via special purpose grants to the states and grants to the non-government sector, has been assumed and accepted for many years. However, the long-standing view that the Commonwealth can appropriate and spend money for any purpose it chooses, pursuant to sections 61 and 81 of the *Constitution*, has recently been rejected by the High Court, which has held that Commonwealth spending must be supported by one of the heads of legislative power provided in the *Constitution*.²⁰ This ruling has a particular, potential impact, on financial grants to the non-government sector for environmental purposes, which must be able to be supported by one or more specific heads of power that are thought to provide the constitutional basis for Commonwealth environmental legislation (as discussed above).

It has been suggested that recent Commonwealth environmental programs such as the Home Insulation Program and the Carbon Farming Initiative - Non Kyoto Fund and Carbon Farming Skills Program, are not supported by any head of power and hence could be struck down if challenged.²¹ Whilst most environmental programs involving payments to the non-government sector are unlikely to be legally challenged, given the benefits that they confer, it is always possible that such a challenge might be brought for other political or ideological purposes, and hence there is some level of uncertainty now attaching to some programs.

One means of resolving this uncertainty would be for the Commonwealth to make greater use of section 96 of the *Constitution*, which provides that ‘the Parliament may grant financial assistance to any State on such terms and

18 See for example, *ICM Agriculture Pty. Ltd. v Commonwealth* (2009) 240 CLR 140; *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242.

19 The classic example of this approach is the *Clean Air Act 1970* 42 USC, ch 85, section 7410 of which requires states to submit for approval by the Federal EPA state implementation plans (SIPs) specifying measures to ensure that air quality within their jurisdictions attains the National Ambient Air Quality Standards prescribed under the Act.

20 See for example, *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156 (*William’s case*). An attempt by the Commonwealth after *William’s case* to provide a general legislative authority for its executive spending (the *Financial Framework Legislation Amendment Act (No. 3) 2012*) was rebuffed by the High Court in *Williams v Commonwealth* (2014) 252 CLR 416. The High Court ruled invalid for a second time the National Schools Chaplaincy Program, despite its listing under the 2012 legislation, on the ground that it was not supported by any head of Commonwealth power.

21 See Pillai and Williams, above n 9, 407.

conditions as the Parliament thinks fit'.²² However, this mechanism involves direct payments by the Commonwealth to the states, and the consent of the state concerned to the conditions attached. This may not always provide a convenient alternative to the provision of grants or payments directly to private parties. There is also a possible constitutional limitation on the use of section 96 to support Commonwealth environmental programs where the conditions imposed would involve the state concerned in 'acquiring' property without the provision of compensation.²³ However, it must be borne in mind, as noted above, that any such claim would depend on a finding that property has been 'acquired' under the relevant scheme, and that the High Court has maintained a relatively narrow interpretation of this term to date.²⁴

2.1.4 Conclusion regarding Commonwealth constitutional powers

Despite the various limitations on Commonwealth legislative and spending power that have been noted above, the Panel agrees with the view of the large majority of legal experts that the Commonwealth nevertheless possesses an extensive capacity to address environmental matters through both of these means if it so desires. It also has the capacity, by virtue of section 109, to exercise supremacy over state environmental laws where its legislation addresses the same subject-matter as state laws in an inconsistent manner.

The Panel's conclusion, therefore, is that the Commonwealth possesses an extensive capacity to address environmental matters through both the passing of legislation and the exercise of its spending powers, despite the various limitations noted above. It also has the capacity under section 109 to over-ride state environmental legislation by adopting its own laws that cover the field on a particular subject. However, its ability to pass environmental laws is not plenary in nature and there is a need to bear in mind, in developing the next generation of environmental laws, the various limitations that exist

2.1.5 Reform option: the possibility of amending the *Australian Constitution* to include an environment power

One means of removing any residual doubt concerning the powers of the Commonwealth to legislate on environmental matters, whilst also reinforcing its responsibility to provide national leadership in this context, would be to amend section 51 of the *Constitution* to provide explicitly for the making of laws by the Commonwealth Parliament on environmental matters. Whilst this option would have the advantage of providing clarity on this long-contested matter, it is the Panel's view (based on the preceding analysis) that it is not a necessary or essential reform in terms of enabling the Commonwealth to assume a stronger leadership role on environmental matters. The Panel believe that it is possible, from a constitutional perspective, for the Commonwealth to do so by making use of its existing powers, both to make laws and to spend, and this Paper shall set out below the proposals in this regard.

APEEL also takes the view that it is most unlikely that any proposed amendment of the *Constitution* to this effect would be likely to be pursued by the mainstream parties in the near future. Even if it were to be pursued, the Panel believe it would be unlikely to succeed, given the contention it would inevitably generate and the record of past referenda failures in such circumstances.²⁵ The Panel therefore does not support the idea of such a constitutional amendment.

22 It is clear from High Court decisions some considerable years ago that there are almost no limits on the terms and conditions that the Commonwealth may attach to such financial assistance: see for example, *South Australia v Commonwealth* (1942) 65 CLR 373. However, one possible limitation could be the implied prohibition against measures that limit the governing functions of the States (discussed above).

23 For a useful discussion of this issue, see Pillai and Williams, above n 9, 408.

24 It has been suggested that a possible Commonwealth vegetation clearance 'trigger' under the *EPBC Act* that would enable the Commonwealth to override 'lax' State native vegetation controls 'would create a very clear pathway for landholders to seek compensation under s 51(xxxi) of the *Australian Constitution*'; M Keogh, *Commonwealth vegetation trigger may open up new possibilities for farmers* (28 April 2016) Farm Institute <<http://www.farminstitute.org.au/ag-forum/commonwealth-vegetation-trigger-may-open-up-new-possibilities-for-farmers>>. This comment is referring to a situation in which s109 would be relied upon to enable the over-riding of state legislation, but a similar argument might be advanced where Commonwealth funding under s96 is being provided to secure action under State vegetation controls that is found to amount to an 'acquisition' of property. However, it is still far from clear that compelling the retention of native vegetation for the purposes of biodiversity protection or to help the achievement of greenhouse gas emissions reduction targets constitutes an 'acquisition' of property under s 51(xxxi) that would, in turn, constrain the use of section 96 for such a purpose.

25 Of forty-four referendums to amend the *Constitution* held since 1901, only eight have been successful.

2.2 The political dimension

Given that environmental management is the subject of strong competing claims to power within many federal constitutional systems, the form of environmental federalism that is adopted within any particular country ultimately will be the result of political choices made either unilaterally by the federal government (through full or partial pre-emption of state laws) or on a joint basis by both federal and state/provincial governments, acting collaboratively or, at times, in conflict with each other. The political dimension therefore is just as important as the constitutional dimension in the determination of the form of environmental federalism that is adopted within any particular country.

Federalism allows for political choices to be made between different models that collectively comprise a 'spectrum' ranging from the full centralisation of power at the federal level to an essentially de-centralised system in which the federal level exerts little or no influence. It is important to understand that environmental federalism does not involve a 'zero sum' game in which a political choice must be made between wholly centralised or de-centralised models.²⁶ Instead, there is a wide range of choice between different environmental federalism models within the central part of the environmental federalism spectrum that involves varying degrees of centralised and de-centralised arrangements. The term 'cooperative federalism' has been employed frequently to describe many of these models. However, this is a particularly elastic term that is often applied unquestioningly to a variety of models that can vary considerably in their nature and the Panel considers it serves little useful purpose in terms of categorising particular forms of environmental federalism.

The approach that will be adopted in the following section is to provide an overview of the most significant political elements of Australian environmental federalism to determine where this system sits in the so-called federalism spectrum.²⁷ This paper will then consider two specific issues: first, the general arguments of a values-based and theoretical nature that have been advanced for predominantly centralised and de-centralised environmental federalism systems respectively, both in Australia and elsewhere; and second, how successful the current Australian system has been in securing effective environmental outcomes. The paper will conclude by recommending that the Commonwealth should make the political decision to adopt a new strategic leadership role on environmental matters and reflect this in a Statement of Commonwealth Environmental Interests (*SCEI*).

2.2.1 Description of the current system

There are four distinct, but related, elements of the politically-based cooperative approach to environmental matters that has evolved in Australia:

- first, there has been a reliance on **intergovernmental forums** in which cooperative approaches have been regularly developed via negotiations between the Commonwealth and state governments;
- second, **intergovernmental agreements** have been developed through these forums for the purpose of defining the roles and responsibilities of the Commonwealth and the states with respect to environmental matters (and also to address particular aspects of environmental management more specifically);
- third, a wide range of **national strategies** has been developed, again through intergovernmental forums, often leading to the adoption of both Commonwealth and state legislation to give legal effect to these instruments; and
- fourth, there have been Commonwealth-funded **programs of financial assistance** directed at both the states and non-government actors.

The combined effect of the intergovernmental agreements and national strategies developed through intergovernmental forums has been to achieve through political processes a more limited role for the Commonwealth

²⁶ For the same viewpoint, see E Ryan, above n 4, 359: '...the broader federalism discourse is increasingly recognizing environmental federalism for lighting a path away from the entrenched 'zero-sum' model, which treats every assertion of authority at one jurisdictional level as a loss of authority for the others'.

²⁷ In the *Background Paper*, the Panel provides a comparative survey of other environmental federalism systems, including the USA and Canada, and conclude that the Australian system is relatively de-centralised in character, very much alike the situation in Canada.

regarding environmental matters than is possible legally, given its substantial constitutional capacity in this context. In effect, potential Commonwealth supremacy in this field has been made subject, through political processes, to an acceptance by the Commonwealth of state primacy.

2.2.1.1 Intergovernmental forums (COAG, Ministerial Councils and the NEPC)

Since its establishment in 1992, the over-arching body for inter-governmental relations in Australia has been the Council of Australian Governments (COAG), comprised of the Prime Minister, the state Premiers and territory Chief Ministers, and the President of the Local Government Association of Australia (ALGA).²⁸ COAG has addressed a wide range of environmental matters, including salinity and water quality, the Murray-Darling Basin, a renewable energy target and national energy efficiency standards. In many instances, the outcomes from its deliberations have been reflected in an intergovernmental agreement or a national strategy.

COAG has become an umbrella for a Ministerial Council system which was well-established prior to its creation. In relation to environmental matters, this dates back to the establishment of the Australian Environment Council (AEC) in 1972. The AEC morphed into other forms over the following years,²⁹ eventually becoming the Standing Committee on Environment and Water (SCEW) in 2010. This long tradition of using specialist Ministerial Councils to address environmental matters collaboratively across jurisdictions came to an end in December 2013, at the first meeting of COAG following the election of the Abbott Coalition government. At this meeting, the Commonwealth insisted upon a reorganisation of COAG Ministerial Councils to reduce their number from 22 to 8, resulting in the abolition of SCEW.³⁰ This means that, for the first time in over forty years, there is no longer a formal intergovernmental forum specifically dedicated to the discussion of collaborative national approaches to environmental matters, apart from the National Environment Protection Council (NEPC).

The NEPC is somewhat unique as an intergovernmental environmental forum in that it was formally established through uniform legislation adopted by the Commonwealth and the states in 1995. Since then, it has developed a small number of instruments known as National Environment Protection Measures (NEPMs).³¹ Given its statutory mandate, the NEPC has continued to exist after the abolition of many other Ministerial Councils, including SCEW, by COAG. This paper examines the effectiveness of the NEPC scheme below.

With the demise of SCEW, informal meetings of Commonwealth and state Environment Ministers (referred to as MEMs) have been convened subsequently. These have taken the form of one day meetings held roughly on an annual basis.³² The initial agenda for these meetings has focused on a national review of environmental regulation ‘to identify unworkable, contradictory or incompatible regulation’,³³ culminating in the release in mid-2015 of the *Interim Report of the National Review of Environmental Regulation*.³⁴ The clear focus of this work has been ‘avoiding unnecessary duplication between levels of government and encouraging innovation and efficiency’,³⁵ thus reflecting an agenda driven by the Commonwealth of reducing so-called ‘green tape’.³⁶

28 For a detailed review of the operation of COAG, see Commonwealth, *COAG and Federal Financial Relations: Department of Prime Minister and Cabinet Reform of the Federation White Paper*, Issue Paper No. 5 <<http://apo.org.au/node/56126>>.

29 These were the Australian and New Zealand Environment and Conservation Council (ANZECC), from 1990 to 2001, and the Environment Protection and Heritage Council (EPHC), from 2001 to 2010.

30 The announcement of the abolition of SCEW may be found on its website, which currently is being maintained for historical purposes: National Environment Protection Council <www.scew.gov.au/>.

31 The *National Environment Protection Council Act 1994* (Cth) s 14(3) provides that NEPMs may take the form of standards, goals, guidelines or protocols, each of which is defined in the Act. Matters addressed by NEPMs include air toxics; ambient air quality; assessment of site contamination; diesel vehicle emissions; movement of controlled wastes; a National Pollutant Inventory and used packaging. For a critique, see RJ Fowler, ‘Law and Policy Aspects of National Standardisation’ in B Boer, RJ Fowler and N Gunningham (eds), *Environmental Outlook No. 2: Law and Policy* (Federation Press, Sydney, 1996) 318.

32 See for example, *Meeting of Environment Ministers* (25 November 2016) Australian Government Department of the Environment and Energy, <<https://www.environment.gov.au/about-us/mem>>.

33 Minister for Environment, Greg Hunt MP, ‘Getting environmental regulation right across Australia’ (Media Release, 19 March 2015) available at <<http://www.environment.gov.au/minister/hunt/2015/mr20150319a.html>>.

34 *National Review of Environmental Regulation Interim Report* (26 February 2015) Australian Government Department of the Environment and Energy, <<https://www.environment.gov.au/about-us/mem/environmental-regulation-review>>.

35 Ibid.

36 The reflection of this agenda in the Commonwealth’s ‘One-Stop-Shop’ initiative will be discussed further below, this paper considers the role of the Commonwealth with respect to environmental assessment and approvals under the *EPBC Act*.

Meanwhile, the six COAG meetings held since December 2013 have not devoted attention to any environment-related matters (apart from the subject of deregulation) until the most recent one held on 16 December 2016, where some discussion occurred with respect to implementation of the Murray-Darling Basin Plan and the need for better regulation of per- and poly-fluoroalkyl substances (PFAS) contaminants.³⁷ Thus, to a large extent, with the abolition of SCEW, environmental matters have disappeared from the agenda on this highest level of the national stage.

2.2.1.2 Intergovernmental agreements

The Australian cooperative federalism model has found its fullest expression through the development of intergovernmental agreements. Whilst such agreements may sometimes be formally endorsed by COAG, many others may be adopted through other avenues, including Ministerial Councils.³⁸ Of particular significance in this regard are two intergovernmental agreements adopted by COAG in the 1990s which were not directed at specific environmental issues, but instead at defining the respective roles and responsibilities of the Commonwealth and the states concerning environmental matters. The most comprehensive of these political accords is the *Intergovernmental Agreement on the Environment (IGAE)*,³⁹ which was adopted in May 1992; and the 1997 *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment (HOA)*, which focuses primarily on the area of environmental assessment and approvals and provided the blueprint for the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.⁴⁰ These are somewhat unique applications of the intergovernmental agreement mechanism and they have had a significant impact in terms of quashing any political contemplation of a more expansive Commonwealth role in environmental management since their adoption.⁴¹

Other intergovernmental agreements have addressed specific aspects of environmental management, rather than broader jurisdictional matters and often have been reflected in, or even appended to, related Commonwealth environmental legislation. Unfortunately, there is no single repository for these various agreements. An interesting example of the use of intergovernmental agreements is in relation to climate change adaptation, where collaborative approaches have been agreed through the National Climate Change Adaptation Framework,⁴² the *National Climate Resilience and Adaptation Strategy*⁴³ and two COAG Select Council on Climate Change resolutions (one establishing a set of national adaptation priorities,⁴⁴ the other defining government roles and responsibilities in managing and allocating climate change risks).⁴⁵

2.2.1.3 National strategies

The Commonwealth and the states also have developed an array of national strategies on a wide range of topics, including ecologically sustainable development (ESD), Australia's Natural Reserves System (NRS), climate change,

37 Council of Australian Government meeting Communique\ (9 December 2016) Council of Australian Governments <<http://www.coag.gov.au/meeting-outcomes/coag-meeting-communique%C3%A9-9-december-2016>>.

38 For a discussion of the constitutional capacity of the Commonwealth to enter into intergovernmental agreements see for example, C Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) *Public Law Review* 294; *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1982) 158 CLR 535, 560 (Mason J).

39 *Intergovernmental Agreement on the Environment* (1 May 1992) Australian Government Department of the Environment and Energy, <<https://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement>>.

40 *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment*, (1996), Council of Australia Governments, <www.environment.gov.au/resource/heads-agreement-commonwealth-and-state-roles-and-responsibilities-environment>.

41 See below for further analysis of the current political arrangement; for a detailed examination of the provisions of these two intergovernmental agreements see for example, *Background Paper*.

42 Commonwealth of Australia, 'National Climate Change Adaptation Framework' Department of Climate Change and Energy Efficiency Department of Climate Change and Energy Efficiency, Commonwealth Parliament, *National Climate Change Adaptation Framework* (2007) 3.

43 Commonwealth of Australia, 'National Climate Resilience and Adaptation Strategy' (Strategy document, Department of the Environment and Energy, Commonwealth Parliament, *National Climate Resilience and Adaptation Strategy* (2015).

44 Council of Australian Governments Select Council on Climate Change, 'National Adaptation Priorities' *Council of National Climate Resilience and Adaptation Strategy*, Council of Australian Governments Select Council on Climate Change (2015) <<https://www.environment.gov.au/system/files/resources/3b44e21e-2a78-4809-87c7-a1386e350c29/files/national-climate-resilience-and-adaptation-strategy.pdf>>.

45 *Roles and Responsibilities for Climate Change Adaptation in Australia*, Council of Australian Governments Select Council on Climate Change (4 May 2012) <<http://archive.southerncouncils.nsw.gov.au/issues/climate-change/council-of-australian-government-coag-select-council-on-climate-change/>>. Some additional agreements not described in the text above include the agreements that have provided the framework for the *Water Act 2007* (Cth). See also *Intergovernmental Agreement on Implementing Water Reform in the Murray Darling Basin* (27 November 2015) Council of Australian Governments <<https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-implementing-water-reform-murray-darling-basin>>; *Gene Technology Agreement* (3 July 2008) Council of Australian Governments <<http://www.coag.gov.au/about-coag/agreements/gene-technology-agreement>>; *Intergovernmental Agreement on Biosecurity* (2012) Department of Agriculture and Water Resources <<http://www.agriculture.gov.au/biosecurity/partnerships/nbc/intergovernmental-agreement-on-biosecurity>>; *National Environmental Biosecurity Response Agreement* (January 2012) Department of Agriculture and Water Resources <<http://www.agriculture.gov.au/biosecurity/emergency/nebra>>.

oceans, forests and the conservation of biological diversity.⁴⁶ One particular strategy that deserves special mention is the *National Strategy for Ecologically Sustainable Development (NSESD)*, which was adopted by COAG in June 1992.⁴⁷ The basic purpose of the *NSESD* is stated as follows:

‘... to set out the broad strategic and policy framework under which governments will cooperatively make decisions and take actions to pursue ESD in Australia’.⁴⁸

It is a matter of considerable contention as to whether the *NSESD* has met its fundamental goal of achieving ‘development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations’.⁴⁹ The rate at which biodiversity in Australia continues to decline suggests a substantial failure on this score.⁵⁰ In Australian Panel of Experts on Environmental Law, *The Foundations for Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017), the Panel explores this subject in much greater detail and recommends that the Commonwealth should establish a process to develop a new goal in place of the *NSESD*.

National strategies are entirely political in nature and have no legal force or effect. Furthermore, and most significantly, there is no specific mechanism for securing their implementation. Instead, it is envisaged by governments that this will be achieved collaboratively through the operation of state and Commonwealth legislation and related administrative action. In this respect, national strategies reflect clearly the highly consensus-based, collaborative form of environmental federalism that has been pursued in Australia.

2.2.1.4 Programs for Commonwealth financial assistance

There is a broad range of Commonwealth programs that provide financial resources to both state governments and non-government parties in support of environment-related activities. These are canvassed in some detail in the *Background Paper*. The National Commission of Audit Second Phase Report on *Towards Responsible Government* identified ten such programs that were operating in 2015, with a collective value of \$297 million (see Annexure C of this Report). Whilst these programs are generated by the Commonwealth rather than through inter-governmental forums (as in the case of national strategies), their design and implementation often involves engagement by the Commonwealth with state governments, and sometimes also with regional and local authorities. They therefore provide a means by which the Commonwealth can seek to influence environmental management at the state, regional and local levels of government, although the amount of funds being made available by the Commonwealth has declined significantly since 2013.

2.2.2 Analysis

The political arrangements described in the preceding section allow little scope for leadership at the central level. The development of national strategies and standards is undertaken through intergovernmental forums, whilst planning controls, environmental regulation and natural resources management are predominantly handled at a de-centralised level (state, regional and local). The political understandings reached a quarter of a century ago in the *IGAE* essentially remain intact. Clause 2.2.1 of the *IGAE* identifies only a limited role for the Commonwealth in relation to matters of foreign policy on the environment, ensuring state policies and practices do not result in external effects, and facilitating the development of national environmental standards (through the NEPC). The Commonwealth has largely abided by this restrictive definition by refraining from taking a leadership role in relation to environmental issues, preferring instead to seek consensus with the states on any national initiatives of a strategic or policy nature.

46 For a fuller list, see Bates, above n 6, 166.

47 *National Strategy for Ecologically Sustainable Development – Part 1 Introduction* (December 1992) Australian Government Department of the Environment and Energy <www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1>.

48 *What does the National Strategy for ESD Contain?* (December 1992) Australian Government Department for the Environment <www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1>.

49 *Ibid.*

50 EG Ritchie et al., ‘Continental-Scale Governance Failure Will Hasten Loss of Australia’s Biodiversity’ (2013) 27 *Conservation Biology* 1133.

On the other hand, the primacy of the states is reflected in clause 2.3.2 of the *IGAE*, which provides that: ‘Each State has responsibility for the policy, legislative and administrative framework within which living and non-living resources are managed within the State’, and also in Schedule 2, which provides that the states have responsibility for ‘resource assessment, land use decisions and approval processes’. These clauses reinforce the view that the states have the primary role and responsibilities with respect to the regulation of the environment.⁵¹

APEEL is therefore of the view that it is appropriate to describe the Australian environmental federalism system as being highly de-centralised in character. The detailed comparison of this system with those of other countries which is undertaken in the *Background Paper* serves to reinforce this conclusion. APEEL believes this conclusion gives rise to a fundamental question as to whether environmental governance could be improved by having a more centralised system of environmental federalism in Australia. The Panel notes that in areas of economic regulation such as taxation, corporations, trade practices and securities and investment, the Commonwealth has been prepared to test its legislative capacity to the full by adopting comprehensive legal schemes, whereas in relation to environmental management it has largely accepted the limited role and responsibilities recognised for it in the *IGAE*. Why a similar approach should not be adopted in the future with respect to environmental management is a matter that APEEL believes deserves serious attention.

The Panel does not assume that centralisation is a preferable model of environmental federalism, and in recognition of the point made above, considers there is no ‘one size fits all’ model of environmental federalism that should cover all aspects of environmental management. But the Panel considers it is appropriate to question whether the heavily de-centralised system that is described above should be re-designed with a view to vesting a stronger, leadership role in the Commonwealth. This paper will examine this possibility from two perspectives: first, by considering the arguments that have been regularly advanced for and against a more centralised approach to environmental federalism - both in the scholarly literature and also in political discourse; and second, by considering how effective the existing de-centralised Australian system has been in delivering sound environmental outcomes.

2.2.2.1 The arguments for a centralised model of environmental federalism

There are several arguments which have been regularly advanced in the American literature on environmental law and federalism in support of a more centralised system of environmental federalism that encompasses both policy and regulation. This paper turns to these sources in this regard as there has been far less consideration of this topic in Australian federalism scholarship. The key arguments have been succinctly summarised by Glicksman and Levy as follows:

‘...the traditional justifications for federal environmental regulation reflect commonly understood collective action problems, including negative environmental externalities, resource pooling, the “race to the bottom”, uniform standards and the “NIMBY” phenomenon’.⁵²

Despite their American sourcing, each of these arguments has some resonance in the Australian context also. This paper only briefly summarises them here. For a more detailed analysis, refer to the *Background Paper*.

The **externalities** argument reflects a recognition that environmental impacts (particularly from air and water pollution) do not respect state boundaries and can be experienced beyond the state in which they are generated, thereby demanding federal regulatory action.⁵³ As noted above, the *IGAE* also acknowledges the role of the Commonwealth in this particular context.

51 As this paper will show below, when it overviews the practical dimension of environmental federalism, this is also clearly reflected in the scope of Commonwealth environmental legislation (see Appendix 1). Whilst extensive in number, Commonwealth environmental laws generally do not overlap with, or pre-empt, corresponding State legislation and have an operation that is largely confined to areas of existing Commonwealth jurisdiction. The major exception is the environmental assessment and approval scheme that operates under the *EPBC Act*, which also will be examined in more detail below.

52 RL Glicksman and RE Levy, ‘A Collective Action Perspective on Ceiling Pre-emption by Federal Environmental Regulation: The Case of Global Climate Change’ (2008) 102 *North-western University Law Review* 579, 593–4.

53 See for example, RL Revesz, ‘Federalism and Interstate Environmental Externalities’ (1996) 144 *University of Pennsylvania Law Review* 2341.

The concept of **resource pooling**, sometimes also referred to as ‘economies of scale’, is based on a recognition that superior federal resources can result in efficiencies in the generation of scientific and technical information. Hence, federal leadership is considered to be warranted where it will generate scientific information that can underpin effective environmental regulation in a way that the states are unable to match when acting alone.⁵⁴

The ‘**race to the bottom**’ theory is based on the assumption that states will be inclined to relax their environmental standards from time to time in order to attract investment by business or industry, so as to generate economic benefits and resource revenues.⁵⁵ From an Australian perspective, it can be argued to have strong relevance in the light of the high level of vertical fiscal imbalance that exists in this country, which can induce states to promote resource development at the expense of environmental standards as a means of enhancing revenues and economic growth. Whilst a competitive ‘race to the bottom’ in which states are actively endeavouring to provide the least stringent environmental obligations for industry may not be evident, there is certainly ample evidence of a preparedness on the part of most states to ease off or wind back environmental regulation under pressure from industries within their respective jurisdictions from time to time.

The rationale of **uniformity** is based on the premise that a single, federally-designed standard will provide more efficient and effective direction to industry and other regulated parties than can a range of differing state-based standards. However, in Australia, this outcome has been pursued by efforts to achieve uniformity via harmonisation of state measures, thereby reinforcing the de-centralised approach to such matters. Saunders notes the strong connection between the uniformity goal and cooperative approaches in Australia:

‘Australian federalism is distinguished by the extent to which uniformity is assumed to be the objective of cooperation, which is deemed to have failed if the requisite degree of uniformity is not achieved’.⁵⁶

It is equally plausible to argue that uniformity can be provided by a scheme in which the Commonwealth establishes uniform national standards. The Panel believe that the goal of uniformity with respect to environmental standards could be achieved more effectively through Commonwealth action than through the de-centralised cooperative approach embodied in the NEPC structure. This paper returns to this question below, when it considers the effectiveness of the current Australian system of environmental federalism.⁵⁷

The ‘**NIMBY**’ (**not in my backyard**) argument has been advanced in the United States in support of federal environmental regulation in order to address the problem of states seeking to avoid having environmentally-damaging activities such as radioactive or toxic chemical waste treatment facilities located within their boundaries. In Australia, as in the United States, such proposals have spawned heated political debate and intense community concern, leading often to a paralysis with respect to the establishment of such facilities. Glicksman and Levy note that, in the USA:

‘Congress has often reacted by establishing federal standards or otherwise taking the power to exclude objectionable facilities out of the hands of state and local decision-makers’.⁵⁸

Whether similar measures would be appropriate in Australia is a question that this paper leaves open at this stage for further consideration. The Panels primary argument is that Commonwealth leadership should be focused on the

54 Glicksman and Levy, above n 52, 596 (noting that this argument only justifies a federal role in generating information and disseminating it to the states and does not provide strong support for federal regulation on the basis of such information).

55 This particular theory has been the subject of some strong debate amongst American commentators. See for example, RL Revesz, ‘Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation’ (1992) *New York University Law Review* 1210; J Adler, ‘Jurisdictional Mismatch in Environmental Federalism’ (2005) 14 *New York University Environmental Law Journal* 130. However, the prevailing view still appears to be in support of its underlying premise: see for example, Glicksman and Levy, above n 52, 598; K Engel, ‘State Environmental-standard Setting: Is There a “Race” and Is It “To the Bottom?”’ (1997) 48 *Hastings Law Journal* 271.

56 C Saunders, ‘Cooperative Arrangements in Comparative Perspective’ in G Appleby, N Aroney and T John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012), 414.

57 There is a question that inevitably arises with respect to the setting of national standards as to whether they would normally operate as a ‘floor’ rather than a ‘ceiling’ - that is to say, whether the states would remain free to impose stricter standards in particular circumstances or, alternatively, would be bound to apply the federally-devised standards in all instances. APEEL believe that Commonwealth-devised standards should operate normally as a ‘floor’ that may be exceeded by the states, thus providing a minimum level of protection for all citizens.

58 Glicksman and Levy, above n 52, 601.

development of national strategies. Whether the Commonwealth should also have an over-riding approval power in such circumstances is a separate, and contentious, question.

The Panel believe there is a further argument that is particular to the Australian situation that may be advanced in support of centralised strategic leadership by the Commonwealth. The implementation of treaty obligations in Australia normally requires that there be legislation in place specifically addressing such obligations prior to ratification by the Commonwealth.⁵⁹ This may be Commonwealth legislation, but it may also often involve a matter that state legislatures will need to address. As a result, ratification of particular treaties can be delayed for considerable periods of time whilst negotiations proceed with the states regarding the development of the necessary state legislation.⁶⁰ If the Commonwealth, following the signing of an environment-related treaty, was able to develop a national strategy on the relevant subject-matter that the states were then encouraged by various means to implement, delays in treaty ratification might be significantly reduced. In addition, state measures for the implementation of treaty obligations might also be more extensive and effective.⁶¹

Despite these extensive arguments in support of a more centralised form of environmental federalism, it must be acknowledged that in recent years there has been a strong surge of political support for decentralised governance more generally. This has been reflected, for example, in a growing disaffection in the United States with many aspects of the US federal government that appears to have contributed in the past year to the election of Donald Trump as President, and also in the 'Brexit' vote by the United Kingdom to leave the EU. Despite the long history in the United States of federal leadership on environmental matters, the Trump administration appears intent on significantly reducing federal involvement in environmental management and leaving much great responsibility with the states. This paper therefore turns to examine the arguments in favor of a more decentralised system of environmental federalism, beginning with an examination of the subsidiarity principle which has often been invoked in this context.

2.2.2.2 The arguments in favor of a more decentralised system of environmental federalism

The Commonwealth has identified the subsidiarity principle as a major driver in the establishment of COAG, offering up a version of the principle that states that 'functions should be performed by the lowest level of government competent to do so'.⁶² This somewhat distorted version of the subsidiarity principle can be compared with the classic definition of the principle in the *Treaty on the European Union 1992*, which allows for the exercise of shared governance functions at the Union level where 'the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional level, but can rather, by reason of the scale or effects of the proposed action, *be better achieved* at Union level'⁶³ (emphasis added). The critical consideration in applying this version of the principle therefore is one of effectiveness - that is to say, it calls for a consideration of where within the relevant tiers of government a particular action can be more effectively achieved. In practice, the subsidiarity principle has not prevented the development of an extensive range of Environmental Directives at the Union level, thus reflecting a broad acceptance within the EU that a centralised approach to environmental policy formulation is consistent with the operation of the principle, whilst allowing also for the implementation of Directives at the national, regional and local levels as appropriate.

Nicholas Aroney suggests that the subsidiarity principle specifically allows for such a centralised approach where local jurisdictions are tempted 'to under-regulate activities the costs of which are borne by other jurisdictions (for example,

59 See for a full example, *Treaty-making process*, Australian Government Department of Foreign Affairs and Trade <<http://dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx>>.

60 See for example of a delay in ratification by Australia of an international environmental treaty, J Prest, 'Why won't Australia ratify an international deal to cut mercury pollution?', *The Conversation* (online), 18 November 2016, <<https://theconversation.com/why-wont-australia-ratify-an-international-deal-to-cut-mercury-pollution-68820>>.

61 Such an approach would reinforce Recommendation 2.2 below concerning the role of the Commonwealth with respect to Australia's stance in international negotiations on environmental matters.

62 Commonwealth of Australia, *Reform of the Federation White Paper: A Federation for Our Future: COAG and Federal Financial Relations*, Issues Paper 5 (2014) 5. Note that this is a distorted prescription of the precautionary principle that offers little or no guidance in practice, given that 'competency' is often a contested issue in federal systems (and especially so with respect to environmental matters).

63 *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) art 5.3, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=en>>; see also *Protocol on the Application of the Principles of Subsidiarity and Proportionality* [1997] OJ C 340/150; *Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C 83/206.

pollution)⁶⁴ and that ‘the principle of subsidiarity suggests that federal governments are sometimes better situated to address such issues by virtue of their larger resources, economies of scale, and the like’.⁶⁵ These observations clearly reflect some of the arguments previously outlined in support of centralised environmental regulation.

Looking beyond the subsidiarity principle, a number of additional arguments have been advanced in support of a decentralised approach to environmental governance. These arguments appear to fall broadly into three categories: legitimacy, innovation and efficiency, with the third of these having been advanced most commonly in Australia.

The **legitimacy argument** arises from a perception that centralised governments are distant from the citizenry and an assumption that representative democracy is best accomplished when policy solutions are tailored to meet local concerns and citizen preferences.⁶⁶ It also assumes that there is a greater capacity to influence policy when it is developed at a decentralised level, and that there are greater opportunities for citizen participation in these circumstances.⁶⁷ In considering these views, the Panel believe it is relevant to take into account the views of the community in relation to the preferred governance arrangements for the environment, which seem often to favor a centralised approach. In Australia, the 2014 Constitutional Values Survey conducted by Griffith University asked some 1200 people the question: ‘Who should be responsible for protecting the environment’? Almost 45% of those polled indicated the Commonwealth should be solely responsible (compared to just 16% supporting sole state responsibility) and almost 73% felt the Commonwealth should be at least partly responsible (compared to almost 46% in support of the states having at least a part responsibility).⁶⁸ Given this overwhelming weight of opinion within the Australian community in support of Commonwealth involvement in environmental governance, it is difficult to accept that the legitimacy argument offers any clear justification for the current environmental federalism arrangements in this country.⁶⁹ Rather the evidence is that there is strong public support for an enhanced leadership role on the part of the Commonwealth in relation to environmental matters.

Turning to the **innovation argument** in support of decentralised environmental governance, there is a plausible rationale that states should be allowed to engage in novel social and economic experiments without being constrained by federal standards or policies.⁷⁰ The Panel are of the view that centrally-designed standards should serve generally as a floor rather than a ceiling so as not to stifle innovative environmental initiatives at the state, regional or local level; the exception being where significant economic and market impacts may arise from allowing states to adopt tougher standards. But the Panel also notes that the innovation argument may be stronger in theory than in practice, insofar as there is little evidence to support its application in circumstances where decentralised environmental governance has been the norm. Weinbust is particularly dismissive of the innovation argument in her comparative review of environmental federalism systems in several countries:

‘In environmental regulation, there is little evidence that sub-national governments with more autonomy will be more innovative. On the contrary, the evidence points to the conclusion that less centralized systems are less innovative and there is no inevitable diffusion of those innovations that do occur’.⁷¹

The **efficiency argument** has been advanced regularly by both governments and industry in Australia in support of a decentralised system of environmental federalism. The arguments usually focus on a perceived need to remove duplication and/or unnecessary overlap between Commonwealth and state environmental regulation in order to

64 N Aroney, ‘Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation’, (2016) 44(1) *Federal Law Review* 1, 3.

65 Ibid 3–4.

66 See R M Verchick and N Mendelson, ‘Pre-emption and Theories of Federalism’, in W B Buzbee (ed), *Pre-emption Choice – The Theory, Law and Reality of Federalism’s Core Question* (Cambridge University Press, 2009) 13, 16–19.

67 For a discussion and questioning of these assumptions, see I Weinbust, *Green Leviathan: The Case for a Federal Role in Environmental Policy* (Routledge, 2nd revised ed, 2013), 14–17.

68 Griffith University, *Australian Constitutional Values Survey 2014*, 12. It should be noted that these responses were despite 51.8% of those polled indicating that they felt it was better ‘for decisions to be made at the lowest level of government competent to deal with the decision’ (at 11). This provides a clear indication that whilst the subsidiarity principle has reasonable support within the Australian community, it is not seen as supportive of a decentralized system of environmental governance in this country.

69 The Panel distinguishes here the strong level of support evident for stronger Commonwealth leadership on the environment from the level of support needed to secure an amendment of the *Constitution* by way of a referendum to formally vest power in the Commonwealth to legislate on environmental matters. As noted above, given the history of failed referenda in Australia, it cannot be assumed that the support identified in the Constitutional Values Survey would translate into the necessary majority of votes required for a successful referendum.

70 Verchick and Mendelsohn, above n 66, 19.

71 Weinbust, above n 67, 22.

reduce allegedly excessive compliance costs for business and industry.⁷² There has been long-standing criticism of the Commonwealth's involvement in environmental assessment and approval processes based on these arguments (which this paper addresses further below), but there has also been frequent resort to the efficiency argument to justify various other schemes that have been designed to reduce Commonwealth involvement in environmental governance. In almost every instance, there has been a twofold reference in relevant government documents to both efficiency and **effectiveness** as joint justifications for such schemes, on the apparent assumption that these two objectives go hand in hand. This paper deals with the question of effectiveness separately below.

The invocation of efficiency and effectiveness has become virtually a mantra in Australia that is repeated unquestioningly by governments and industry in support of de-centralised approaches to environmental management. In the process, governments have regularly accepted or been significantly influenced by arguments advanced by industry and business representatives concerning the costs of duplication and unnecessary overlap. These arguments appear often to have a specious foundation. For example, a 2013 Senate Inquiry into the *EPBC Act* found, after careful examination, that there was no clear evidence to support assertions made to it by industry groups in this regard:

'The committee rejects the claims made by business interests that Commonwealth powers of approval are the cause of inefficiencies, delays, and loss of income to project proponents'.⁷³

Correspondingly, there has been little or no reference by governments to the arguments canvassed above in support of a more centralised system of environmental governance. There is an entrenched and seemingly unchallengeable assumption that efficiency through avoided duplication inevitably means desistance by the Commonwealth in favor of the states.

The Panel is of the view that it is time to challenge these arguments. There is an important distinction to be made in this regard between regulation and policy-making. In the former context, the choice is between federal regulation on the one hand, and state, regional or local regulation on the other; whereas in the latter context the choice is between intergovernmental forums such as COAG and the NEPC or a Commonwealth authority. In terms of efficiency, the Panel believe that the de-centralised approach based on achieving consensus wholly or substantially within Ministerial Councils and/or COAG before environmental strategies or policy can be adopted nationally may be considerably less efficient than working through a Commonwealth authority. Whilst this would also involve significant consultation and negotiation, the capacity of one or two jurisdictions to delay or dilute particular outcomes would be avoided. The Panel is therefore of the view that the efficiency argument holds little weight in terms of environmental policy formulation processes in Australia.

In appraising the various arguments canvassed above for centralised and de-centralised approaches respectively, the Panel is of the view that those supporting a centralised approach have greater weight and relevance in relation to the Australian system of environmental federalism, particularly in terms of strategy and policy.⁷⁴ The arguments based on legitimacy, innovation and efficiency do not appear to have a particularly strong justification or applicability in this country. This may well be a reflection of a broader proposition that such arguments are less applicable when dealing with a 'collective action' problem such as environmental harm. This appears to be the view of a significant majority of the expert commentators in this field, and the Panel is satisfied that it applies equally in the Australian context as it does elsewhere.

APEEL are reinforced in this conclusion by the findings of a unique comparative survey of environmental federalism by Weibust in three countries (Switzerland, Canada and the USA) and the EU, which concluded that centralisation of

72 For a typical example of industry advocacy based on these arguments, see the joint submission of the Australian Petroleum Production and Exploration Association, the Business Council of Australia and the Minerals Council of Australia, Submission No 24 to the House of Representatives, *Inquiry into streamlining environmental regulation, 'green tape' and one-stop-shops*, April 2014, available at <http://www.minerals.org.au/news/inquiry_into_streamlining_environmental_regulation_green_tape>, which states (at 3): 'Broadly, there are four sources of cost, delay and uncertainty in environmental regulation. These are where processes are (1) inefficient, (2) unnecessarily duplicative between and within governments, (3) due to their open-ended nature or by being poorly defined, introduce uncertainty into project delivery and (4) accompanied by unduly complex and prescriptive, often open-ended, conditions'.

73 Senate Environment and Communications Legislation Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (2013), 26 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2010-13/epbcfederalpowers/report/index>.

74 For the same conclusion offered over twenty years ago, see P Toyne, *The Reluctant Nation: Environment, Law and Politics* (ABC Books, 1994). The late Phillip Toyne served a distinguished career both within the non-government sector and subsequently as a senior Federal government officer, where he was involved in the early stages of drafting of the *EPBC Act*.

environmental policy development invariably leads to more effective outcomes:

‘Environmental regulation presents a collective action problem, one best resolved by a centralized response. When environmental governance in these federations was most decentralized, lower levels of government proved unable to prevent serious environmental problems from growing worse. Strenuous efforts at cooperative solutions to transboundary pollution problems were similarly ineffective’.⁷⁵

Even for those who seek to advance the subsidiarity principle in support of the current environmental federalism system in Australia, a proper application of this principle (in the form that it has been defined in the EU rather than the distorted version widely adopted in Australia) allows for the possibility of federal leadership in relation to strategy and policy where this would be ‘better achieved’ at the federal level. This raises specifically the additional argument regarding ‘effectiveness’ that has been widely invoked alongside efficiency in Australia - that is, that the current de-centralised system is more effective than a more centralised one would likely be. A simplistic assumption to this effect has been made repeatedly by Commonwealth and state governments (and frequently also industry representatives) when asserting the ‘effectiveness’ justification for various arrangements of a de-centralised nature, without any real effort to assess its validity.⁷⁶ The question is inevitably hypothetical in nature, but it can be addressed in part by examining the performance of the current Australian system from an effectiveness perspective.

2.2.2.3 The effectiveness of the current, de-centralised system of environmental governance

The *Background Paper*, provides a detailed critique of the current system which is summarised in this paper beginning with a consideration of COAG and the Ministerial Council system, whose operations have been criticised by some legal commentators for involving a so-called ‘democracy deficit’. In particular, it has been suggested that the process involved for the development of many outputs from these bodies has been managed exclusively by senior government officials and has not allowed for regular involvement in outcomes by parliaments (both state and/or Commonwealth) or key stakeholders (including both industry and the community).⁷⁷ These criticisms have strong relevance in the context of environmental federalism, since two key intergovernmental agreements (the *IGAE* in 1992 and the *HOA* in 1997) were developed by COAG without any form of public consultation and have not been subjected to any discussion or scrutiny within either the Commonwealth or state parliaments. The result has been a substantial reframing of the constitutional capacity of the Commonwealth on environmental matters through political accords reached behind closed doors and without any form of external scrutiny.

Even were the COAG system to be more open and democratic in character, APEEL thinks there is cause still to question the adequacy and timeliness of the strategies and other outputs that are generated by this system. The need to arrive at a consensus amongst all jurisdictions with respect to these instruments often causes long delays in their adoption and can lead to modified outcomes (sometimes described as ‘lowest common denominator’ results). Bates notes that, in addition to being slow to be developed and representing a lowest common denominator approach, national policies and strategies are ‘too much affected by political considerations’ and are also ‘strong on motherhood statements of concern but come up short on positive action’.⁷⁸ The end result is a lack of vigorous strategic direction nationally in relation to critical aspects of environmental management. A similar criticism has been levelled recently by Debus.⁷⁹

Also, the implementation of such instruments is entirely a voluntary prerogative of state and Commonwealth governments and can lead to widely varying levels and methods of delivery across jurisdictions. To take just one

⁷⁵ Weibust, above n 67, 191.

⁷⁶ The absence of any comparative assessment of this nature is not peculiar to the Australian situation. Weibust, above n 67, 21, notes that: ‘There has been no systematic study comparing the effectiveness of federal vs. state and local provision of environmental regulation. One reason is that very little comparative data is available on the performance of state and local governments in this area, with the exception of programs that have been delegated by the US federal government’.

⁷⁷ C Saunders, ‘The Constitutional, Legal and Institutional Foundations of Australian Federalism’, in R Carling, (ed), *Where To For Australian Federalism?* (Centre for Independent Studies, 2008) 1; P Kildea, ‘Making Room for Democracy in Intergovernmental Relations’, in P Kildea, A Lynch and G Willians (eds) *Tomorrow’s Federation: Reforming Australian Government* (The Federation Press, 2012) 73.

⁷⁸ Bates, above n 6, 166.

⁷⁹ R Debus, ‘All living things are diminished: Breaking the national consensus on the environment’ (Perspectives Series, Whitlam Institute, University of Western Sydney, November 2014) 12: ‘Although the national conservation programs of the last 40 years have been vital to the protection of the environment, they have certainly not been wholly successful. In some areas, threats to ecosystems such as invasive species have worsened; new threats emerge; wildlife continues to decline and some habitats continue to fragment. If the losses are to be decisively stemmed and the landscape permanently restored, the effort will have to be more effective – it will require sustained, mainstream funding and some better methods’ (available at <<http://apo.org.au/node/42305>>).

example of what might be termed an ‘implementation deficit’ involving a significant national strategy - the *National Biodiversity Strategy 2010-2050*⁸⁰ - a recent review of this *Strategy* concluded that it has failed to ‘effectively influence biodiversity conservation activities’.⁸¹ The review noted that ‘there was no ongoing oversight from jurisdictions to facilitate and coordinate implementation of the *Strategy*’ and also that ‘an implementation plan, including allocation of responsibility for actions, has not been established and coordinated implementation of the *Strategy* has been ineffective’.⁸² These are very significant deficiencies that are not confined to this particular *Strategy* and which are attributable to the de-centralised nature of the system for both development and implementation of such strategies.⁸³

Another important consideration concerning the effectiveness of the current system is that the substantial restructure of the Ministerial Council system by COAG in early 2014 means there is no longer a fully-functional Ministerial Council for environmental matters generally, leaving only the NEPC to perform its relatively narrow role with respect to the production of NEPMs (which is discussed further below). This development reflects a down-grading of environmental concerns within the COAG system and leaves even less scope for the development of national environmental strategies, as has occurred regularly in the past.

With respect specifically to the NEPC, APEEL considers that many of the deficiencies associated with national strategies can be attributed also to this model. It has proven to be an extremely slow-moving vehicle for the production of national standards and for their up-dating from time to time. Despite its three-quarters majority voting rule, in practice it has essentially produced lowest-common-denominator outcomes. In addition, NEPMs do not automatically take effect within state jurisdictions and therefore require further, specific action in each jurisdiction to ensure their operation. In short, it has not served to deliver either efficient or effective outcomes, thereby failing the test noted above that is commonly applied by governments in Australia to justify arrangements of this nature. These criticisms are supported by a recent review of air pollution law and policy in Australia by Environmental Justice Australia, which concluded as follows:

‘The two critical elements that are currently lacking in our regulatory system are strong Commonwealth leadership on standard setting to break the current regulatory logjam, and mechanisms to ensure [that] implementation of the national standards occurs at state, regional and pollution-source levels’.⁸⁴

In addition, the uniform NEPC legislation allows only a limited range of matters to be addressed through a NEPM, with a focus wholly on environmental quality matters and no provision in relation to biodiversity, heritage, climate change or natural resources-related issues. These additional matters are all left to be addressed through national strategies of an informal character, which as suggested above have serious deficiencies associated with them.

Finally, this paper suggests that one clear measure of effectiveness of the system of environmental governance adopted in Australia is the condition of the Australian environment, a matter which is addressed through the preparation of national *State of the Environment Reports (SOE Reports)* every five years by an independent committee. Since 1996, there have been five national *SOE Reports* produced, the most recent being released in March 2017.⁸⁵ This latest *SOE Report* notes that the main pressures facing the Australian environment are the same as in 2011 when it

80 Department of the Environment and Energy (Cth), *Australia’s Biodiversity Strategy 2010-2030*, Australian Government: Department of the Environment and Energy, available at <<https://www.environment.gov.au/biodiversity/conservation/strategy>>.

81 Department of the Environment and Energy (Cth), *Report on the Review of the first five Years of Australia’s Biodiversity Conservation Strategy 2010-2030, Executive Summary*, Australian Government, Department of the Environment and Energy, available at <<https://www.environment.gov.au/biodiversity/publications/australias-biodiversity-conservation-strategy-five-year-review>>.

82 Ibid.

83 In the case of the implementation of national strategies by the Commonwealth, there is also a glaring limitation arising from the absence of a proper environmental regulation regime beyond its environmental assessment and approval system to manage activities undertaken by Commonwealth bodies or on Commonwealth land (for example, where site contamination issues are involved). This paper will address this issue further below.

84 Environmental Justice Australia, ‘Why Australia urgently needs effective national air pollution laws’ (Research Report, Environmental Justice Australia, 20 May 2014) 22, available at <<https://envirojustice.org.au/major-reports/clearing-the-air-why-australia-urgently-needs-effective-national-air-pollution-laws>>. The Panel agrees with this assessment and notes that similar criticisms may be levelled in other standards-related contexts not covered by the NEPC, for example with respect to ambient water quality. The *Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000* were undergoing a review by a Joint Steering Committee of the COAG Standing Committee on Environment and water (SCEW). This review last reported on progress in December 2013. With the abolition of SCEW by COAG in 2014, and only informal meetings of Commonwealth and State Ministers taking place occasionally now, there appears to be little prospect that this review will be completed and the Guidelines revised any time within the near future.

85 See Department of the Environment and Energy (Cth), *Australia State of the Environment (SoE) 2016 Overview*, available at <<http://www.environment.gov.au/science/soe>>.

previously reported.⁸⁶ The 2011 *SOE Report* identified some serious concerns with respect to the condition and trends of the Australian environment, including the following:

- Australia's unique biodiversity is in decline and new approaches will be needed to prevent accelerating decline in many species;
- Australia is particularly vulnerable to climate change and its effects are already being seen;
- the impacts of urban air quality on health is still a matter of serious concern;
- Australia's land environment is threatened by widespread pressures, including invasive species, inappropriate fire patterns, grazing and land clearing;
- there are threats to Australian soils in the form of acidification, erosion and loss of carbon; and
- ocean acidification will have a major impact on marine ecosystems.⁸⁷

It is of particular significance to the Panel's examination of the adequacy of the current system of environmental governance that the 2011 *SOE Report* attributes these problems at least in part to the 'fragmented' nature of the environmental governance system. Likewise, the 2017 *SOE Report* suggests that the key challenges to the effective management of the Australian environment include a need for national leadership, a more strategic focus on planning for a sustainable future and specific action programs and policy.⁸⁸ APEEL strongly endorse these views and will present in the next section of this paper ideas as to how these needs can be met.

2.2.2.4 Conclusion

Taking all of the above considerations into account, APEEL concludes that the case for the re-design of the current environmental federalism system in Australia is overwhelming. The Panel does not, however, envisage this re-design to be of such a radical nature as to involve a substantial transfer to the Commonwealth of regulatory functions that have been established for many years at the state, regional and local levels. Rather, **APEEL proposes that responsibility for strategic leadership should be assumed at the central level by the Commonwealth, whilst the implementation of national strategies developed by the Commonwealth should remain primarily with the states, and where appropriate, regional and local governments.**⁸⁹ This paper sets out below ideas with respect to how the Commonwealth could act at first instance in the political domain to pursue this fundamental reform of the current system. In the following section, on the practical dimension of environmental federalism, this paper outlines the legal mechanisms that the Commonwealth could employ for this purpose

2.2.3 Proposals for reform: a new strategic role for the Commonwealth

In considering political options for reform of the current system of environmental federalism in Australia, this paper returns to the core question identified at the outset – *Who should determine the appropriate form of environmental federalism in Australia?* Until now, the clear answer to this core question has been the Commonwealth and the states collectively, working through COAG and Ministerial Councils to establish a consensus-based, cooperative system that has been consolidated through the *IGAE*. This core question involves a consideration of whether, in contributing to the next generation of environmental laws in Australia, the Commonwealth should make a political break from the current system by defining and developing a new strategic leadership role for itself on environmental matters.

⁸⁶ Ibid, Executive Summary.

⁸⁷ See Department of the Environment and Energy (Cth), *State of the Environment Report, 2011 – Summary, including Headlines*, available at <<https://soe.environment.gov.au/download/reports#key-findings>>.

⁸⁸ Department of the Environment and Energy, *SOE 2016 Overview*, Executive Summary, above n 85.

⁸⁹ One qualification to this broad conclusion with respect to the system of environmental assessment and approval established by the Commonwealth in 1975 and substantially reformed through the *EPBC Act* in 1999, is that the Commonwealth has a responsibility to ensure that matters of national environmental significance are fully addressed and protected and that it therefore should continue to be directly involved in this area of environmental regulation. This paper outlines the reasons for this particular conclusion, and the proposals for reform of the *EPBC Act* EEA process, in further detail below.

The Panel notes that as long ago as 1974, there was an authoritative recognition that the Commonwealth should assume a strong degree of responsibility for the environment. In the *Report of the National Estate* (referred to as the 'Hope Report', after the Chair of the Inquiry into the National Estate, Justice Robert Hope), the following statement was made:

'The conception of the functions of a central government of a country is not something static. Rather, it is something which grows from decade to decade....We hold firmly to the view that the protection of Australia's national heritage is a proper function of the Australian national government'.⁹⁰

In a recent article, Woinarski and Blakers have noted the failure of governments in Australia to accept and give effect to this insightful statement:

'The reality is that, 40 years after the National Estate inquiry, responsibility for nature remains unsettled. The states have not ceded it, and the Australian government has not accepted it. Caught between, our care for nature is hostage to changing political fortunes, lacks clear goals and is starved of resources. No-one is accountable... Nature is our shared heritage and...the Australian government is responsible and should be held accountable for its fate'.⁹¹

The Panel wishes to challenge the long-standing assumption in political circles, and which has been regularly endorsed by industry, that the determination of the form of environmental federalism in Australia must continue to be addressed by the states and the Commonwealth through a collective consensus on roles and responsibilities, in particular through an intergovernmental agreement such as the *IGAE*. Instead, the Panel are of the view that this is a matter which the Commonwealth could, and should, assume responsibility for addressing by itself. This exercise should involve a process that includes extensive consultation with the states, regional and local governments and other key stakeholders, but which ultimately leads to a final determination by the Commonwealth for itself of the nature and extent of the role and responsibilities it wishes to assume with respect to the environment.

APEEL's conclusion in this regard inevitably will involve the abandonment by the Commonwealth of the existing inter-governmental 'jurisdictional' agreements in the form of the *IGAE* and *HOA*. There is nothing from a legal perspective that precludes this option being pursued by the Commonwealth, as these agreements are entirely political in nature and have no binding legal effect. Even from a political perspective, however, the Panel does not see such a step as highly controversial, given that the *IGAE* is now almost a quarter-century old.

There is, of course, an alternative approach to addressing the deficiencies of the current system that would involve attempting to renegotiate the *IGAE* and *HOA* in order to recognise an enhanced leadership role for the Commonwealth. The Panel is extremely doubtful that this would lead to a successful redesign of the current environmental federalism model and suspect that such an exercise inevitably would result in a continuation of the current, decentralised approach in order for a consensus to be reached. The Panel does not assume that the states would be totally opposed to such a system redesign, particularly if they could see benefits for themselves from this exercise, but it is doubtful that they would be likely to be supportive proponents of it in the first instance.

RECOMMENDATION 2.1

The Commonwealth should define the nature and extent of its own role and responsibilities in relation to environmental matters; in doing so, it should:

- (i) acknowledge its responsibility for providing national strategic leadership on the environment; and*
 - (ii) recognise that the states will continue to be involved in environmental regulation under state environmental laws and regulatory processes.*
-

⁹⁰ Committee of Inquiry into the National Estate, Parliament of Australia, *Report of the National Estate: Report of the Committee of Inquiry into the National Estate* (1974) 213.

⁹¹ J Woinarski and M Blakers, 'Australian Life' (2015) *Green Agenda*, available at <<http://greenagenda.org.au/2015/07/australian-life/#more-757>>.

Further to Recommendation 2.1, the Panel believe that the first step to be taken by the Commonwealth should be to develop a **Statement of Commonwealth Environmental Interests (SCEI)** that sets out in detail the role and responsibilities it is willing to perform with respect to environmental matters and the types of environmental matters in which it considers it has an interest. The SCEI would then be reflected in the design of the next generation of Commonwealth environmental laws. For practical and political purposes, the SCEI would replace the limited definition of the Commonwealth's role and responsibilities provided in the *IGAE*, thereby effectively terminating that agreement. It would also provide a revised statement of the various environment matters in which the Commonwealth has an interest that is provided in the *HOA*.

The Panel envisage that the SCEI would have two components addressing respectively Commonwealth environmental functions and relevant environmental matters in which the Commonwealth has an interest, together with a third component related to the Commonwealth's role in international affairs concerning the environment.⁹²

RECOMMENDATION 2.2

*The Commonwealth should develop a **Statement of Commonwealth Environmental Interests (SCEI)** comprised of three broad components:*

- (i) a statement of the **functions related to the environment** that it will perform in the future, including:

the provision of strategic leadership on environmental matters;

specific aspects of environmental regulation, including environmental assessment and approval;
and

the environmental regulation of activities undertaken by Commonwealth entities (whether on or outside Commonwealth land) and by other parties on Commonwealth land;*
 - (ii) a statement of the **environmental matters** in which the Commonwealth has an interest, comprised of two elements:

first, a revised list of matters of national environmental significance (MNES) that will serve as triggers for the Commonwealth's environmental assessment and approval process; and

second, a revised list of additional matters besides the listed MNES with respect to which the Commonwealth could pursue a strategic leadership role; and*
 - (iii) a declaration that Commonwealth leadership on environmental matters extends to the adoption of responsible and progressive negotiating positions in international negotiations on various environmental matters.*
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2.3 The practical dimension

Having examined the constitutional and political dimensions of environmental federalism and recommended a re-design of the current system to provide a stronger strategic leadership role for the Commonwealth on environmental matters, this paper must address finally the practical dimension of this subject beginning with a description of the legal mechanisms that have been employed to date by the Commonwealth to implement the various intergovernmental agreements, national strategies and programs as described above and an assessment of the extent to which these

⁹² In the *Background Paper*, the Panel sets out in more detail the subject-matter of these three components.

should remain in place. This paper then outlines ideas concerning the legal mechanisms that could be employed by the Commonwealth to pursue a stronger strategic leadership role and to secure the engagement of the states in the implementation of its strategic measures. Finally, this paper considers the future regulatory role of the Commonwealth, including with respect to the vexed subject of environmental assessment and approvals.

2.3.1 Description of the current system

Commonwealth environmental law dates back to the mid-1970's and clearly reflects the influence of the political approaches to environmental federalism described in the previous section of this paper. The substantial body of Commonwealth environment-related legislation that is currently in operation, as set out in Appendix 1 of this paper, reveals an overwhelming preference for complementary and interlocking arrangements with state legislation on the same subject-matter rather than for pre-emptive approaches. In a number of instances, Commonwealth legislation forms part of a nationally-agreed scheme emanating either from COAG or a relevant Ministerial Council that is given effect through either uniform or 'nationally consistent' legislation. In other instances, the Commonwealth has simply drafted its legislation with considerable care to limit its operation so as to avoid duplication of, or overlap, with state measures. This paper will set out a brief overview of the various types of mechanisms that have been employed in pursuit of this Australian version of 'cooperative' environmental federalism.

2.3.1.1 Uniform legislative schemes

Uniform legislative schemes have been adopted in relation to a number of aspects of environmental regulation, including with respect to marine pollution (largely implementing international treaty measures), historic shipwrecks and the adoption of NEPMs.⁹³ In the case of the NEPM scheme, as noted above, the states are responsible for adoption and implementation of these measures within their respective jurisdictions under their own environment protection legislation.⁹⁴ Each state has established an Environment Protection Authority for the purpose of regulating pollution and managing wastes within their respective jurisdictions and hence the Commonwealth plays only a peripheral role in the area of environmental protection, principally through its involvement in the NEPC.⁹⁵

2.3.1.2 'Nationally consistent' legislative schemes

The concept of 'nationally consistent' legislation underpins a range of other Commonwealth Acts that are directed at the assessment of the environmental and health risks associated with certain products or processes - in particular, agricultural and veterinary chemicals, industrial chemicals, therapeutic goods, food additives, gene technology and biological control of weeds. In each instance, the relevant legislation seeks to implement a national scheme that has been adopted by way of an inter-governmental agreement adopted by the Commonwealth and the states. It usually establishes a Commonwealth authority to manage the relevant risk assessment process and the consequential issue of licences or permits (for example, for import, manufacture and sale), whilst leaving other regulatory functions to be covered through state legislation (for example, re use, storage, transport and disposal).

The concept of 'national consistency' varies across these several Acts, but has often been accomplished by the use of an 'applied law' mechanism whereby one jurisdiction adopts a law on a particular subject which is then applied by the other jurisdictions. In two instances (agricultural chemicals and therapeutic goods), relevant Commonwealth measures have been adopted as state law,⁹⁶ whilst other schemes allow for particular regulatory functions to be performed at

⁹³ For the relevant Commonwealth legislation, see Appendix 1 hereto.

⁹⁴ See *National Environment Protection Measures (Implementation) Act 1998* (Cth).

⁹⁵ See further Bates, above n 6, 597–702 for a description of relevant State measures. This paper has recommended above (see Recommendation 2.2) that the Commonwealth should develop its own environmental protection measures to regulate activities undertaken by Commonwealth entities and by any parties on Commonwealth land.

⁹⁶ The AGVET Code presented in a Schedule to the *Agricultural and Veterinary Chemicals Act 1994* (Cth) is deemed to be a law of any Territory (s 7) and may be adopted as the law of any state (s 11(2)) and likewise with respect to Regulations made under this Act (ss 9 and 11(3)); in relation to therapeutic substances, corresponding state legislation has applied the Commonwealth's *Therapeutic Goods Act 1989* (Cth) as a law of the state: see for example, *Poisons and Therapeutic Goods Act 1966* (NSW), s 31; and *Controlled Substances Act 1984* (SA), s 11A.

the state level rather than by the Commonwealth - for example, in relation to the storage, transport, handling and disposal of industrial chemicals. A number of these Acts also include a 'conferral clause' whereby functions, powers and duties arising under 'corresponding state laws' may be conferred on Commonwealth authorities.⁹⁷ In some instances, provision also has been made for administrative appeals or judicial review proceedings arising from the implementation of corresponding state laws by a Commonwealth authority to be handled by the Commonwealth Administrative Appeals Tribunal⁹⁸ or Commonwealth courts⁹⁹.

2.3.1.3 Complementary Commonwealth legislation

Looking beyond Commonwealth legislation that forms part of a uniform or nationally consistent scheme, a collaborative approach has been achieved by limiting the scope of Commonwealth environmental legislation so as to avoid duplication with state measures related to the same subject-matter. In most instances, such approaches are the result of prior understandings reached by the Commonwealth and the states via intergovernmental agreements. This approach is reflected, for example, in Commonwealth legislation concerning various types of national environmental standards (motor vehicles, fuel quality, radiation protection and nuclear safety, water efficiency labelling and energy efficiency). It is also evident in arrangements with respect to greenhouse and energy reporting and product stewardship.¹⁰⁰ Under these various legislative schemes, any relevant state legislation will normally operate alongside, and unimpeded by, the relevant Commonwealth legislation.

There are two particular means by which Commonwealth environmental legislation frequently has been restricted in its scope so as to not overlap or over-ride state legislation on the same subject-matter.

First, the Commonwealth has often limited the operation of its legislation to 'places' over which it has exclusive legislative jurisdiction by virtue of section 52 of the *Constitution*. In the case of offshore waters, it has reflected the terms of the *Offshore Constitutional Settlement (OCS)* adopted in 1978,¹⁰¹ by applying its legislation with respect to marine pollution, fisheries, minerals and petroleum only in the 'Commonwealth' waters extending beyond the coastal section that is subject to state jurisdiction under the *OCS*.¹⁰² It also should be noted that various aspects of the biodiversity conservation component of the *EPBC Act* (for example, regarding the protection of listed endangered species and ecological communities and the establishment and management of protected areas) only apply to areas under Commonwealth jurisdiction.¹⁰³

Second, the operation of certain Commonwealth environmental legislation has been confined to functions that rest with the Commonwealth rather than the states, such as the regulation of exports and imports. This is evident in legislation governing hazardous wastes, endangered species, illegal logging, moveable cultural heritage and certain industrial chemicals, much of which is designed to implement international agreements regulating global trade in the relevant items.¹⁰⁴

97 *Therapeutic Goods Act 1989* (Cth), ss 6AAA, 6AAAE (and see also ss 6AAB–6AAC in relation to the constitutional basis for conferral); *Agricultural and Veterinary Chemicals Act 1994* (Cth), ss17–18; *Gene Technology Act 2000* (Cth), s 17; a more limited form of conferral in relation to notifications is provided for in s 41 of the *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth).

98 *Therapeutic Goods Act 1989* (Cth), s 6B; *Agricultural and Veterinary Chemicals Act 1994* (Cth), s 18.

99 *Therapeutic Goods Act 1989* (Cth), s 6AAAD.

100 Whilst the *Products Stewardship Act 2011* (Cth) contains a pre-emptive provision relating to mandatory product stewardship schemes (s 39), its only application to date (in relation to televisions and computers) was the result of a prior consensus reached between Commonwealth and State Ministers rather than unilateral Commonwealth action.

101 See *Coastal Waters (State Powers) Act 1980* (Cth) and *Coastal Waters (State Title) Act 1980* (Cth), which form part of a uniform legislative scheme; for further details see <<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/TheOffshoreConstitutionalSettlement.aspx>>.

102 In the case of some Commonwealth fisheries zones located in the northern offshore waters, and in the case of all petroleum-related activities, it has gone further in terms of collaborative arrangements by establishing Joint Authorities comprised of the respective State and Commonwealth Ministers to administer the relevant Commonwealth legislation.

103 For example, the Act provides for the preparation by the Commonwealth of recovery plans for threatened species and ecological communities listed under the Act, and also for threat abatement plans to be prepared in relation to listed threatening processes. However, it only proscribes actions by a Commonwealth agency in contravention of such plans (s 268) and imposes a duty to implement such plans only 'to the extent that they apply in Commonwealth areas' (s 269(1)). Where a recovery plan or threat abatement plan applies outside a Commonwealth area in a particular state, as is very common, the Commonwealth 'must seek the cooperation of the State' with respect to implementation of the plan (s 269 (2)).

104 See relevant legislation at Appendix 1 to this report.

2.3.1.4 Commonwealth environmental legislation that applies directly within the states

After taking the above arrangements into account, there remain only a small number of instances in which Commonwealth legislation is capable of operating directly within the states in a manner that pre-empts or duplicates arrangements under state laws on the same subject-matter. In a few instances, the Commonwealth has considered it appropriate to legislate so as to cover the field with respect to a particular environmental matter, usually for the purpose of implementing relevant treaty obligations - for example, with respect to nuclear-related matters addressed in international agreements. The states have also agreed to have the Commonwealth deal comprehensively with the regulation of ozone depleting substances, in pursuance of international treaty obligations under the *Vienna Convention* and the *Montreal Protocol*.

In other instances, Commonwealth legislation may appear to operate directly within a state without necessarily over-riding state laws on the same subject-matter, but in each instance closer examination reveals that there is an underlying political accord between the Commonwealth and the states to allow for Commonwealth regulation and that the Commonwealth has not sought to act unilaterally or coercively in these particular situations.¹⁰⁵

This paper has not addressed in this overview the *EPBC Act*, which has the capacity to apply to activities being undertaken within, and subject to, equivalent state environmental laws, and which has been criticised for allegedly duplicating these state measures. The paper deals with this topic separately in the following section, after detailing the proposals for legal mechanisms to facilitate the strategic leadership role that the Panel recommends the Commonwealth should adopt.

2.3.1.5 Commonwealth financial assistance legislation

Finally, the Panel notes that there are instances over the past 40 years where the Commonwealth has sought to influence environmental management at the state level through legislation for the provision of direct financial assistance to the states, relying on section 96 of the *Constitution* (as discussed above). An early example of this approach which is not widely appreciated, dates back to the mid-1940's, when the Commonwealth provided direct financial assistance to the states for public housing development on the condition that the states adopt 'town planning' measures to ensure the orderly development of Australian cities in the anticipated post-war boom.¹⁰⁶ All states accepted this scheme and thus began the development of modern state planning laws in Australia, at first instance via the amendment of local government legislation, but eventually as stand-alone measures. It is these state planning laws in their contemporary form that still provide a core element of environmental law in Australia today.

The use of section 96 in this manner by the Commonwealth to drive the development of appropriate environmental planning laws at the state level is a matter to which this paper later returns when it recommends the use of Commonwealth financial assistance as one means of securing state cooperation in the implementation of Commonwealth-developed national strategic measures.

2.3.2 Analysis

APEEL does not see the need to propose wholesale changes to the legislative schemes just described, which for the most part reflect the desirable goal of promoting coordinated approaches to Commonwealth and state environmental regulation. In particular, as indicated above, the Panel does not advocate that the Commonwealth should take over from the states (and regional and local authorities established within the states) the wide range of environmental

¹⁰⁵ For example, the Commonwealth's *Water Act 2005* (Cth), which appears to reflect a more centralist and coercive approach, is based on the terms of the Murray-Darling Basin Agreement made between all the Basin State jurisdictions and the Commonwealth (and which is included in the first Schedule to the Act). In addition, the constitutionality of this Act was underpinned by the use of s 51(xxxvii) of the *Constitution* to enable a referral of state powers to the Commonwealth. The Commonwealth drove a hard bargain in terms of securing stronger powers for the Murray-Darling Basin Authority in return for the allocation of substantial Commonwealth funds for the buy-back of water from irrigators for environmental flows and for infrastructure works designed to increase water efficiency. Nevertheless, the legislation is ultimately the product of a political agreement between all the governments involved.

¹⁰⁶ See *Commonwealth and State Housing Agreement Act 1945*, cl 3.1: 'Each State shall ensure that adequate legislation exists in the State to enable it at all times to control throughout the State - (a) rental housing projects under this Agreement; (b) slum clearance; and (c) town planning'.

regulatory functions that they currently perform. Instead, the principal pathway that is urged for the re-design of the existing environmental federalism system is for the Commonwealth to assume responsibility for developing the strategic parameters of the system, rather than relying on the current consensus-based approach that involves all jurisdictions. In the following section on options for reform, this paper outlines in more detail the specific means, in the form of legal mechanisms, by which the Commonwealth could follow this new pathway.

Alongside this new approach, the Panel envisage a continued reliance on the existing legislative mechanisms as described above, which together form different elements of the federalism spectrum referred to in the previous section of this paper (see also Recommendation 2.10 below). The Panel also strongly support an ongoing direct role for the Commonwealth in environmental assessment and approvals and will address these matters in more detail below, when this paper considers the future regulatory role of the Commonwealth.

2.3.3 Proposals for reform: Key elements of a new Commonwealth strategic role

This paper sets out below the specific legal mechanisms which the Panel believe the Commonwealth could employ to pursue a national strategic leadership role on environmental matters. In particular, the paper describes the types of strategic environmental instruments that the Commonwealth should develop; the process by which these instruments would be adopted; and the means by which the Commonwealth can act to ensure their implementation by the states. The paper will also address the question of how to ensure that the Commonwealth acts proactively to develop strategic environmental instruments and pursue their implementation, given that particular governments may adopt differing attitudes to this responsibility from time to time.

2.3.3.1 Commonwealth Strategic Environmental Instruments (CSEIs)

APEEL proposes that Commonwealth strategic leadership on environmental matters should be pursued through the development by a relevant Commonwealth authority (see further below as to the nature of this authority) of both national and regional strategic environmental instruments, with different types of instruments being involved in these respective contexts. These are summarised in the following table:

Commonwealth Strategic Environmental Instruments (CSEIs)

NATIONAL ENVIRONMENTAL MEASURES (NEMs)	REGIONAL ENVIRONMENTAL PLANS (REPs)
Strategies	Terrestrial Landscape-Scale Plans
Programs	Marine Regional Plans
Standards	
Protocols	

2.3.3.1.1 National Environmental Measures (NEMs)

Looking first at NEMs, the Panel proposes an adaptation of the range of instruments currently provided for by section 14(3) of the *National Environment Protection Council Act 1994 (NEPC Act)* that are able to constitute a NEPM - namely a standard, goal, guideline and protocol. This paper suggests the addition of **strategies** and **programs** in place of goals and the exclusion of guidelines, which are documents essentially of an informal and advisory nature that should not be treated in the same fashion as the other three categories. The Panel believe that the NEPC uniform legislative scheme

should be abolished¹⁰⁷ and that the Commonwealth should adopt legislation under which it assumes responsibility for the development of NEMs in relation to the broad range of matters outlined in the proposed SCEI. The Panel see no particular constitutional impediment in this regard.

National environmental strategies would comprise statements that set out overarching goals and objectives with respect to particular environmental matters. This is not a new concept and there have been many examples in the past, such as the *National Biodiversity Strategy*, the *National Climate Change Strategy*, and the *NSESD*. The difference however is that the Panel proposes that the Commonwealth should assume responsibility for the design and formal adoption of national environmental strategies in the future, rather than having such instruments adopted through COAG or a Ministerial Council. The Commonwealth should consult extensively with the states and key stakeholders in the course of their development, but it would assume ultimate responsibility for their adoption. This approach stands in distinct contrast with the current approach in which the approval of all jurisdictions is generally required for the adoption of national environmental strategies.

To help explain the proposals in this regard, Australian Panel of Experts on Environmental Law, *The Foundations for Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017) recommends that a new national strategy on sustainable development/sustainability should be developed by the Commonwealth. APEEL sees this as one of the highest priorities for the Commonwealth in terms of pursuing its suggested leadership role on environmental matters. In developing such a strategy, the Commonwealth could reconsider the core definition and related principles concerning ESD, with the aim of having these reflected in the next generation of environmental laws. It also could develop a set of targets that are designed to enable the achievement of the United Nation's *Sustainable Development Goals (SDGs)* and *Global Agenda 2030* in Australia. This would constitute a much more detailed and fine-grained form of strategy statement that would involve the development of goals and targets across a wide range of topics.¹⁰⁸

Turning to the idea of **national environmental programs**, the Panel suggests that these would be instruments developed by the Commonwealth that outline actions needing to be undertaken across all levels of government in order to achieve specific environmental outcomes. They would differ from national environmental strategies by being focused essentially on practical action rather than aspirational goals. As with strategies, the Panel see no significant limitation on the types of environmental matters that might be made the subject of a national environmental program, either in policy or constitutional terms. To a considerable extent, the implementation of national environmental programs would be dependent upon Commonwealth financial assistance, a matter discussed further below.

To illustrate the nature of this particular type of national environmental measure, the paper suggests here several ideas for programs that would contribute to the protection of biological diversity:

First, noting that Australian Panel of Experts on Environmental Law, *Terrestrial Biodiversity Conservation and Natural Resources Management Governance* (Technical Paper 3, 2017) recommends the completion of the National Reserve System (NRS), a Commonwealth program could provide a means of pursuing this recommendation by identifying specific targets for additions to the NRS, possibly based on recommendations arising from the regional plans canvassed below. One part of this program could involve the adoption of consistent criteria and terminology for the classification of different categories of protected area across all jurisdictions.¹⁰⁹

Second, taking a specific aspect of the protected areas system that has attracted attention recently - the idea of a national network of wildlife corridors - the Commonwealth could develop a wildlife corridors program that might prove more effective (and less easily ignored) than the National Wildlife Corridors Plan adopted by the Commonwealth in

107 If the Commonwealth were to repeal its *NEPC Act*, this would for all practical purposes bring an end to the uniform scheme, even if the corresponding state legislation remained on the statute books.

108 For an insightful evaluation of how another developed country, Germany, could implement the SDGs and the Global Agenda 2030, see German NGO Forum on Environment and Development, *Position Paper: Implementation of the Global 2030 Agenda for Sustainable Development in Germany*, March 2016, available at <<https://www.globalpolicy.org/component/content/article/271-general/52849-implementation-of-the-global-2030-agenda-for-sustainable-development-in-and-by-germany.html>>.

109 APEEL recognise that any program related to completion of the NRS would have to link closely to regional environmental plans of the kind that is proposed below, insofar as these plans can be expected to also address this topic.

2012, which has since been abandoned.¹¹⁰

Third, in relation to endangered species protection, a national endangered species program could provide for consistency of approach across all jurisdictions to listings and a coordinated approach to the development of recovery programs - possibly linked also to a national ecological restoration strategy.

Turning to a different context in which a national environmental program might be envisaged, the Panel recognises that one of the greatest challenges to effective environmental management in Australia is the lack of adequate data upon which to base both policy and decisions. The Panel notes in this regard, the recommendation in Technical Paper 3 on the need for Commonwealth leadership with respect to monitoring, evaluation and reporting. The need for better environmental data and monitoring of environmental conditions has also been noted by Woinarski and Blakers, citing several *SOE Reports*.¹¹¹ The Panel believe there is a compelling need for leadership by the Commonwealth in this context through the development of a national environmental programme with respect to environmental data collection, monitoring, evaluation and reporting, to be implemented in collaboration with relevant state, regional and local bodies.

Finally, with respect to climate mitigation and the promotion of clean energy, many of the policy options canvassed in Australian Panel of Experts on Environmental Law, *Climate Law* (Technical Paper 5, 2017) and *Energy Regulation* (Technical Paper 6, 2017) could be framed within a national climate change and clean energy strategy that establishes specific national emissions and renewable energy targets, which could then be complemented by a national program that identifies the key mechanisms to be developed respectively by the Commonwealth and the states for the achievement of these targets.

Turning next to the idea of **national environmental standards**, the Panel notes that these have been an important component of the various NEPMs that have been developed over the past twenty years by the NEPC (for example, in relation to ambient air quality and diesel vehicle emissions). The Panel see particular advantages in having a Commonwealth environmental authority develop national environmental standards in terms of reducing the time required for their adoption or amendment, and also with respect to ensuring their implementation through the various mechanisms as discussed below. As noted above, it is envisaged that national environmental standards would operate in most instances as a floor rather than a ceiling or, in other words, that they would constitute a mandatory minimum standard, with the states left free to adopt more stringent standards if they so desire. The Panel acknowledges that there may be some limited circumstances where national standards may constitute a ceiling and would over-ride any contrary state standards of a stricter nature.¹¹²

One example offered of a possible new national environmental standard is with respect to the establishment of regulatory controls for carbon emissions from coal-fired power plants. Should a regulatory approach (as distinct from a market or tax-based approach) be considered a desirable means of meeting emissions reduction targets set in a national environmental strategy, the relevant standards for carbon emissions from power plants could be prescribed in a national environmental standard.

Finally, with respect to NEMs, it is envisaged that **national environmental protocols** could be used for various more technical purposes, for example, to develop various types of national environmental and sustainability indicators that would provide a framework for future reporting on the state of the Australian environment and the progress that is being made towards developing a more environmentally and socially sustainable society. Another application of a guideline or protocol could be for the purpose of establishing a common approach across all jurisdictions within Australia to the operation of biodiversity offsets, where currently there is a diversity of approaches evident.

APEEL acknowledges that in some of the circumstances identified above, implementation of a NEM may require the adoption of legislation to set in place appropriate regulatory or other mechanisms. This would most likely be

¹¹⁰ For details, see Department of Sustainability, Environment, Water, Population and Communities, *National Wildlife Corridors Plan*, Australian Government: Department of Sustainability, Environment, Water, Population and Communities, <<http://www.environment.gov.au/topics/biodiversity/biodiversity-conservation/wildlife-corridors>>.

¹¹¹ J Woinarski and M Blakers, above n 91, citing in support S Morton, and A Tinney, *Independent review of Australian Government environmental information activity: Final report* (Canberra, Department of Sustainability, Environment, Water, Population and Communities, 2012).

¹¹² In the United States this has occurred only in three contexts: motor vehicle emissions, nuclear health and safety and pesticides packaging and labelling.

at the state level in most instances, but it may also involve the Commonwealth where this is necessary to influence activities of Commonwealth bodies or undertaken on Commonwealth land, or possibly where states have declined to cooperate in the implementation of a particular measure. In the case of the states, the Panel understands that the Commonwealth cannot compel the passage of implementing legislation by the state parliaments and that it is possible that some NEMs could therefore face significant obstacles with respect to their implementation where the necessary legislation has not been adopted at the state level. This paper outlines below two mechanisms (direct financial assistance and conditional pre-emption) that the Panel proposes should be attached to this new system for NEMs and which may have a strong influence in terms of inducing states to cooperate with respect to the implementation of such measures, including by way of any necessary legislative action.

2.3.3.1.2 Regional Environmental Plans (REPs)

APEEL sees (REPs) as a critical element of the new structure of Commonwealth strategic environmental instruments, particularly as they should integrate with, and provide a basic means for the implementation of NEMs, especially national environment strategies and programs. Delivery of nationally-focused strategies, particularly those focused on biodiversity protection and natural resources management, will require their integration with related measures at the regional level.

The Panel envisage two specific forms of strategic instruments at the regional level that should be developed by the Commonwealth, in each instance involving an expanded application of processes that are already provided for in the *EPBC Act*.

First, as proposed in Technical Paper 3 on the management of terrestrial biodiversity, the Panel recommends the pursuit of **terrestrial landscape-scale plans** at appropriate bioregional scales through a nationally coordinated framework. The Commonwealth could lead this process by coordinating the preparation of such plans in consultation with the states and non-government stakeholders. A key element of this approach that is strongly promoted in Technical Paper 3 is the need to coordinate existing, fragmented and sometimes overlapping natural resources planning processes across all levels of government. The development of these plans will also involve sensitive and difficult challenges with respect to the acknowledgment of the various types of aboriginal land tenures that exist across Australia.

As Technical Paper 3 also recognises, a number of subsidiary questions need to be addressed in relation to this broad proposal. One such question which is only briefly addressed in Technical Paper 3 is what would constitute 'appropriate' bioregional scales for such plans, in particular, whether the existing *Interim Biogeographic Regionalisation for Australia (IBRA)* system (which recognises 89 bioregions and 419 sub-regions) provides a suitable framework for landscape scale planning.¹¹³ This system is focused presently on the identification of large, geographically distinct areas of land with common characteristics for the purpose of identifying gaps in comprehensiveness in the National Reserves System (NRS), but it could provide the structure for the broader system of bioregional planning advocated in Technical Paper 3.

As recommended in Australian Panel of Experts on Environmental Law, *Marine and Coastal Issues* (Technical Paper 4, 2017), the Panel also see the need for a new, **integrated marine planning framework** based on the development of marine regional plans for specific marine bioregions. In a parallel approach to the use of the IBRA system for the terrestrial environment, this framework could be based upon the *Integrated Marine and Coastal Regionalisation of Australia (IMCRA v4.0)* system, which provides the regional spatial framework for classifying Australia's marine environment into bioregions.¹¹⁴

With respect to each of the two types of regional environmental plan recommended in this section, the Panel recognises that there is an existing Commonwealth framework in place under the *EPBC Act* that can facilitate their use. What is needed in the next generation of environmental laws is, first, a mandatory requirement for the preparation by the Commonwealth of bio-regional plans (both terrestrial and marine)

¹¹³ For details of the IBRA, see Department of the Environment and Energy (Cth), *Australia's bioregion framework*, Australian Government: Department of the Environment and Energy <<http://www.environment.gov.au/land/nrs/science/ibra/australias-bioregion-framework>>.

¹¹⁴ For details of the IMCRA, see Department of the Environment and Energy (Cth), *Integrated Marine and Coastal Regionalisation of Australia*, Australian Government: Department of the Environment and Energy <<http://www.environment.gov.au/node/18075>>.

and, second, new mechanisms (in the form of implementation plans) for ensuring that the outcomes of these planning processes are fully implemented by both the Commonwealth and the states (see further below).

RECOMMENDATION 2.3

*The Commonwealth, in pursuance of a national leadership role on environmental matters, should assume responsibility for the development of the following types of **Commonwealth Strategic Environmental Instruments (CSEIs)**:*

- (i) **National Environmental Measures (NEMs)**, comprising strategies, programs, standards and protocols; and*
 - (ii) **Regional environmental Plans (REPs)**, comprising terrestrial landscape-scale plans and marine regional plans.*
-

2.3.3.1.3 The process for the adoption of CSEIs

At the outset, it will be necessary to determine where responsibility should be placed within the Commonwealth for managing the process of developing and adopting the various types of Commonwealth strategic environmental instruments described above. The Panel anticipates that this responsibility would be vested by the next generation Commonwealth environmental legislation in a new Commonwealth environmental institution and this paper canvasses below some options with respect to the nature of this institution (see Recommendation 2.14(1)).

As noted above, there is also a question as to whether, and in what way, the Commonwealth Environment Minister should be involved in the development and approval of such measures, given that it may be necessary from time to time for the Minister to pursue the adoption of implementing Commonwealth legislation in relation to a particular instrument. If primary responsibility rests with an independent Commonwealth institution for producing such instruments, it will be important to ensure that there is strong support for their implementation within the Commonwealth government more generally, particularly should new Commonwealth legislation be required for the purposes of implementation of particular instruments.

It is reasonable to expect that the Commonwealth institution responsible for the development of strategic environmental instruments would consult closely with the Commonwealth government of the day through the Environment Minister and Department concerning any proposed new instruments. In most instances, this should result in the generation of an appropriate level of commitment within the Commonwealth government to the taking of all action necessary to ensure implementation of such instruments at the Commonwealth level, including by way of securing any necessary legislation. However, this paper envisages two specific mechanisms that might serve to ensure a high degree of cooperation and coordination in this regard.

First, there is the possibility that both national and regional strategic environmental instruments could be declared to be legislative instruments under the *Legislative Instruments Act 2003 (Cth)*, which would mean that they must be tabled in the Commonwealth Parliament and would be subject to the possibility of disallowance by a resolution of either house of the Parliament. This form of legislative review is already provided for under the *NEPC* legislation in relation to NEPMs (s 21) and also with respect to the Murray-Darling *Basin Plan* prepared under the *Water Act 2006 (Cth)*. Such an approach would provide a clear flag to indicate if there may be difficulties associated with securing the future passage through the Commonwealth Parliament of any legislation required to enable the implementation of a particular instrument at the Commonwealth level, and might serve also to indicate the level of acceptance on the part of the states of particular instruments. Should an instrument be disallowed, this would clearly reflect strong resistance from either or both directions and the need for further negotiation of its content.

The second possibility is for a power to be vested in the Commonwealth Environment Minister to ‘over-rule’ any Commonwealth strategic environmental instrument that the relevant Commonwealth institution has decided to approve. The power to do so should be exercisable by the Minister only upon limited grounds, for example, related to the perception of an over-riding ‘public interest’ in not allowing the instrument to come into operation. The Panel are wary of such a procedure insofar as it may enable a Commonwealth government that is antipathetic or even hostile to environmental concerns to undermine the system by over-ruling all new instruments approved by the Commonwealth institution; but recognise that there is a realpolitik associated with the development and implementation of such instruments (particularly those that take the form of strategies and programs) which necessitates buy-in by the government of the day through its Environment Minister if this system is to be effective. The trade-off for securing such buy-in, therefore, might be to vest a residual power to disapprove a specific instrument in the Commonwealth Environment Minister, who would then have to publicly justify taking such action on ‘public interest’ grounds. The Panel makes no firm recommendation at this time concerning this particular safeguard mechanism and look forward to canvassing its merits with interested parties.

Turning to the question of the specific process by which strategic environmental instruments would be developed, the Panel suggests that the future generation of Commonwealth environmental legislation should spell out the various steps required to be pursued by the relevant Commonwealth institution, including requirements for giving notice of an intention to develop measures, for consultation with all key stakeholders (including state governments) in the course of their preparation, and for the final approval of measures by the relevant Commonwealth institution.

RECOMMENDATION 2.4

The next generation of Commonwealth environmental legislation should spell out the process for the development of Commonwealth strategic environmental instruments and provide for such instruments to be treated as ‘legislative instruments’ under the Legislative Instruments Act 2003 (Cth).

2.3.3.2 Implementation plans (state and Commonwealth)

Once a strategic environmental instrument has been adopted by the Commonwealth, the question arises as to how best to secure its implementation - both by the states and by relevant Commonwealth agencies. This question will arise at the state level irrespective of whether particular states have participated in the preparatory process. This paper therefore addresses first the question of how to secure state involvement in the implementation of approved Commonwealth strategic environmental instruments and then consider the same question in the Commonwealth context.

APEEL wish to draw upon the experience in the United States with respect to the implementation of federal environmental standards (as outlined in detail in the *Background Paper*) by proposing that the principal mechanism for securing the implementation of Commonwealth strategic environmental measures should be an **implementation plan**. Such plans would need to be developed by the states for each relevant strategic instrument and submitted to the proposed, new Commonwealth environmental institution for its approval. The next generation of Commonwealth environmental legislation would need to include a provision that invites each state to submit a State Implementation Plan (SIP) within a prescribed time after a strategic measure has been adopted (say, six to twelve months).

An important element of this proposed scheme is that in some instances it may be necessary for states to make changes to their existing laws and their supporting administrative arrangements (or even possibly to enact new laws) in order to ensure that they are able to fully and effectively implement particular Commonwealth strategic environmental instruments. For example, the Panel envisage that this approach could be used to pursue implementation at state level of the proposals advanced in Australian Panel of Experts in Environmental Law, *Democracy and the Environment*

(Technical Paper 8, 2017) with respect to the recognition of both substantive and procedural environmental rights.¹¹⁵ Providing stronger incentives for the states to improve and upgrade their environmental laws from time to time is a critical objective of the system this paper is proposing, one which is largely absent from the current environmental federalism system. This approach would allow those elements of environmental governance capacity which are best pursued at the Commonwealth level to be married with other elements that tend to be best undertaken at the state, regional and local levels. There is a need therefore to provide for a specific mechanism whereby such changes could be identified and agreed upon within SIPs.

The mechanism that has been employed for this purpose under the US system is 'delegation', which involves the Environmental Protection Agency in reaching agreement through implementation plans with each state as to the relevant state legislative and administrative measures that will be relied upon by the state concerned for the purpose of implementing federal standards (in the case of clean air) or by the approval of state licensing systems (in the case of clean water). In each instance, federal regulatory controls may be brought into operation so as to pre-empt relevant state measures if a state does not receive the required Federal delegation (see further below regarding how this mechanism might be adapted to the Australian situation). There is also a reservation of capacity for enforcement action to be pursued against non-complying parties under the relevant federal legislation (both by the EPA and citizens), even where state legislation is being used under an EPA delegation to regulate air and water quality.

The Panel envisage that this approach could be adapted in the Australian context to allow for the 'accreditation' of state laws and administrative arrangements by the Commonwealth through a SIP, with this being conditional, where it appears necessary, upon appropriate amendments of particular laws or the adoption of new laws by the relevant state government. Whilst the concept of accreditation has proved particularly contentious in relation to its proposed operation through approval bilateral agreements under the *EPBC Act* (see further below), there are significant differences from these previous and, to date, unsuccessful attempts to apply this concept from the scheme that is recommended here. In particular, the approach this paper proposes does not involve a withdrawal by the Commonwealth from its existing role with respect to environmental assessment and approvals. Instead, to the contrary, a failure by a state to secure accreditation of its relevant legislation and administrative arrangements could lead to its own environmental assessment and approval measures being pre-empted by the Commonwealth legislation (see further below).

APEEL believe that placing responsibility for the conclusion of SIPs with the states in an independent Commonwealth environmental institution would lead to a more rigorous accreditation process than has been evident with respect to the negotiation of bilateral agreements under the *EPBC Act*. The relevant Commonwealth legislation could provide, for example, for publication of, and public consultation concerning, draft SIPs before their conclusion.

There should also be provision in the future legislation that if a state fails or declines to prepare a SIP, the Commonwealth would be empowered to prepare the required plan for that state. In the United States, the threat of this action being taken by the federal government has proven to be a powerful incentive for states to develop their own implementation plans, rather than have it done for them by the federal EPA. This is primarily because the states prefer to tailor the actions identified in the implementation plan to their particular legal and administrative arrangements as far as possible, which is less likely to be the case where the federal government is making these decisions for them.¹¹⁶

APEEL acknowledge that, depending on the nature of the particular strategic environmental instrument, there may be significant limitations with respect to what a Commonwealth-prepared SIP could propose, in the absence of appropriate enabling or supporting legislation within the relevant state or states. In such circumstances, the

115 APEEL suggest that the recognition of the proposed right to a clean and healthy environment could be picked up by the Commonwealth as a requirement that it presents to the states as a condition for securing approval of a particular SIP that is attached to an appropriate strategic instrument. It is unlikely that there would be an instrument devoted specifically and primarily to this topic, but if, for example, a new national clean air strategy or standard were to be adopted, the Commonwealth might be justified in stipulating this fundamental right as a measure it wishes to see adopted at the state level as one means of securing implementation of that instrument. The Panel believes the nexus between the particular instrument and the fundamental right in this instance would be sufficient to support such an approach by the Commonwealth.

116 The strength of this attitude is demonstrated by the fact that those states currently involved in challenging the validity of the *Clean Power Plan* have been working simultaneously on the preparation of their own implementation plans to cover the possibility that their legal action may fail. Whether this may change as a result of the election of President Trump remains to be seen, given the likelihood that the administration will try to withdraw the Plan.

Commonwealth will need to consider to what extent, and by what means, it could facilitate implementation of the relevant instrument through its own legislative measures. Even if this is not considered feasible or desirable, there is a further mechanism (conditional pre-emption) outlined below that the Panel recommends the Commonwealth be empowered to use as a means of inducement to secure state cooperation with respect to the taking of all actions, including the adoption of new legislation where necessary, provided for under a SIP.

APEEL do not consider that this scheme for the implementation of Commonwealth strategic environmental instruments at the state level would face constitutional difficulties in terms of the argument that it impinges upon the fundamental nature of a state's existence (see the discussion of constitutional powers above). The states will have a choice as to whether to develop implementation plans, and in so doing, to commit to any amendments of existing laws or adoption of new laws required to implement a particular measure. A failure to develop a SIP, or to secure approval for one, would have the consequence that the Commonwealth would do this job for the state concerned and may then use the conditional pre-emption mechanism where this appears necessary to ensure delivery of its implementation plan (see further below).

It is also desirable for implementation plans to be produced by relevant Commonwealth agencies in order to ensure that its strategic environmental instruments are fully implemented, where relevant, at the Commonwealth level. This would involve the relevant legislation requiring Commonwealth departments and authorities whose responsibilities and functions are covered by a particular instrument to produce Commonwealth Implementation Plans (CIPs) for approval by the proposed new Commonwealth environmental institution. There are two matters that will need to be addressed in order to ensure that Commonwealth is able to pursue implementation of its strategic environmental instruments via the development of CIPs. First, the Commonwealth needs to develop a more detailed system of environmental regulation that can be applied to activities undertaken by Commonwealth entities or on Commonwealth land; and second, it needs to be clear that the Commonwealth institution responsible for the administration of this system of environmental regulation, and hence for the development of CIPs to give effect to Commonwealth strategic environmental instruments, is separate and distinct from the Commonwealth institution that is responsible for developing such instruments and approving related CIPs.

The first issue arises because it is not possible, for constitutional reasons, for state environmental laws to apply to activities undertaken by Commonwealth departments, agencies and bodies or to activities undertaken on Commonwealth land.¹¹⁷ There is presently no environmental regulatory scheme at the Commonwealth level (equivalent to those established in each state) that will allow, for example, for the issue of environment licenses, protection orders and clean-up orders by the Commonwealth. This is a long-standing problem that has been of concern to state environment protection authorities for many years,¹¹⁸ for example, where site contamination has occurred on Commonwealth land, but is threatening or has caused groundwater contamination beyond the boundaries of such land. This paper has already addressed this issue in Recommendation 2.2 above by proposing that the Statement of Commonwealth Environmental Interests (SCEI) include a commitment to establishing such a regulatory scheme at the Commonwealth level.¹¹⁹

The second issue involves the avoidance of an obvious conflict of interest. Whichever Commonwealth institution is responsible for the implementation of strategic environmental instruments through this regulatory scheme should be responsible for developing the relevant CIPs, but their approval should be the responsibility of the Commonwealth institution that also is responsible for approving SIPs. There is an obvious need to separate the administration of the strategic environmental instruments scheme from the Commonwealth's environmental regulatory scheme so that they are performed by different entities. This would mean that any potential conflict of interest issue would thereby be avoided.

¹¹⁷ See *Australian Constitution*, ss 51–52 (and also s 109 with respect to activities of Commonwealth entities authorised by Commonwealth legislation). Note that although the *Commonwealth Places (Application of Laws) Act 1970* (Cth) provides for state laws to apply to Commonwealth places, it does not include planning and environmental protection laws.

¹¹⁸ See for example, Environment and Natural Resources Committee, Parliament of Victoria, *Report on the Environmental impact of Commonwealth Activities and Places in Victoria* (1994) (it should be noted that the Commonwealth refused to participate in this Inquiry).

¹¹⁹ The alternative solution, of having the Commonwealth accept the application of state environmental and planning laws to its activities and places, has never appeared to have been acceptable politically to the Commonwealth, and the Panel has opted therefore for the alternative solution of having the Commonwealth establish its own environmental regulatory scheme to cover these situations.

RECOMMENDATION 2.5

*The implementation of each Commonwealth strategic environmental instrument should be addressed at first instance by the development of an **implementation plan** by each state (and also any affected Commonwealth agency) for approval by the relevant Commonwealth environmental institution, which should also have the power to:*

- (i) develop such a plan for states that fail to do so; and*
 - (ii) to accredit state environmental legislation and administrative arrangements through an approved implementation plan.*
-

2.3.4 Mechanisms for securing state involvement

There is a significant practical question as to what can be done to ensure that the states will cooperate in the implementation of strategic environmental instruments developed by the Commonwealth. This paper has already discussed the challenge in relation to the development of implementation plans by the states, but there is also the question of ensuring that the states perform the actions required of them by SIPs for the purpose of implementing strategic environmental measures. These actions may include the amendment of relevant legislation, adoption of new legislation, reorganisation of administrative arrangements and the eventual attainment of any goals, targets or standards that may be prescribed by such measures. This is a fundamental aspect of the reforms that the Panel is proposing to the current model of environmental federalism, as it cannot be assumed that the states will readily embrace and engage with this radically different scheme. Once more, this paper will draw to some extent on the approach and experience in the United States to propose some means by which this practical challenge can be addressed.

The Panel believes there are two specific mechanisms that the Commonwealth can employ in a complementary manner which will help to secure state cooperation with respect to both the development of SIPs and their subsequent implementation. These tools take the form respectively of a carrot and a stick:

- the ‘carrot’ is the **provision of financial assistance by the Commonwealth to the states** to support their implementation efforts; and
- the ‘stick’ is the threat of **conditional pre-emption of state regulatory powers**¹²⁰ where states fail to cooperate in the implementation of Commonwealth strategic environmental instruments or, despite making some effort to do so, fail to attain the goals, targets or standards established by such instruments.

The Panel envisage that in most circumstance these mechanisms would operate alongside each other, with the common factor being the preparation by the states of SIPs which, once approved by the Commonwealth, would pave the way for the provision of financial assistance to assist with implementation at the state level, whilst also avoiding the threat of Commonwealth pre-emption of relevant state legislation. As noted above, it is open to states to elect not to prepare a SIP in relation to a particular Commonwealth strategic environmental measure, in which case they would be ineligible for any Commonwealth financial assistance linked to that measure. In such circumstances, the Panel has proposed that the Commonwealth would be empowered to prepare a SIP for the relevant state; should the state fail subsequently to pursue the measures provided for in this Plan, the sanction of conditional pre-emption would then come into play, thus providing an additional and powerful inducement for state cooperation from the outset.

¹²⁰ This paper describes this mechanism as ‘conditional pre-emption’ because it would only come into operation in the event that a state fails to cooperate in the implementation of a national strategic environmental measure and could cease to operate at a future date where state implementation comes into play; in this respect, it is different from full pre-emption, which involves the permanent and unqualified over-riding of inconsistent state legislation in all circumstances by a particular Commonwealth law.

APEEL believe that each of these tools has a clear constitutional foundation. In the case of financial assistance, this is provided by section 96 of the *Constitution*, which provides that the Commonwealth Parliament ‘may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’. In relation to conditional pre-emption, this is provided by section 109 of the *Constitution*, which renders invalid any state law to the extent that it is inconsistent with a valid law of the Commonwealth. There has been extensive past experience with the use of section 96 to achieve particular outcomes desired by the Commonwealth (including with respect to environmental matters), but little or no experience with the use of section 109 on a conditional basis for such purposes (unlike the US, where conditional pre-emption has been a cornerstone of federal environmental regulation).¹²¹ This paper will set out next some more detailed proposals concerning how each of these mechanisms might be used by the Commonwealth.

RECOMMENDATION 2.6

The Commonwealth should pursue state cooperation with respect to the development and implementation of national strategic environmental instruments by:

- (i) providing financial assistance to the states to support their implementation efforts, and*
 - (ii) using the mechanism of conditional pre-emption of state regulatory powers, in particular with respect to environmental assessment and approval, where states fail to cooperate in the implementation of national instruments or to attain the goals, targets or standards established by such instruments.*
-

2.3.4.1 Direct financial assistance

With respect to **Commonwealth direct financial assistance to the states**, the Panel notes that this would provide the opportunity for states to choose the particular regulatory measures and administrative arrangements that they prefer to rely upon for the purpose of implementing Commonwealth strategic environmental instruments, subject to the accreditation of these by the Commonwealth via an approved SIP. Relevant measures can be designed by the states to suit their individual political, geographical and economic circumstances and there will also be the opportunity in most circumstances for states to set more stringent targets or standards if they so desire.

In light of the High Court’s decisions in the *School Chaplain’s* cases, discussed above, the financial assistance to be provided by the Commonwealth should be based upon section 96 specific purpose grants rather than the exercise of the Commonwealth’s executive powers (see the discussion of this issue above, in section 2.1 above on the constitutional dimension of environmental federalism). APEEL envisage that the Commonwealth would adopt specific financial assistance legislation under section 96 of the *Constitution* that would tie the availability of state funding for particular strategic environmental measures to the provision by the states of satisfactory SIPs. There are precedents for such legislation in the form of the *Natural Resources Management (Financial Assistance) Act 1992* (Cth), which formalised the Land Care scheme, and the *Natural Heritage Trust Act 1997* (Cth), which dedicated part of the proceeds of the sale of Telstra to various environment-related purposes. Both Acts provide for the establishment of a special account from which grant payments may be made to the states and for grants to be made subject to conditions be set out in agreements with the states for each grant. The 1992 Act also sets out additional conditions that will apply to all Commonwealth grants under its provisions (for example, regarding the return of moneys in the event of non-

¹²¹ For a revealing description of the USA experience, see Ryan, above n 4, 355–418, in particular the discussion of the tools of environmental federalism that have been utilised in the USA (at 400–412).

performance, auditing etc.).¹²²

In order for this mechanism to work, it clearly will be necessary for the Commonwealth to make available appropriate levels of funds that can be distributed by way of grants to the states. There are two potential challenges to be addressed in this regard. First, there is the question as to how the Commonwealth will raise the funds required for its various financial assistance schemes. This paper addresses this question in the final section below. Second, there is the question of how to ensure that those in office within the Commonwealth government from time to time remain committed to providing adequate funds for this purpose and do not use cuts in funding to undermine the effectiveness of the system. A concern has arisen in the United States in recent years with respect to substantial decreases in EPA grants to the states to assist their implementation of federal standards and other schemes.¹²³ These decreases have been a consequence of reductions in the EPA budget through the Congress, and it seems likely that further reductions will occur under the Trump administration.

APEEL envisage that the administration of the state grants scheme would be undertaken by the Commonwealth environmental institution that is responsible for adopting strategic environmental instruments and negotiating state implementation agreements, including the making of grants agreements with the states. But it will be necessary for the Commonwealth to allocate the necessary funds to this institution for this purpose, and it is in this regard that there may be a difficulty should a particular government decide to substantially reduce the relevant allocation.

If the scheme were to depend entirely on annual appropriations for this purpose, this might constitute a constant threat to the efficacy of the scheme. However, the Panel believe that this potential difficulty could be avoided to a considerable extent by creating a special account and enabling the Commonwealth environment institution to apply the income from this account to support grants to the states. The account could be designated as an Environmental Future Fund and be managed in a similar manner to the Australian Future Fund established in 2006, which now comprises almost \$143 billion allocated across five separate funds.¹²⁴ APEEL believe there is an overwhelming argument for the establishment of a similar 'future fund' for the environment to support and underpin the strategic leadership role that it recommends be assumed by the Commonwealth. This option is discussed further below.

RECOMMENDATION 2.7

The Commonwealth should adopt specific financial assistance legislation under section 96 of the Australian Constitution that would:

- (i) tie the provision of grants to the states in relation to particular Commonwealth strategic environmental instruments to the provision by the states of acceptable State Implementation Plans (SIPs) and the carrying out of any reform initiatives prescribed therein; and*
 - (ii) provide for the establishment of an Environmental Future Fund, the income from which would be used to support such grants to the states.*
-

¹²² Also note an interesting provision in the *Federal Financial Relations Act 2009* (Cth) concerning the making of partnership payments to the states that might be adapted to this specific context (s 16):

'The Minister may determine that an amount specified in the determination is to be paid to a State specified in the determination for the purpose of making a grant of financial assistance to:

- (a) support the delivery by the State of specified outputs or projects; or
- (b) facilitate reforms by the State; or
- (c) reward the State for nationally significant reforms'.

It is clear from this provision that it is possible for the Commonwealth to link direct financial assistance to the states to the undertaking of specified 'reforms' by the states, which is assumed may include both legislative and administrative initiatives. Where such initiatives have been agreed with a state through an approved SIP, APEEL envisage a similar statutory scheme being developed for state grants that are linked to the implementation of such initiatives by the state concerned.

¹²³ See Environmental Council of the States (ECOS), 'Statement on President's FY 2017 Budget' (Press Release, 9th February 2016, available at <<http://www.ecos.org/documents/statement-on-the-presidents-fy2017-budget/>>.

¹²⁴ See Future Fund, *Future Fund: Australia's Sovereign Wealth Fund* (2017) Future Fund <<http://www.futurefund.gov.au/>>.

2.3.4.2 Conditional pre-emption

To understand the system of **conditional pre-emption** that this paper proposes as a means of providing a strong sanction for states that fail to contribute to the implementation of particular strategic environmental instruments, it is necessary once more to refer briefly to the US experience in this regard.¹²⁵ Conditional pre-emption has been described as the 'classic model' of cooperative environmental federalism in US environmental law.¹²⁶ It has its origins in a range of federal Acts adopted by the US Congress in the 1970s - including the *Clean Air Act 1970*, the *Clean Water Act 1972*, the *Safe Drinking Water Act 1974*, the *Resource Conservation and Recovery Act 1976* and the *Surface Mining Control and Reclamation Act 1977*. Each of these Acts has enabled the adoption of federally-designed national programs in which the states have been invited to participate by pursuing implementation action in ways that best suit their own needs. Those states that fail to participate face the prospect of the federal government adopting Federal Implementation Plans for their jurisdiction and then directly regulating particular activities within their boundaries by pre-empting any conflicting state law. In each instance, the threat of conditional pre-emption is accompanied by an alternative in the form of an offer of federal financial assistance for state implementation programs. Under the *Clean Air Act*, there is an additional and unique threat of the loss of other, existing federal financial assistance in the form of highway funds for failure to cooperate. In the vast majority of cases, states have elected to prepare and pursue the implementation of SIPs rather than forgo financial assistance and face pre-emption of their own regulatory powers. In practice, as Professor Erin Ryan has insightfully described in her book, *Federalism and the Tug of War Within*,¹²⁷ state and federal governments engage in ongoing consultation, negotiation and compromise with respect to both the development and subsequent implementation of SIPs or equivalent arrangements.

The question therefore is whether a system of conditional pre-emption similar to that which has been employed in the US could be developed in Australia? Whilst section 109 of the *Constitution* offers a similar mechanism to the pre-emption doctrine in the US, it will be necessary to determine, first, in what circumstances it might be applied by the Commonwealth; second, which Commonwealth environmental legislation potentially could operate in a pre-emptive manner so as to replace equivalent state measures; and third, the procedural steps required to trigger a conditional pre-emption, and also to revoke it where a state has subsequently committed to implementation.

In relation to the first of these matters, APEEL envisage that conditional pre-emption would be an option where the Commonwealth environmental institution administering the overall strategic instruments scheme has made a formal determination that a particular state is a 'non-implementing State' in relation to a particular strategic instrument as a result of the failure by the state to (i) secure an approved state implementation plan; (ii) to undertake the legislative and/or administrative reforms identified in a SIP as essential for the purposes of implementation of the instrument (and thereby achieving accreditation of its relevant arrangements); or (iii) to adequately implement the relevant instrument under its accredited legislative and administrative arrangements (for example, a prolonged failure to attain targets or goals identified in the relevant instrument).

Turning to the second question concerning which Commonwealth legislation might pre-empt corresponding state laws, the Commonwealth is in a position that differs substantially from that of the federal government in the US, where there are detailed federal regulatory schemes under its environmental legislation concerning clean air and water, wastes, hazardous chemicals, site contamination etc. that can operate in place of equivalent state legislation where states are not cooperating with respect to the implementation of federal standards. There is no current Commonwealth legislation of an equivalent, wide-ranging nature in terms of establishing environmental regulatory measures that can over-ride equivalent state provisions. The Panel do not propose that the Commonwealth should adopt such wide-ranging legislation except with respect to activities involving Commonwealth entities and places, given the range of such measures already in place at the state level. The Panel believe that this therefore leaves the Commonwealth's environmental assessment and approval (EAA) measures, currently found in the *EPBC Act*, as the primary vehicle for the exercise of the pre-emption mechanism so as to over-ride equivalent state EAA measures.

¹²⁵ There is a vast body of scholarly literature on this subject in the USA. See for example, W Buzbee (ed), *Pre-emption Choice: The Theory, Law, and Reality of Federalism's Core Question* (Cambridge University Press, 2009) For a recent, in depth survey, see Robbins, above n 3.

¹²⁶ Ryan, above n 4, 404.

¹²⁷ Ryan, E., *Federalism and the Tug of War Within* (Oxford University Press, 2012).

APEEL propose that wherever the Commonwealth has made a formal determination that a particular state is a ‘non-implementing’ state, it could trigger the pre-emption of state environmental assessment laws and any other related state law concerning environmental approvals and licences (for example, planning legislation that requires approval for various types of land development and environmental protection laws that require environmental approvals and licenses for prescribed activities) where this is considered necessary to facilitate the implementation of the particular strategic instrument within that state. This would mean that the Commonwealth EAA measures would operate to the exclusion of these equivalent state laws in relation to any **newly proposed activities involving matters of national environmental significance within a ‘non-implementing’ state.**

APEEL do not propose that this would constitute a general form of pre-emption covering all activities involving MNES; instead, it would be necessary to introduce an alternative test for the triggering of the Commonwealth EAA process in these particular circumstances (in place of the current test of likely significant impact on the particular MNES), based on a finding that **the activity involving an MNES would be likely to impact significantly upon the implementation of the particular strategic instrument within the relevant state.**

Under this approach, the Commonwealth EAA measures would apply in place of all equivalent state measures wherever proposed actions involving MNES are determined by the Commonwealth to have sufficiently significant potential impacts upon the implementation of a strategic environmental instrument to trigger the operation of its EIA procedures. Correspondingly, the relevant state planning and environmental authorities would no longer have any regulatory powers with respect to such activities. Whilst this might appear to represent a potentially substantial transfer of regulatory powers to the Commonwealth, it must be remembered that such pre-emption is likely to be relatively rare in practice, if the US experience in this regard is any guide, and that it would be applicable only within a particular state that was not cooperating sufficiently in terms of the implementation of a particular Commonwealth strategic environmental instrument. APEEL do not see this approach therefore as being likely to result in any substantial or wholesale shift of regulatory responsibilities from the states to the Commonwealth.

There is a contrary argument that could be made in this particular context that the threat of pre-emption with respect to proposed activities involving MNES within a state is relatively hollow if, as recommended below, the Commonwealth EAA process is going to operate alongside the equivalent state measures anyway. Under this reasoning, it is suggested that the states may feel they have relatively little to lose by risking pre-emption, given the Commonwealth is engaged anyway in the assessment and approval of MNES-related activities. There is some force to this argument, but it is difficult to predict whether states would be prepared to forgo control over such activities in order to remain outside the reach of a particular strategic instrument. The US experience in this regard may not be readily translatable to the Australian context, given the more limited level of pre-emption involved. However, it is envisaged that this form of pre-emption would be supplemented by two, additional forms of pre-emption that would provide a substantial disincentive to states to refrain from the action needed to effectively implement a strategic environmental instrument.

The need for these additional forms of pre-emption may arise in two particular circumstances:

- first, where there are **new activities of a prescribed kind that do not involve MNES**, but which may be potentially significant in terms of ensuring the successful implementation of a national strategic environmental instrument within a ‘non-implementing’ state; and
- second, where there are **existing activities of a prescribed kind that are operating under state environmental approvals and licences**, but which may need to undertake additional action beyond that required under those approvals and licences in order to contribute to the future implementation of a SIP within a ‘non-implementing’ state.

With respect to the first of these situations, it would be a relatively straightforward matter for the future generation Commonwealth environmental legislation to stipulate that its provisions will override any state measures with respect to environmental approvals and licences in **relation to any new activities of a prescribed kind that may have a significant impact upon the implementation of a national strategic instrument.** In other words, the Commonwealth could extend the scope of its EAA measures (and their pre-emptive effect over equivalent measures within a

particular state) to particular activities besides those involving MNES in order to ensure the effective implementation of a particular Commonwealth strategic environmental measure in a 'non-implementing' state.¹²⁸ This mechanism would provide an extremely powerful incentive for states to cooperate fully in the development and implementation of SIPs as it would expand considerably the range of activities over which they would lose jurisdiction in terms of environmental assessment and approval if they fail to do so. Once again, it should be emphasised that APEEL do not see this process as being likely to involve a wide-scale transfer of regulatory functions from the states to the Commonwealth in practice, as it is likely the sheer threat of pre-emption will induce state cooperation in most instances.

Turning to the second situation, where it appears necessary for **existing activities** that are subject to state environmental regulation to undertake some additional action to assist with the implementation of a national strategic environmental measure, and it is evident that a state is not acting to require such action by the regulated parties, the Commonwealth could require those conducting particular activities of a prescribed nature (being activities which it is considered may influence substantially the implementation of the relevant strategic environments instrument) to submit an **Environmental Improvement Programme** (EIP) to the Commonwealth for its approval. This particular regulatory mechanism has been employed in a number of states to secure significant upgrades of existing facilities that are failing to meet acceptable levels of environmental performance (for example, in relation to clean air or water standards).¹²⁹ An EIP would need to set out how the particular activity will make the adjustments necessary to ensure that it is contributing adequately to the implementation of the relevant National Strategic Environment Instrument and its related SIP. The relevant Commonwealth legislation should provide that, if there is any inconsistency between the requirements applicable to the activity under state environmental legislation and the obligations arising from an EIP approved by the Commonwealth, the latter would prevail.¹³⁰

Whilst taken together, these three forms of conditional pre-emption may appear to be draconian in nature, but the experience in the US, as is already noted, is that conditional pre-emption is used rarely in practice and that, instead, the threat to do so activates a process of negotiation and compromise that usually serves to address the particular situation. This has proved to be so even though US federal environmental legislation provides extensive opportunities for citizen enforcement action for non-compliance, including where state non-attainment of federal standards is evident. Such enforcement actions have been relatively rare in practice and, instead, it has been the use of negotiated approaches by the EPA with non-implementing states that have generally produced substantial outcomes.¹³¹ APEEL are of the opinion that if the full range of pre-emption options is provided to the Commonwealth in its next generation of environmental legislation, there is good reason to believe the American experience could be replicated in Australia.

APEEL are also of the view that the operation of this system would be considerably enhanced, given its highly negotiable character, by having the proposed Commonwealth environmental institution responsible for the strategic environmental instruments scheme establish a regional office in each state through which many of the relevant negotiations with state counterparts would be undertaken. This offers a far more suitable, and potentially acceptable, model from the state perspective than does one based on a central authority in Canberra performing these functions at a substantial distance from the counterpart state authorities. Experience in the US suggests that the regionalisation of federal agencies has been a significant factor in developing effective working relationships between the regional offices and state governments and their environmental agencies.¹³² This paper pursues further consideration of this idea in the section below concerning the proposed new federal environmental authority.

128 In terms of the constitutional basis for such a provision, the Panel believe it would be possible for the Commonwealth legislation to cover such activities where they are being undertaken by a trading corporation or by any party for the purposes of interstate or overseas trade and commerce. It may also be possible to extend the reach to activities that are directly linked to the implementation of particular international treaty obligations. Whilst this may not achieve a total coverage of all relevant activities (for example, where undertaken by individuals or partnerships, but not for the purposes of trade and commerce), the reach of the relevant provisions would nevertheless be likely to be quite extensive in practice.

129 See for example, the *Environment Protection Act 1993* (SA) s 54, which enables the South Australian Environment Protection Authority to include a condition in an environmental authorisation that enables it to require a licensee to prepare an environmental improvement programme which may include requirements to take specified action to give effect to the provisions of a state environmental protection policy.

130 Once again, with respect to the constitutional basis of such a provision, the Panel believe the same approach could be adopted as outlined above n 128.

131 E Hammond and D Markell, 'Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-out' (2013) 37(2) *Harvard Environmental Law Review* 313.

132 See D Owen, 'Regional Federal Administration' (2016) 63 *UCLA Law Review* 58, 58 arguing that 'Federal decentralization undercuts conventional wisdom about the relative advantages and disadvantages of state (or local) and federal governance and offers nuance to theories explaining how a federalist system actually functions, plus new possibilities for policy reforms designed to promote innovative, responsive governance'. For details of the EPA Regional Offices, see United States Environmental Protection Agency, *EPA Organization Chart* (2017) Environmental Protection Agency <<https://www.epa.gov/aboutepa/epa-organization-chart>>.

With respect to the third matter concerning **the process for initiating the operation of the conditional pre-emption mechanism**, APEEL believe this could be done with respect to specific Commonwealth strategic environmental instruments by regulations made pursuant to the parent Commonwealth Act. This would mean that any recommendation concerning pre-emption made by the Commonwealth institution administering the strategic instruments scheme would need to be acted upon by the Commonwealth Environment Minister through an instruction to prepare the necessary regulations, and would thus also be subject to a disallowance motion in the Commonwealth Parliament. In this regard, all of the arguments that are canvassed above concerning the process for the making of Commonwealth strategic instruments are applicable in this context also. APEEL recognise that there is the potential for this significant aspect of the overall strategic instruments scheme to be undermined by a Commonwealth government (or parliament) that is antipathetic or hostile to it. However, on the other hand, this process also presents the opportunity for greater political ‘buy-in’ through the involvement of the Commonwealth Environment Minister and the Commonwealth Parliament in any action of a conditionally pre-emptive nature.

It also will be necessary for the Commonwealth environmental legislation to provide for the revocation of a conditional pre-emption (both primary and secondary) where a state has demonstrated that it is prepared to take all action necessary in the future to secure effective implementation of a Commonwealth strategic measure within its boundaries. This will require the Commonwealth legislation to set out a process whereby the relevant state would resume responsibility for oversight of those activities that were dealt with by the Commonwealth during the period of pre-emption. This may need to involve a re-issue by the relevant state environmental authority of any approval granted by the Commonwealth with at least the same conditions applicable. The state authority would then also take over responsibility for administering its own compliance and enforcement measures in relation to these activities.

RECOMMENDATION 2.8

The next generation of Commonwealth environmental legislation should provide that, where the Commonwealth considers a state has not acted sufficiently to implement a Commonwealth strategic environmental instrument, regulations may be made pursuant to the legislation to conditionally pre-empt (cf., over-ride) the operation of state environmental laws concerning:

- (i) the approval/licensing of new activities involving matters of national environmental significance (MNES);*
- (ii) the approval/licensing of other prescribed kinds of new activities; and*
- (iii) the environmental regulation of existing activities of a prescribed kind, including with respect to requiring improved environmental performance,*

wherever any such activity is considered by the Commonwealth to be likely to impact significantly upon the implementation of the relevant Commonwealth strategic environmental instrument.

2.3.5 Mechanisms for ensuring Commonwealth implementation

Whilst this paper has focused above on the means by which state involvement with the development and implementation of Commonwealth strategic environmental instruments can be encouraged, another serious question that needs to be addressed is how this scheme would operate in the event that a Commonwealth government was disinclined or strongly opposed to the idea of developing such instruments in the future, or to pursuing the implementation of those that had already been adopted. This situation might arise because of a political/philosophical belief within the Commonwealth government of the day that environmental matters do not have the required priority to warrant such action or simply through a reluctance to invest the resources required for the development and

oversight of the implementation of such measures. This paper has already addressed this issue to some extent above, however it is also possible to develop some specific accountability mechanisms that would help to ensure the ongoing involvement of the Commonwealth government in this scheme.

2.3.5.1 Role of a proposed Commonwealth Environmental Auditor

This paper discusses further below the mechanisms for ensuring the effective implementation of environmental law generally and canvasses here the possibility of establishing an office of Commonwealth Environmental Auditor which would have responsibility for reviewing and reporting on the environmental governance performance of the Commonwealth. One aspect of this responsibility could be for this body to consider whether the relevant Commonwealth environmental institution has failed to develop appropriate national strategic environmental instruments and to make recommendations for action by it in this regard.¹³³ This oversight function could extend to identifying and reporting on situations where the Commonwealth has failed to take necessary action to implement strategic instruments through its own agencies.

2.3.5.2 Federal Court of Australia review functions

Another option, which is likely to be more controversial in nature, could be to allow for interested parties to seek orders from the Federal Court to compel the relevant Commonwealth environmental institution to undertake the preparation of a particular instrument or to pursue implementation action, including by way of triggering conditional pre-emption. Inevitably, this would raise questions concerning the maintenance of a proper separation between the judicial, legislative and executive powers, particularly as Australian courts have displayed a reluctance to become involved in 'policy' matters when exercising their judicial review powers.

There are examples elsewhere in the world in recent years of where courts have heard cases of this nature and ordered action to be taken by governments to address particular environmental problems. The Indian Supreme Court has been particularly active in this regard,¹³⁴ and more recently, a Dutch court in the *Urgenda* case ordered stronger action on climate mitigation to be pursued by the Dutch government.¹³⁵ Very recently, in the United States, a District Federal Court in Oregon allowed proceedings to be brought by minors and a NASA climate scientist seeking orders to compel action by the federal government on climate change.¹³⁶ The action will now proceed to trial where issues related to the existence of a public trust in the atmosphere will be contested.

As the urgency and seriousness of issues such as climate change and biodiversity loss become more apparent, courts elsewhere are taking it upon themselves to order appropriate policy responses by reluctant or indifferent governments. This is a trend that seems likely to increase and the Panel do not think it is unrealistic or inappropriate to propose that express provision should be included in the next generation of Commonwealth environmental legislation for orders to be sought by third parties from the Federal Court requiring the Commonwealth institution to develop a strategic environmental instrument with respect to a matter that requires such action and to take follow-up implementation action to ensure its effective operation.¹³⁷

133 APEEL also considers it would be appropriate for the Commonwealth Environment Minister to have the power to direct the proposed Commonwealth institution to develop a strategic instrument with respect to a particular matter.

134 See for example, G Sahu, 'Implications of India Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4 *Law, Environment & Development Journal* 375; R Jain, *The India Supreme Court as Environmental Activist* (24 January 2014) *The Diplomat* <<http://thediplomat.com/2014/01/the-indian-supreme-court-as-environmental-activist/>>.

135 The English translation of the ruling is available from the website of the court, see de Rechtspraak, *Uitspraken* (2015) de Rechtspraak <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>>. It should be noted that the decision is currently subject to an appeal by the Dutch government. For an Australian critique, see K Lake, *What does the Dutch court ruling on climate targets mean for Australia?* (26 June 2016) *The Conversation* <<https://theconversation.com/what-does-the-dutch-court-ruling-on-climate-targets-mean-for-australia-43841>>.

136 *Juliana v United States* (D Or, No 6:15-cv-01517-TC, 10 November 2016) to order see Our Children's Trust, *Landmark US Federal Climate Lawsuit* (2017) Our Children's Trust <<https://www.ourchildrenstrust.org/us/federal-lawsuit/>>. For a review of the preliminary decision, see M Scanlan, 'Juliana v United States: Does the Constitution Guarantee a Liveable Planet for our Kids?' *Vermont Top 10 Environmental Watch List 2017*, available at <<http://vjel.vermontlaw.edu/topten/juliana-v-united-states-constitution-guarantee-liveable-planet-kids/>>.

137 Note, in suggesting this idea, that the Panel have also considered the possibility of vesting a power in the Commonwealth Environment Minister to over-rule a strategic environmental instrument on 'public interest' grounds; there is no reason why any such ruling should not also be judicially reviewable, though it is recognised that it may be difficult to persuade a Court to make an adverse finding in such circumstances. On the other hand, it is acknowledged that a failure by the Minister to develop regulations to put into operation a primary or secondary conditional pre-emption with respect to a particular strategic instrument, which involves in essence a legislative action, may be a step too far in terms of possible judicial review.

This issue of Commonwealth reluctance with respect to the scheme for strategic environmental instruments could also arise where such measures have been developed by the Commonwealth, but it has subsequently failed to secure the required state implementation plans or to adopt one for a non-participating state. There is also the possibility that even where the Commonwealth has done so, it has not followed up with consequential action in the form of conditional pre-emption where a SIP is not being adequately implemented by a state.

In the first of these particular circumstances, the Panel believe it is appropriate for an application to be able to be made to the Federal Court by an interested party for an order to compel the Commonwealth environmental institution to produce a Commonwealth drafted implementation plan for the relevant state. However, more complex legal issues will be involved in relation to any case involving a claim that a state has not adequately implemented a particular SIP and should be subject therefore to consequences in the form of the conditional pre-emption actions outlined above. Similar issues were involved in the litigation brought some years ago by then Senator Bob Brown in which it was claimed that the Tasmanian *Regional Forestry Agreement (RFA)* was not being properly implemented by the Tasmanian government and that the Commonwealth should therefore resume regulation of forestry activities in Tasmania under the *EPBC Act*.¹³⁸ The Federal Court at first instance was prepared to make a ruling in favour of the applicant and it was only due to changes to the *RFA* that were introduced by the Commonwealth after this decision that the case was lost on appeal.¹³⁹

APEEL do not consider it will place an inappropriate burden on the Federal Court to empower it to hear applications of this nature in the future, should this scheme be developed by the Commonwealth. It is essentially a matter of having the Court determine whether there has been substantial compliance with the obligations imposed in a SIP or CIP, a task that the Federal Court at first instance in the Tasmanian *RFA* case was prepared to undertake with respect to the obligations spelled out in the particular *RFA*. The appropriate order in circumstances where the Court concludes that a state has substantially failed to perform its obligations under a SIP or CIP would be to require the relevant Commonwealth environmental institution to activate the conditional pre-emption powers that are outlined above. However, as noted above, the mechanism by which conditional pre-emption would ultimately be brought into operation would be by way of regulations made at the direction of the Environment Minister, following a request from the Commonwealth environment institution. APEEL acknowledges that a failure by the Environment Minister to develop such regulations with respect to a particular strategic instrument, which involves an action of a legislative nature, may be a step too far in terms of possible judicial review. However, where a court has ordered the Commonwealth environmental institution to trigger a conditional pre-emption by recommending to the Environment Minister that appropriate regulations should be adopted, there will at least be some significant pressure on the Minister to act on any such request. A judicial finding of inadequate implementation of a strategic instrument within a state should have strong persuasive effect in terms of the consequential action required of the Commonwealth Environment Minister.

Finally, there could also arise a question with respect to the failure by Commonwealth agencies to develop implementation plans with respect to their own activities that are affected by a Commonwealth strategic environmental measure, or to substantially perform obligations arising from implementation plans. In both situations, it is appropriate for an application to be able to be made to the Federal Court by interested parties for orders to compel the relevant Commonwealth agency to meet these obligations under the Commonwealth environmental legislation.

¹³⁸ *Brown v Forestry Tasmania (No 4)* [2006] 157 FCR 1.

¹³⁹ *Forestry Tasmania v Brown* [2007] 167 FCR 34; see also Bates, above n 6, 181 for a discussion of these cases.

RECOMMENDATION 2.9

To ensure that the Commonwealth performs its responsibilities with respect to the development and implementation of national strategic environmental instruments, the following safeguards should be incorporated within the next generation of Commonwealth environmental legislation:

- (i) vesting power in a new Commonwealth Environmental Auditor to monitor the implementation by Commonwealth agencies of Commonwealth strategic environmental instruments and to make recommendations for action by such agencies where this appears necessary;*
 - (ii) to allow interested parties to request the Federal Court to order the relevant Commonwealth institution (see Recommendation 2.14 (i)) to:
 - (a) undertake the preparation of a particular strategic environmental instrument;*
 - (b) undertake the preparation of an implementation plan where a state has failed to do so with respect to a particular strategic environmental instrument;*
 - (c) activate the conditional pre-emption powers where the Court is satisfied that a state has failed to perform the tasks required of it under a State Implementation Plan (SIP); and**
 - (iii) to allow parties to request the Federal Court to order non-complying Commonwealth agencies to develop implementation plans with respect to their own activities that are affected by a Commonwealth strategic environmental instrument, or to substantially perform obligations arising from their implementation plans.*
-

2.3.6 Compliance and enforcement considerations

Finally, this paper will offer some brief observations concerning the implications of the redesigned environmental federalism scheme proposed above in relation to compliance and enforcement action. Such action can involve the exercise of administrative remedies such as enforcement orders, or resort to the courts for both criminal sanctions and civil remedies (often in the form of injunctions or declaratory orders). In the United States, the particular way in which conditional pre-emption has operated has resulted in the possibility of enforcement action being pursued in the courts by federal environmental authorities (or third parties utilising citizen enforcement provisions to seek civil remedies) in relation to activities that are being regulated by the states under a SIP or other similar arrangement. The Panel do not see this approach as being possible, or necessary, under the scheme as proposed.

In the first place, Commonwealth strategic environmental measures are not regulatory instruments in the sense that they give rise to direct obligations that parties other than the states must meet. The only compliance and enforcement issues arising with respect to them are those canvassed above concerning the possible failure of state and Commonwealth governments respectively to perform their required duties under this scheme. As a result, there is no question arising from these measures with respect to compliance and enforcement action against parties undertaking activities that are potentially subject to environmental regulation.

In the normal course of events, it is the states who will be responsible for compliance and enforcement activity under their own legislation with respect to all regulatory requirements that are designed to implement a Commonwealth strategic environmental instrument. There is an ongoing challenge for most states in allocating adequate resources to ensure effective compliance and enforcement under their environmental legislation, but this could be addressed to some extent under the proposed system should the financial assistance provided by the Commonwealth to support

the implementation of Commonwealth strategic environmental instruments at the state level include an allowance for compliance and enforcement activity.

Should the Commonwealth find it necessary to respond to state inaction (including lack of compliance and enforcement action) with respect to a particular strategic environmental measure by invoking the mechanism of conditional pre-emption outlined above, it would then become responsible for undertaking any necessary compliance and enforcement action against parties that are not complying with the requirements imposed under the relevant Commonwealth laws. As noted above, where a conditional pre-emption is revoked as a result of a state demonstrating its capacity to effectively implement a Commonwealth strategic environmental instrument in the future, there will need to be a process whereby the relevant state resumes regulatory control over all activities that were approved by the Commonwealth during the period of pre-emption, including with respect to compliance and enforcement action.

Taking all of these considerations into account, the Panel does not see any particularly challenging issues arising with respect to compliance and enforcement matters under the proposed, redesigned environmental federalism scheme. Responsibility for such action would essentially remain with state environmental authorities in most circumstances, but could be reassigned to the Commonwealth in what is expected to be relatively rare circumstances where conditional pre-emption action has been undertaken by it. A consistent failure by a state to pursue necessary compliance and enforcement action, to the extent that it leads to a failure to substantially implement a particular Commonwealth strategic environmental measure, could expose it to the sanction of conditional pre-emptive action by the Commonwealth.

2.4 The Commonwealth's future regulatory role

To complete this examination of environmental federalism, this paper turns, finally, to the question of what regulatory role the Commonwealth should perform under the next generation of environmental laws. After addressing briefly the general elements of this topic, this paper examines the specific and contentious subject of the Commonwealth's role in environmental assessment and approval (EAA).

2.4.1 General elements

As noted above in the analysis of the existing legislative arrangements for environmental management, APEEL does not see the need for major changes to these complementary schemes and envisages a continued reliance upon them as part of a broadly cooperative approach between the Commonwealth and the states to environmental regulation. The above proposals for Commonwealth strategic leadership on environmental matters would sit alongside, and be in addition to, these existing legislative arrangements, except in replacing the current NEPC uniform legislative scheme. However, this paper advances below an argument for the continued operation of the Commonwealth's EAA process in a manner that overlaps equivalent state measures. Finally, as also noted above, APEEL believes there will be some limited circumstances in which the best environmental outcomes can be achieved through the Commonwealth adopting a comprehensive legislative scheme that over-rides any state law on the same subject-matter, particularly where this will mean that industries and markets will have a common and consistent set of environment standards to work with (for example, with respect to motor vehicle emissions).

RECOMMENDATION 2.10

The next generation of Commonwealth environmental legislation, in addition to providing for mechanisms to enable the Commonwealth to pursue a strategic leadership role on environmental matters, should include the following types of other legislative arrangements, as appropriate to the particular context:

- (i) the operation of **complementary legislative schemes** (for example, through uniform legislation or an applied law scheme) where the best environmental outcomes are likely to be achieved by apportioning roles and responsibilities between the Commonwealth and the states (for example, with respect to various risk regulation processes related to chemicals, genetically modified organisms, etc.);*
 - (ii) the operation of **an overlapping legislative scheme for environmental assessment and approval (EAA)** of activities that may impact significantly on matters of national environmental significance (MNES) (see also Recommendation 2.12); and*
 - (iii) the adoption of an **over-riding (pre-emptive) regulatory scheme** by the Commonwealth in the limited circumstances where the best environmental outcomes and market stability are likely to be achieved by such an approach (for example, in relation to motor vehicle emissions and ozone regulation).*
-

APEEL proposes one further recommendation concerning the Commonwealth's current legislative and administrative arrangements. Given the wide range of Commonwealth functions of a regulatory nature outlined in the overview above, the Panel sees value in a review of their operation. An important challenge for the Commonwealth is to identify opportunities to simplify its substantial body of environmental legislation, particularly with respect to the current institutional arrangements for its implementation. There is a multiplicity of Commonwealth administrative authorities charged with regulatory responsibilities under this wide array of legislation. The Panel believes there is a strong argument for reviewing all of the Commonwealth's existing administrative structures and regulatory functions to determine where opportunities may exist to consolidate these within a new Commonwealth environmental authority. Such a review is a task that is beyond the capacity of the Panel to perform, but it is suggested as something that could be undertaken in the near future by the Commonwealth as part of a wider commitment by it to a new strategic leadership role. This paper outlines below some options in relation to new Commonwealth environmental institutions, including a new authority that might constitute the locus for a consolidation of the existing, diverse regulatory functions performed by the Commonwealth.

RECOMMENDATION 2.11

The Commonwealth should review all of its existing administrative structures and regulatory functions to determine where opportunities exist to consolidate these within a new Commonwealth Environmental Protection Authority (CEPA) (see also Recommendation 2.14(ii)).

2.4.2 Environmental assessment and approval (EAA)

2.4.2.1 Overview of the current system

The broad architecture of the *EPBC Act's* EAA provisions was developed in the 1997 *HOA* that was adopted through COAG. Once more, the Australian decentralised system of environmental federalism is clearly evident, with the states having a strong influence through the *HOA* on the design of the new Commonwealth EIA scheme. Some of the key elements of the *EPBC Act* that were determined via the *HOA* were as follows:

- that Commonwealth involvement in EAA would be limited to the 'matters of national environmental significance' (MNES) listed in Attachment 1 of the *HOA*;
- that the MNES could not be varied or added to by the Commonwealth other than in consultation with the states;
- that the Commonwealth has interests and obligations in relation to a wide range of other matters listed in Part II of Attachment 1 of the *HOA*, but that these matters could not serve to trigger the assessment and approval process of the Commonwealth;
- that the Commonwealth should rely on state processes as the preferred means of assessing proposals;
- that the *HOA* would not affect any arrangement made under a *Regional Forestry Agreement*; and
- that the Commonwealth would limit its decisions to only those aspects of a proposal related to MNES.

When the *EPBC Act* was passed in 1999, it generally reflected these design criteria. It provided for the application of its EAA provisions to activities involving 'matters of national environmental significance' (MNES). There are now nine MNES identified under the Act, as follows:

- (a) world heritage properties;
- (b) national heritage places;
- (c) wetlands of international importance (listed under the *Ramsar Convention*)
- (d) listed threatened species and ecological communities;
- (e) migratory species protected under international agreements;
- (f) Commonwealth marine areas;
- (g) the Great Barrier Reef Marine Park;
- (h) nuclear actions, including uranium mines; and
- (i) a water resource, in relation to coal seam gas and large coal mining development.

The range of MNES identified by the Act has been the subject of regular criticism for its failure to include additional matters - in particular, greenhouse gas emissions, land clearance and water-affecting activities. The introduction in 2013 of a 'water trigger' that is limited to certain types of water-affecting activities has partially addressed the last-mentioned matter, but the other two areas have remained outside the MNES list. A ten year review of the *EPBC Act* published in December 2009 (the Hawke Review) recommended that a new MNES be created with respect to 'ecosystems of national significance' and also suggested the introduction of an interim greenhouse trigger.¹⁴⁰ In its formal response to the Hawke Review, the Gillard government accepted the first of these recommendations but not

¹⁴⁰ Department of the Environment, Water, Heritage and the Arts (Cth), *The Australian Environment Act: Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) Australian Government: Department of the Environment and Energy, available at <<https://www.environment.gov.au/resource/australian-environment-act-report-independent-review-environment-protection-and>>.

the second, arguing that its carbon price mechanism would meet that particular need.¹⁴¹ A discussion on the question of revisions to the list of MNES is addressed below.

This paper does not propose to provide here a detailed outline of the *EPBC Act's* EAA provisions.¹⁴² Rather, it focuses its analysis below on the more fundamental question as to the justification for the Commonwealth EAA scheme. This question has been put in the spotlight by the recent attempts by the Commonwealth under its 'One Stop Shop' initiative to use the mechanism of approval bilateral agreements provided for in the Act to hand over its approval powers under the Act to the states.

2.4.2.2 Analysis

In addressing this issue, APEEL acknowledges at the outset the need for **procedural** harmonisation between Commonwealth and state EAA measures so as to avoid duplication with respect to the task of preparation of environmental assessment documentation by proponents and related public consultation activities. The use of procedures bilateral agreements under the *EPBC Act* has been a necessary step in this regard. However, APEEL believes the second generation of procedures bilateral agreements that were executed in 2014-15 has gone too far in delegating to state authorities full responsibility for the review of environmental assessment documentation, including the consideration of public submissions. If, as is proposed below, the Commonwealth is to continue to be involved in the approval of projects covered by its EAA legislation, then it should also have an active role in reviewing the environmental assessment documentation submitted by proponents, as a precursor to the making of approval decisions and, in particular, setting whatever conditions are to be attached to an approval. With this proposal in mind, this paper turns now to the question of whether (and why) the Commonwealth should retain its role with respect to environmental **approvals** in relation to projects covered by its EAA legislation.

The fundamental question in this context, which has been highlighted recently by the Commonwealth government's One Stop Shop initiative, is whether the Commonwealth should exercise a separate environmental approval function alongside state processes of a similar nature. In seeking to use the mechanism of approval bilateral agreements provided for in the *EPBC Act* to transfer its approval powers to the states, the Commonwealth has argued that the accreditation of state approval legislation through these agreements will result in higher and more consistent standards of performance on the part of the relevant state EAA systems (as was also suggested by the Hawke Review in its final report). By way of support for the One Stop Shop initiative, the mining and petroleum industries (including the coal seam gas industry), working closely with the Business Council of Australia (BCA), have argued that the handover of Commonwealth approval powers to the states is necessary in order to avoid duplication of functions that are already performed by the states and also to reduce alleged costs and delays incurred by industry in complying with the *EPBC Act*.¹⁴³

This Commonwealth's argument concerning the promotion of higher standards of EAA practice at the state level is attractive in theory but difficult to accept, given past practices in this context. First, there have been no significant improvements to state EAA processes that can be directly attributed to the execution of procedures bilateral agreements, despite overwhelming evidence that almost every state process is seriously deficient.¹⁴⁴ Furthermore, in recent times, some states have weakened their environmental approvals legislation, even whilst negotiating approval bilateral agreements with the Commonwealth.¹⁴⁵ Accordingly, there is little cause for confidence that higher standards would be achieved at the state level through the execution of approval bilateral agreements. Nor is there any clear

141 See Department of the Environment, Water, Heritage and the Arts (Cth), *Australian Government response to the report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) Australian Government: Department of the Environment and Energy <<https://www.environment.gov.au/resource/australian-government-response-report-independent-review-environment-protection-and>>.

142 The *Background Paper*, provides a detailed examination of the history of Commonwealth involvement in EAA dating back to its original legislation adopted in 1975 (the *Environment Protection (Impact of Proposals) Act 1974* (Cth)) and of the various, unsuccessful attempts to limit the application of this legislation.

143 See for example, A Hepworth, 'Companies urge war on environmental 'green tape'', *The Australian* (online), 11 April 2012 <<http://www.theaustralian.com.au/national-affairs/companies-urge-war-on-environmental-green-tape/news-story/07e52cd2a240d46da2fbdedbdf83cf9>>.

144 For a damning critique of state EIA processes, see the collection of case studies presented in T Bonyhady and A Macintosh, *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010).

145 For example, in Queensland, through the *State Development, Infrastructure and Planning (Red Tape Reduction) and Other Legislation Amendment Act 2014* (Qld).

indication that the Commonwealth would vigorously undertake the 'monitoring, performance audit and oversight' functions indicated by the Hawke Review as an essential accessory to the accreditation of state processes under approval bilateral agreements.

Turning to the industry arguments based on alleged duplication of functions, APEEL believes these fail to acknowledge that the Commonwealth has pursued a highly coordinated and collaborative approach to the procedural aspects of its EAA process requirements through procedures bilateral agreements. Noted also, as outlined in *Background Paper*, is that it was the Commonwealth, not the states, which first entered the field of EIA in Australia, and that it could therefore be argued that it is the states who have duplicated the Commonwealth process. However, insofar as some duplication does exist with respect to environmental approvals, it may be argued that such duplication actually is beneficial in terms of the overall effectiveness of decision-making from an environmental federalism perspective. This view has been advanced by Hollander, who argues that having overlapping approval responsibilities enables a wider range of interests to influence the policy debate and 'provides an additional arena to assess the merits of a proposed development'.¹⁴⁶

In the environmental federalism literature, this overlapping approach has been described as 'polyphonic' federalism,¹⁴⁷ a key feature of which is thought to be the presence of creative tensions between the federal and state levels. Contrary to commonly held assumptions about the benefits of avoiding duplication and overlap, it has been argued that 'duplication, overlap and redundancy perform a useful function in a complex policy domain such as the environment where the science is uncertain and the politics fraught' and that 'overlapping responsibilities provide the opportunity for a wider range of interests to influence the policy debate, especially where there is a lack of agreement between the different governments...'.¹⁴⁸

There is also cause to question the arguments by industry concerning excessive costs and delays associated with the operation of the *EPBC Act*. For example, allegations of this nature contained in a submission by the BCA to COAG in April 2012 were found by an independent economic assessment to have been substantially exaggerated.¹⁴⁹ Galligan, in examining claims more generally by industry regarding excessive Commonwealth regulation, refers specifically to claims by the BCA concerning federal inefficiencies that 'are probably exaggerated given that they take no account of other benefits of competition that might be accruing at the same time and they assume no additional costs associated with the proposed alternative'.¹⁵⁰ These observations seem apposite with respect to the Commonwealth's EAA process.

It should also be noted that the level of costs genuinely incurred in complying with the *EPBC Act* process usually represents a small proportion of the overall project development costs for most major resource projects. Finally, it is important in terms of alleged delays associated with the Commonwealth EIA process to take into account that some may be attributable to the operation of state rather than Commonwealth processes, and also may be a consequence of proponents having failed to produce adequate scientific analysis in their draft environmental impact statements (EIS). None of these factors have been acknowledged or taken into account by industry critics of the *EPBC Act* or by the Commonwealth in advancing its One Stop Shop initiative.

The principal argument that has been advanced by opponents of the One Stop shop initiative is that the states, who are the victims of an extreme vertical fiscal imbalance under the Australian federal system, are overly influenced by the economic benefits that they perceive will flow from resources and other forms of development and are therefore not in a position to deal objectively with the consideration of MNES. This

146 R Hollander, 'Rethinking Overlap and Duplication: Federalism and Environmental Assessment in Australia' (2009) 40 *Publius* 136, 155.

147 See R A Schapiro, 'From Dualism to Polyphon' in W Buzbee (ed), *Pre-Emption Choice: The Theory, Law and Reality of Federalism's Core Question* (Cambridge University Press, 2009) 33; E Ryan, *Federalism and the Tug of War Within* (Oxford University Press, 2012) (arguing for the recognition of 'Balanced Federalism' as a means of avoiding a zero sum game approach to environmental federalism in which a strict choice is to be made between federal or state responsibility).

148 Hollander, above n 146, 137, 155.

149 See Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum (April 2012)* Business Council of Australia, 5–6 <<http://www.bca.com.au/publications/discussion-paper-for-the-coag-business-advisory-forum-1>>; and for the critique, see Economists at Large, *A response to the Business Council of Australia's Discussion Paper for the COAG Business Advisory Forum: On environmental assessments and approvals* (2012) Economists at Large <<http://www.ecolarge.com/work/response-to-bca-discussion-paper-on-environmental-assessment-and-approval/>>.

150 B Galligan, Submission No 46 to Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: an agenda for reform*, April 2011, 2–3.

argument has been advanced, for example, by the Australian Network of Environmental Defenders Offices (a network of public interest environmental law firms):

‘Only the Commonwealth has the mandate and the willingness to consider the needs of the whole of Australia when approving projects that could affect the environment. A State government has no motivation to put the national interest before its own State interest when approving development within its own State’.¹⁵¹

There are examples in support of this argument, in the form of situations where the Commonwealth has needed to exercise its powers under its EAA and earlier world heritage legislation to refuse approval for state-supported, but environmentally damaging projects - including Fraser Island, the Franklin River dam and, more recently, the Traveston Crossing dam in Queensland. But the refusal by the Commonwealth to approve specific projects is not the only influence it can exert and is in fact a rarely exercised prerogative. A more pervasive influence has been exerted by the Commonwealth through setting conditions on environmental approvals that ensure more effective management requirements than might have been accomplished by state processes alone. This is, of course, a difficult benefit to measure exactly, given that the settling of conditions is usually the product of a consultative process between the Commonwealth and the relevant state, but nevertheless it is a significant one.

The Panel’s position is that it supports continued Commonwealth involvement in the assessment and approval of proposals or activities that may impact significantly on MNES, including (but not confined to) where this is necessary to ensure compliance with international obligations arising from various international treaties that have been entered into by Australia. Whilst APEEL accepts entirely the justification for the long-standing arrangements to harmonise the **procedural** aspects of Commonwealth and State EIA processes, the Panel does not support the use of approval bilateral agreements to accredit state **approval** processes as it considers the Commonwealth EAA scheme can provide an additional, arms-length evaluation of proposals of a kind that cannot be guaranteed at all times by the states.

APEEL recognises that the position adopted here with respect to this particular aspect of the Commonwealth’s environmental functions stands apart from a general support for the retention by the states of their existing environmental regulatory powers. However, the Panel are not suggesting that the states should relinquish their powers with respect to EAA in favour of the Commonwealth.¹⁵² Rather, as advocated in the literature canvassed above, the Panel believe that a ‘polyphonic’ system in which creative tensions may arise between the Commonwealth and state levels is the most appropriate federalism model in this particular context. This accords also with the proposition advanced above that there is no ‘one-size-fits-all’ approach or solution to the environmental federalism challenge and that different forms of environmental federalism may be utilised in various contexts. Having stated its position on this highly contested matter, APEEL wish to address next a number of additional matters which flow from the above conclusion, and to propose some substantial reforms to what is considered a far from adequate Commonwealth EAA process.

2.4.2.3 Options for reform

There has been extensive discussion concerning possible reforms to the EAA scheme under the *EPBC Act*, including the extensive examination undertaken through the Hawke Review several years ago. In this section, the paper will advance some suggestions for what are considered highly desirable reforms that should be incorporated into the component of the next generation of Australian environmental laws that addresses the subject of EAA.

¹⁵¹ Australian Network of Environmental Defenders Offices, *Objections to the proposal for an environmental ‘one stop shop’* (December 2013) Environmental Defenders Office NSW <http://www.edonsw.org.au/briefing_one_stop_shop>. See also C McGrath, ‘One stop shop for environmental approvals a messy backwards step for Australia’ (2014) 31 *Environmental and Planning Law Journal* 164.

¹⁵² It is necessary, however, to qualify this conclusion to take account of the proposals above for the Commonwealth to use the mechanism of conditional pre-emption where necessary to address a failure by a state to participate in the implementation of Commonwealth strategic environmental measures. As this paper notes above, this approach would not involve a complete over-riding of state EIA measures generally, but would apply selectively to particular states with respect to specific Commonwealth strategic environmental measures.

The first question this paper will address is whether it is appropriate for the Commonwealth to continue to limit its involvement in EAA to the examination of matters directly related to the relevant MNES which serves to trigger its involvement. The alternative would be for it to examine all environmental issues or impacts arising from the proposed activity, thereby duplicating the range of matters that would also be considered at the state level. This was, in fact, the situation which existed under the previous *Environment Protection (Impact of Proposals) Act 1974 (Cth) (EPIP Act)*, the validity of which was confirmed in the *Murphyores* decision in the context of export approvals. The Hawke Review of the *EPBC Act* in 2010 was equivocal on this matter, putting forward several options, one of which was that all environmental matters that a project impacts upon should be required to be considered by the Commonwealth.¹⁵³ The Panel supports this particular option on the basis that it is an unnecessarily artificial distinction to draw between impacts relating to MNES and those relating to environmental matters more generally.

APEEL also believe there should be a clearer direction to take into account cumulative impacts, which often are overlooked in the course of applying the EAA process. At the same time, the Panel advocates the adoption of a collaborative approach by Commonwealth and state agencies to the imposition of conditions on their respective approvals so as to avoid inconsistent or contradictory obligations being imposed on proponents. APEEL believes that such collaboration could be facilitated by the establishment of regional offices of the Commonwealth authority that is responsible for the administration of the Commonwealth EIA process. The Panel does not believe that there is any significant constitutional obstacle to the adoption of this wider assessment approach by the Commonwealth.

A second question relates to the range of MNES that can trigger the Commonwealth assessment and approval process. The Panel is of the view that the next generation of environmental laws should not be constrained in this respect by an intergovernmental agreement reached almost twenty years ago and that it is appropriate therefore to review and revise the range of MNES 'triggers' currently identified in the *EPBC Act* to ensure that they are reflective of contemporary and emerging environmental concerns. New matters to be considered for inclusion as triggers in the proposed SCEI should include ecosystems of national significance (as per the Hawke Review, recommendation 8), a greenhouse gas trigger (in the absence of any comprehensive Commonwealth legislative scheme in relation to climate mitigation, as recommended in Australian Panel of Experts on Environmental Law, *Climate Law* (Technical Paper 5, 2017)), and a vegetation clearance trigger - all of which have been canvassed in the past. APEEL does not preclude other possible triggers that might also be added by the Commonwealth.

A third question relates to the administration of the Commonwealth assessment and approval process, which presently lies primarily in the hands of the Commonwealth Environment Minister in relation to the key decisions as to whether to trigger the process and to grant approvals. This paper addresses in section 3 below, the need for the establishment of a new environmental institution or institutions by the Commonwealth and argue that any such institution should have independence from political direction with respect to the various responsibilities assigned to it. The Panel believe this independence should extend to the implementation of the Commonwealth's EAA process, which it proposes be vested in an independent Commonwealth Environment Protection Authority, thereby eliminating the current form of political involvement in this process. The reasons for recommending this change are set out in more detail in the section below where this paper outlines the proposals for new Commonwealth environmental institutions.

Fourth, APEEL believes that certain current exclusions from the operation of the *EPBC Act* have no place in the next generation of Commonwealth environmental laws. The Panel does not support the exemption from the Commonwealth EIA process of forestry operations covered by a *RFA*, given the considerable evidence that *RFAs* have not delivered adequate or effective outcomes at the state level, and believe this exemption should not be a part of the next generation of Commonwealth environmental laws.¹⁵⁴ APEEL also questions the appropriateness of recent steps by the Commonwealth to side step the application of the *EPBC Act* to offshore petroleum activities in Commonwealth waters by vesting authority solely in the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations*

¹⁵³ See Hawke Review, above n 140, Recommendation 25.

¹⁵⁴ See J Feehely, N Hammond-Deakin and F Milner, *One Stop Chop: How Regional Forest Agreements Streamline Environmental Destruction* (2013) Lawyers for Forests <<http://www.edotas.org.au/wp-content/uploads/2013/10/One-Stop-Chop-Final-report.pdf>>; EDO Tasmania, *State Forests, National Interests: A Review of the Tasmanian RFA* (May 2015) Wilderness Society; *Brown v Forestry Tasmania (No 4)* [2006] 157 FCR 1.

2009 (Cth). This new scheme has involved the issue of blanket approvals for all such activities under the *EPBC Act* pursuant to several strategic environmental assessments (SEAs) carried out thereunder. A recent evaluation of these arrangements by Professor Simon Marsden has offered a quite scathing conclusion as to their motive and effect:

‘SEA (re offshore petroleum activities) in Australia is, in reducing the regulatory burden rather than focusing on ESD, increasingly also becoming a fast-track process alongside certain project level assessments, whether they are of major significance or not. It is furthermore extremely difficult to see how reducing red tape in environmental legislation can, in the way proposed, be compatible with ESD’.¹⁵⁵

APEEL is of the view that the next generation of environmental laws should not allow for the privileging of particular industries or activities from the general schemes that they establish, including with respect to EAA. The mining and petroleum industries have successfully pleaded in many instances, particularly at the state level, for environmental regulation of their activities to be managed through the agencies responsible for the issue of relevant tenures rather than by environmental authorities. APEEL believes such special treatment is inappropriate and should not be permitted in the future, including in the particular instance discussed here of Commonwealth assessment and approval of offshore petroleum activities.

RECOMMENDATION 2.12

The Commonwealth should continue its involvement in the assessment and approval of activities that may impact significantly on matters of national environmental significance (MNES) alongside corresponding state processes, with the following reforms to the current process to be adopted:

- (i) that consideration be given to all environmental impacts (including cumulative impacts) associated with the proposed activity, not just those related to the relevant MNES;*
 - (ii) that the current list of MNES be expanded;*
 - (iii) that responsibility for the key decisions whether to trigger the process and to approve activities made subject to the Commonwealth process be transferred from the Environment Minister to a new, independent Commonwealth environment authority;*
 - (iv) that the exemption for operations covered by a regional forestry agreement be removed;
and*
 - (v) that the exclusion of offshore petroleum activities from the EPBC Act process be terminated.*
-

In addition to the above recommendations, which all relate to the scope of the Commonwealth EIA process and its administration by the Commonwealth, APEEL wish to draw attention to two substantive deficiencies which the Commonwealth EIA process shares in common with the equivalent state EIA processes. These are, first, inadequate arrangements for public participation in the EIA process, and second, a substantial failure to ensure post-approval monitoring of projects that have been made subject to EIA (or the related use of adaptive management to adjust the conditions applicable to particular projects where unanticipated environmental impacts have arisen). APEEL believes that the Commonwealth should demonstrate leadership in relation to the design of EAA systems across Australia by incorporating reforms to its current system that address both these deficiencies.

With respect to the subject of **public participation**, the Panel notes that, with a few exceptions at the state level, this is generally confined to providing an opportunity for public comment on the draft EIS documentation. It has become common for such documentation to be voluminous whilst, at the same time, failing to selectively and adequately

¹⁵⁵ S Marsden, ‘SEA of Australian Offshore Oil and Gas Development: ESD or Deregulation’ (2016) 33 *Environmental and Planning Law Journal* 21, 30.

address the critical environmental issues raised by proposed projects. It is also doubtful whether comments provided by the public on a draft EIS have any particular influence or effect subsequently, when the assessment of the final EIS documentation is undertaken by the relevant government agency. The process is also vulnerable to bias in two respects: first, given that the proponent, usually relying on environmental consultants, is responsible for the preparation of the EIS documentation; and second, that government officers situated within environmental agencies that are answerable to their minister are responsible for the preparation of assessment reports and recommendations to the ultimate decision-maker (usually their minister).

APEEL believes that one means of countering these potential biases, whilst also affording a more constructive and genuine approach to public participation in the EAA process, is for an independent public inquiry to be conducted with respect to each project proposal that is made subject to a full EIS requirement. Such inquiries would be conducted by scientists with the appropriate expertise in relation to each particular proposal, to be identified from a pool of experts appointed for this purpose. The Panel notes that such an arrangement was established early in the operation of the *EPIP Act*, but was not continued after the first few years of operation of this Act and that whilst the *EPBC Act* also contains a provision for the conduct of public inquiries (s 107), this has essentially lain idle since the Act was passed.

APEEL recommends that a public inquiry be made a mandatory part of the EIA process whenever a full EIS is required by the Commonwealth, and for a pool of expert hearing Commissioners to be established from which a panel of three could be selected to conduct each inquiry. The role of the public inquiry would be twofold. First, it would afford interested and concerned parties within the community the opportunity to express their views and any concerns they may have with respect to the environmental and social impacts of the proposed activity. APEEL recognise that the complexities with respect to some scientific issues related to a project may mean that there is a need for communities to have access to their own, independent scientific advice and therefore support a scheme whereby access may be provided to such advice in order to assist interested parties to present submissions to a public inquiry.¹⁵⁶ Second, a public inquiry would enable a more targeted and detailed examination of the critical environmental issues raised by a project to be undertaken for the purpose of providing publicly available recommendations to the relevant decision-maker. This process would bring a greater degree of objectivity to the assessment process and help to counter the inherent biases mentioned above. It would also serve to focus attention on a decision-maker where the recommendations of an inquiry are not accepted, compelling some public justification for the final decision and therefore a higher level of political accountability.

Turning to the subject of **post-project monitoring**, this has been a widely neglected element of EAA systems in Australia, even though the risk-based methodology that underpins them is assumed to involve adaptive management techniques that allow for the revision of approval conditions where necessary (see the Panel's *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017) for a discussion of this topic). Without such monitoring, most projects proceed through construction and operation without any vigorous oversight to check that they are meeting the performance criteria established on the basis of their environmental assessment and reflected in the conditions attached to their approval. This is partly a compliance and enforcement issue related to whether actions required by such conditions have been undertaken by the proponent, but it is also, and more fundamentally, related to the question of the accuracy of the impact predictions presented in an EIS in the first place. There has been very little study of this subject in Australia since a project undertaken by Buckley over 25 years ago revealed that, at that time, impact predictions had an accuracy of less than 50%.¹⁵⁷ Likewise, evidence of EIA impact prediction accuracy is relatively scant overseas, but the few studies that have been undertaken have produced similar results.¹⁵⁸ This is a fundamental and serious area of concern with respect to the EIA process which requires greater attention.

APEEL recommends that monitoring and reporting of the environmental impacts of projects made subject to the Commonwealth EAA process should be a mandatory requirement, and that the Commonwealth legislation should

¹⁵⁶ See for an example of what was termed an 'intervenor funding' scheme in Ontario, Canada, *Intervenor Funding Act*, RSO 1990, cl-13 (which lapsed in 1996); for a discussion of this scheme, see D S McRobert, *Intervenor Funding for Public Participation in Federal Environmental Decision-making* (CreateSpace, 2012).

¹⁵⁷ R Buckley, 'Auditing the precision and accuracy of environmental impact predictions in Australia' (1991) 18 *Environmental Monitoring and Assessment* 1.

¹⁵⁸ For a review of this subject, see B Dipper, C Jones and C Wood, 'Monitoring and Post-Auditing in Environmental Impact Assessment: A Review' (1998) 41 *International Journal of Environmental Planning and Management* 731, 741 noting that the limited studies undertaken indicate that 'only a minority of EIA forecasts have proved accurate or almost accurate'.

provide also for an adaptive management approach whereby conditions attached to a project approval may be revised to address any unforeseen impacts that are disclosed by such monitoring and reporting. The Panel also believe it is desirable, at a more general level, for a new Commonwealth environmental institution (to be discussed below) to be charged with the task of performing an audit of previous Commonwealth-managed EISs to provide a contemporary evaluation of the reliability of the impact predictions made therein. This could provide a valuable insight into where particular types of impacts may need to be addressed differently in the course of granting project approvals, particularly in terms of the particular conditions attached to an approval.

RECOMMENDATION 2.13

That the next generation of Commonwealth environmental legislation, in providing for a Commonwealth environmental assessment and approval (EAA) process, should include provision for the following measures:

- (i) a mandatory requirement to conduct a public inquiry whenever a full environmental impact statement (EIS) is required by the Commonwealth, such inquiry to be conducted by a panel of hearing commissioners selected from a pool of scientific and other experts appointed for this purpose;*
 - (ii) for access to independent expertise to be provided to selected community representatives to assist them to present submissions to an EIS-related public inquiry;*
 - (iii) a mandatory requirement upon proponents to undertake monitoring and reporting of the environmental impacts of projects approved under the Commonwealth EAA process, together with an adaptive management approach whereby conditions attached to a project approval may be revised to address any unforeseen impacts that are disclosed by such monitoring and reporting; and*
 - (iv) an audit of previous Commonwealth-managed EISs be undertaken by a newly-established Commonwealth environmental institution to provide a contemporary evaluation of the reliability of the impact predictions made therein (see also Recommendation 2.14(ii)).*
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3. Commonwealth environmental institutions

In advancing ideas for a redesigned system of environmental federalism in Australia, the Panel is very conscious of the questions that inevitably will arise concerning how such a system would be administered and resourced. In particular, the Panel see a need to establish a new Commonwealth institution to oversee the development and implementation of Commonwealth strategic environmental instruments, but also recognise that other institutional reforms at the Commonwealth level may be desirable. The Panel appreciate also that funds will be required for the operation of any new Commonwealth environmental institution and that additional amounts will be required for the purposes of the financial assistance schemes that would support state implementation of Commonwealth strategic environmental instruments. These matters are addressed in the final two sections of this paper, looking firstly, in this section, at the need for a new environmental institution or institutions to be established by the Commonwealth, then examining the subject of revenue-raising.

3.1 Overview of current institutional arrangements

Given that there are over 70 Commonwealth Acts that relate to some aspect of environmental management (see Appendix 1 to this paper), and that most of these establish one or more institutions for the purposes of their administration, there is inevitably a plethora of Commonwealth agencies, authorities, boards and committees performing various functions alongside and in addition to the Minister and Department of Environment and Energy. In 2014, the Commonwealth National Commission of Audit, in a report on Commonwealth infrastructure and public service performance and accountability,¹⁵⁹ presented a list of Commonwealth bodies in Annex B to its report which identified 194 ‘principal’ bodies and a staggering 696 ‘non-principal’ bodies. Whilst now slightly dated, this list is instructive in terms of providing some insight with respect to the wide range of environment-related institutions that have been established by the Commonwealth.

This paper has drawn on the National Commission of Audit report to produce a list of the ‘principal’ Commonwealth bodies that have an environment-related function (see Table 1 below). Table 1 does not include a much larger list of additional bodies classified as ‘non-principal bodies’, though this classification at times appears to have been applied somewhat arbitrarily by the Commission.

¹⁵⁹ National Commission of Audit, *Towards Responsible Government: The Report of the National Commission of Audit – Phase Two* <<http://www.ncoa.gov.au/report/phase-two/index.html>>.

Table 1: List of ‘principal’ Commonwealth bodies (per the National Commission of Audit, 2014)

Australian Pesticides and Veterinary Medicines Authority
Department of the Environment
Clean Energy Regulator
Climate Change Authority
National Environment Protection Council Service Corporation
Director of National Parks
Great Barrier Reef Marine Park Authority
Murray-Darling Basin Authority
National Water Commission (since abolished)
Australian Radiation Protection & Nuclear Safety Authority
Food Standards Australia New Zealand
Australian Renewable Energy Agency
National Offshore Petroleum Safety & Environmental Management Authority
Clean Energy Finance Corporation

There are many other significant Commonwealth bodies not included in Table 1 that perform important administrative functions in relation to the environment, but the overall situation is one of great complexity and diversity. Those described here is what is considered to be some of the key components of this complex administrative structure.

At the present time, the Commonwealth performs various environment-related functions through the Department of the Environment and Energy and various statutory authorities such as the Great Barrier Reef Marine Park Authority and the Murray-Darling Authority, the Climate Change Authority and the Clean Energy Regulator. It also has established a number of authorities under cooperative schemes with the states which perform a range of risk assessment functions.¹⁶⁰ There has never been established a Commonwealth environment protection authority of a similar nature to the US Environmental Protection Agency¹⁶¹ and, instead, the primary vehicle for Commonwealth involvement in environmental matters has been a Department that answers to its relevant Minister. This Department has taken many different names and forms over the past 40 plus years and presently operates, as noted above, as the Department of Environment and Energy (since July 2016).

The Department of Environment and Energy (the Department) manages a wide range of programs that are underpinned by about to Commonwealth environment-related Acts. These include environmental protection (which incorporates the *EPBC Act's* EAA process), a clean environment, national parks and marine matters, biodiversity conservation, national heritage, climate change and energy, and a science and research arm.¹⁶² Whilst this appears at face value to be an extensive portfolio, it must be remembered, and as pointed out above, that Commonwealth regulatory powers are generally limited to Commonwealth actions and activities on areas under Commonwealth control and, in some cases, functions that it has agreed with the states to perform. The Department is, of course, always subject to the direction of the incumbent Minister for the Environment. Moreover, although the Department can always seek expert advice, it is basically an administrative body whose senior officers are usually chosen for their experienced as administrators rather than any specialist expertise in the relevant sciences.

¹⁶⁰ These include, apart from several such bodies included in the Table 1 above, the National Industrial Chemicals Notification and Assessment Scheme (NICNAS), the Office of the Gene Technology Regulator (OGTR), the National Regulatory Authority for Agricultural and Veterinary Chemicals (AGVET) and the Department of Health Therapeutic Goods Administration.

¹⁶¹ Note that a proposal to this effect by PM Hawke in 1990 was quickly dismissed through the subsequent Closer Partnership Initiative and the 1992 COAG *IGAE* signed off by his successor, PM Paul Keating.

¹⁶² See Department of Environment and Energy (Cth), *Topics* (2017) Department of the Environment and Energy <<https://www.environment.gov.au/topics>>.

3.2 Analysis

APEEL believe that there are two broad questions to be addressed concerning the shape of future Commonwealth institutional arrangements for the environment, especially in light of the recommendations for the redesign of the current environmental federalism model that is presented in this paper. The first question is whether a new institution should be established that would assume responsibility for the operation of the system of Commonwealth strategic environmental instruments that this paper has proposed.¹⁶³ This in turn appears to require consideration of whether there should be a clear separation between **strategic** and **regulatory** functions when designing the Commonwealth's institutional arrangements regarding the environment.

The second question involves the choice between vesting responsibility for various administrative functions (both strategic and regulatory) within a statutory authority or, alternatively, continuing with the current arrangements (as largely reflected in the *EPBC Act*) that place most responsibility with the Environment Minister and the Department. An ancillary question in this context is the extent to which any statutory authority that may be established should enjoy independence from Ministerial direction in performing its functions. These are general design questions that is necessary to address before considering specific options with respect to new Commonwealth institutional arrangements for the environment.

3.2.1 The need for a new Commonwealth institution regarding strategic environmental instruments

The question to be addressed here is where responsibility should rest within the Commonwealth for the development of the various types of strategic environmental instruments recommended in this paper and for the performance of some other functions identified for the Commonwealth in the other APEEL *Technical Papers*. In particular, should there be a separate institution that has essentially a high-level, strategically-focussed mission and which sits apart from other administrative structures of the Commonwealth established to perform environment-related functions?

APEEL is of the view that it is desirable to establish a separate institution with a predominantly strategic policy focus. This conclusion is supported by the findings of the Productivity Commission, in its report on major project development assessment processes in 2013, which recommended as follows:

'The Commission proposes that jurisdictions pursue the institutional separation of their environmental assessment and enforcement functions from their environmental policy functions'.¹⁶⁴

However, the Panel recognise that there is a further question, as noted above, as to whether this proposed new scheme should be administered by a new statutory authority or by the Minister and the Department. Given the scheme involves extensive consultation and negotiation with state governments, it may be argued that the political diplomacy required is best undertaken via a Minister with the support of Departmental officials, rather than by an independent statutory authority. On the other hand, it can be argued that the most effective implementation of the scheme would be likely to be achieved through having it administered by an independent, expert institution that is, and is perceived to be, free of political or other influence. On balance, the Panel supports this latter argument and therefore favour the establishment of a new statutory institution to drive the strategic leadership role that this paper recommends the Commonwealth should assume in the future.¹⁶⁵

¹⁶³ With respect to the first question, APEEL believe that there are additional functions that are not currently being performed by the Commonwealth, but which are recommended here and in other *Technical Papers* should be taken up by it, which also could be assigned to the institution responsible for oversight of Commonwealth strategic environmental measures (see further below).

¹⁶⁴ Productivity Commission, 'Major Project Development Assessment Processes' (Research Report, Productivity Commission, 2013) 19 <<http://www.pc.gov.au/inquiries/completed/major-projects/report>>.

¹⁶⁵ APEEL accept, however, that the appropriation of Commonwealth funds for the purpose of establishing direct financial assistance schemes linked to the implementation of Commonwealth strategic environmental instruments is inescapably a function of the government of the day, with the relevant institution being left to administer whatever funds are allocated by this means. This paper sets out, below, proposals for the establishment by the Commonwealth of a special account, the income from which can be applied by the proposed statutory authority for such purposes.

3.2.2 The need for a new Commonwealth institution for environmental regulation

APEEL believe it is necessary to consider the need, alongside a new, strategically-focused Commonwealth environmental institution, for a separate and additional Commonwealth environmental regulatory authority. In the review of the practical dimension of environmental federalism above, this paper notes the wide array of Commonwealth environmental legislation and supporting administrative arrangements and recommends a review of these for the purpose of determining where there may be opportunities to consolidate some functions in a new Commonwealth regulatory institution (see Recommendation 2.11). As discussed immediately above, any such institution should be distinct from one which is responsible for strategic and policy-related functions. The question that arises once more, however, is whether a separate statutory authority is preferable to having regulatory functions exercised through a Minister and a supporting Department.

At the State level, environmental protection regulatory functions are generally exercised by statutory environmental protection authorities that enjoy a reasonable degree of independence from ministerial direction with respect to the routine performance of such functions (including licensing, issuing of orders and other enforcement action). On the other hand, in relation to land-use planning and the assessment and approval of major projects, state governments generally have favoured vesting responsibility for administration of the relevant process in a department and for the approval of projects in a minister. The same arrangements currently apply with respect to EAA at the Commonwealth level under the *EPBC Act*. When it considered these arrangements, the Productivity Commission produced something in the nature of an each-way bet. First, it expressed support for the general approach of placing regulatory responsibilities in an independent authority:

‘Good regulatory practices can only go so far in promoting certainty and transparency. Changes to regulatory governance and institutional arrangements also have a role to play. In particular, public confidence, competitive neutrality and impartiality are more likely to be established through independent regulatory agencies. This is one of the lessons from jurisdictions that have already established such agencies’.¹⁶⁶

However, when it came to applying this principle to environmental approvals under an EAA system, it favoured leaving responsibility for environmental approvals with the relevant Minister:

‘The least-cost institutional form should be determined by each jurisdiction having regard to existing structures. This institutional separation should not alter the authority of the relevant Minister to make primary environmental approval decisions. For the Australian Government, this means transferring the assessment and enforcement functions required by the *EPBC Act* from the Department of the Environment to a new independent agency’.¹⁶⁷

Thus, whilst the Commission supported the vesting of assessment and enforcement functions in an independent authority, it stopped short of supporting the same approach with respect to the exercise of approval powers, suggesting that these should remain in the hands of the Minister. APEEL is strongly supportive of the general principle espoused by the Commission and therefore support the establishment of a separate Commonwealth institution that would be responsible for the performance of a wide array of environmental regulatory functions that are currently exercised by various different bodies. Whether this jurisdiction should extend to the granting of environmental approvals where the Commonwealth’s EAA process has been triggered is clearly a matter upon which opinions may vary, but the Panel see no reason in principle to exclude this particular function from the general scheme involving an independent environmental regulatory body. This matter is discussed further below.

With these considerations in mind, this paper will address in the next section some specific proposals for the establishment of several new Commonwealth environmental institutions.

¹⁶⁶ Productivity Commission, above n 164, 18–19.

¹⁶⁷ *Ibid* 19.

3.3 Options for reform

3.3.1 A Commonwealth Environmental Commission (CEC)

This paper recommends that the Commonwealth should establish a statutory body that will have jurisdiction for the new range of Commonwealth strategic functions as proposed. In particular, the Panel consider as appropriate an environmental counterpart to the economic strategy role of the Reserve Bank of Australia and that this new institution might be called the **Commonwealth Environmental Commission** (CEC). Following the Reserve Bank model, the membership of this Commission might include some ex officio members, such as the Secretary of the Department of the Environment and Energy and the CEO of the Commission, but the bulk of the members would be appointed for a term of years by the Governor General on the advice of the government of the day. It is anticipated that, as with the Reserve Bank, such an appointment would be seen as a prestigious and important one, offering an opportunity for national service at the highest level.¹⁶⁸

The Panel envisage four broad types of responsibilities being vested in this Commission. First, a very significant and substantial range of tasks will be involved in relation to the proposed system of Commonwealth strategic environmental instruments, including the development and adoption of such instruments and the approval of state and Commonwealth implementation plans with respect to each instrument.¹⁶⁹ In addition, there will be a need to administer financial assistance programs that are designed to support the various instruments and their related implementation plans.¹⁷⁰ It will be necessary also to monitor the implementation of Commonwealth instruments through their related implementation plans and to determine whether to trigger the pre-emption of state assessment and approval laws in the event of non-cooperation by a state with respect to a particular instrument.¹⁷¹

Second, as proposed in Australian Panel of Experts on Environmental Law, *Terrestrial Biodiversity Conservation and Natural Resources Management Governance* (Technical Paper 3, 2017), there is a range of tasks relating to environmental data collection, monitoring, evaluation and reporting (including state of the environment reporting) that need to be pursued by the Commonwealth, in collaboration with the states. This paper notes above (and also in Technical Paper 3) the serious deficiencies that exist at present in Australia with respect to the availability of environmental data and suggested that there is a compelling need for better monitoring, evaluation and reporting with respect to the state of the environment. This paper has also recommended the development of a Commonwealth environment protection measure in the form of a protocol that would provide for a nationally consistent approach to data collection, evaluation and reporting, including through the development of national indicators. The Panel believe that the CEC should be responsible for driving these activities on a national scale, including through the development of appropriate protocols.

Third, as suggested in Australian Panel of Experts on Environmental Law, *The Foundations for Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017), there is a need to develop sustainability indicators and to report on progress against these indicators. These particular functions should be seen as complementary to the environmental monitoring and related tasks just referred to.

Fourth, there would be considerable benefits in reviving the role of the former Resources Assessment Commission (which is briefly outlined above) in undertaking broad-level, strategic inquiries into particular environmental issues or challenges and providing advice to the Commonwealth government on the basis of such inquiries. This investigative

¹⁶⁸ APEEL envisage that appointees to the Commission would be chosen by reason of their personal qualities, not as a representative of any organisation or government, and that, between them, members would bring to the Commission a wide range of expertise and experience about the tasks it will be required to perform. Of course, this expertise could not cover all the relevant tasks and issues to be addressed by the Commission (many of them highly specialised), but these gaps could be filled by staff or consultants. As with the Reserve Bank, the Panel believe the Commission would be seen as a most desirable place to work, enabling it to attract top quality scientists and other professionals.

¹⁶⁹ Note, however, that this paper has countenanced the option of allowing the Minister the power to disallow strategic environmental instruments on public interest grounds, and also suggested that such instruments should be subject to review by the Commonwealth Parliament; thus, the power of the Commission to approve these instruments is of a qualified nature.

¹⁷⁰ As noted above, this paper recognises that the appropriation of funds to support such schemes is inevitably a responsibility of the Commonwealth more generally and that the Commission will be required to work with whatever resources are made available to it for this purpose; see further below, the recommendations for how adequate resources might be generated.

¹⁷¹ Once again, this power would be of a qualified nature, insofar as this paper has suggested that the means by which pre-emption would be implemented would be through the adoption of regulations made under the parent Act that provides more generally for the system of Commonwealth strategic environmental instruments.

role could be activated by the Commission itself, or at the request of the Commonwealth Environment Minister. The findings arising from such inquiries could also lead to the identification of topics upon which the Commission might consider the adoption of new strategic environmental instruments.

In addition to the four types of functions outlined above, the Panel envisage that the Commission would be available to advise the government of the day about policy issues that may arise out of the Commission's published information, or independently thereof.

Taken together, this constitutes a substantial array of essentially new functions that are not being performed by existing Commonwealth environmental institutions. It is the Panel's view is that it is highly desirable to separate these strategic, monitoring and evaluative functions from those of an essentially regulatory nature that are being performed currently by the Commonwealth through its existing administrative institutions. This paper has noted above that this separation would assist the proposed CEC to also oversee the performance of the Commonwealth agency charged with the responsibility for environmental regulation in relation to its implementation of such instruments. More generally, there are considerable advantages in separating these inter-related tasks from those of a more conventional, regulatory nature by vesting them in a high-level Commonwealth Commission. This would enable a well-coordinated approach at a strategic level, backed by the gathering and analysis of essential data, which could serve to inform and guide the form and content of regulatory and other arrangements.

Turning to the question of the degree of independence that the proposed Commission should enjoy, the Panel's view is that it should be free from Ministerial direction in relation to the performance of the functions outlined above. There is no novelty about this suggestion. There are already statutory authorities, both Commonwealth and state, which have a degree of guaranteed independence in their decision-making. For example, in the Commonwealth sphere:

- although the *Reserve Bank Act 1959* does not expressly make the Board independent of the Treasurer in its decision-making, it implies this by making provision (s 11) for a formal mechanism to settle policy differences between the Board and the government;
- section 8(4) of the *Auditor General Act 1997* provides that, subject to the Act and other Commonwealth laws, 'the Auditor General has complete discretion in the performance of his or her functions or powers'.

APEEL believe that the functions of the Commonwealth Environmental Commission outlined above are similarly high level in nature to those exercised by the Reserve Bank and the Auditor-General and that therefore an equivalent level of independence is appropriate for the Commission. If the Commission has a general advisory role to the government alongside its specific functions, it would be essential for it to be seen as independent of government, by conveying its advice openly, for example, in a document that the Environment Minister would be obliged to lay before the Federal Parliament.

The cost to the Commonwealth budget of an Environment Commission would depend upon the scale of its activities and the extent of any alternative revenue sources that might be identified by the government of the day. It is not possible here to estimate exactly what might be that cost, but can note, by way of rough comparison, that the General Administrative Expenses for the Reserve Bank of Australia in 2014-15 totalled \$340 million, after deducting \$28 million spent on materials used in its note and security products.¹⁷² Whilst this might be regarded as a significant sum, it is less than 1% of the 2015-16 Estimated General Government Expenses.¹⁷³

In the final analysis, the question is how much is Australia willing to pay to protect its natural assets? In this final section, the paper considers a range of options for raising the revenue required not only to support the operations of the proposed Environment Commission, but also the various financial assistance schemes which is recommended the Commonwealth develop as a means of inducing state cooperation with respect to the implementation of national strategic environmental instruments.

Finally, with respect to the location of the proposed Commonwealth Environmental Commission, it is possible some

172 See Reserve Bank of Australia, *Annual Report* (2015–16) <<http://www.rba.gov.au/publications/annual-reports/rba/2016/>>.

173 See Australian Government, Budget Report No. 1, Statement 5, available at <http://www.budget.gov.au/2016-17/content/bp1/html/bp1_bs5-01.htm>.

might fear that it would become just another bureaucracy, staffed by people resident in Canberra and ignorant of the places with which they have to deal, however this need not be so. The Commission's head office might be located in Canberra or it might not. The Reserve Bank is headquartered in Sydney, but also operates offices in several cities. Wherever the head office of the Environment Commission is situated, it would be possible, and indeed desirable, for the bulk of the staff to be located in selected centres throughout the country, perhaps chiefly in the various state capitals, but also in some major regional centres. As noted above, the United States' Environmental Protection Agency has a number of regional offices that are located outside Washington DC and whose staff are aware of, and sensitive to, the concerns and aspirations of the governments and communities within their region. A similar approach as highly desirable with respect to the CEC.

3.3.2 A Commonwealth Environment Protection Authority

Even with the establishment of a CEC, there will remain a range of other Commonwealth institutions that are responsible for performing various regulatory tasks that are assigned under existing Commonwealth environmental legislation. As recommended above, a review of existing Commonwealth regulatory functions and administrative arrangements could reveal opportunities to establish a more coordinated and efficient institutional structure than exists at present by consolidating various authorities. It is therefore recommended that, following a review of existing institutions and legislation, there should be established a **Commonwealth Environment Protection Authority** that would have primary responsibility for the exercise of Commonwealth environmental regulatory functions.

With respect to the regulatory functions that are currently exercised by the Commonwealth through the Environment Minister and the Department (including with respect to the EAA process under the *EPBC Act*), there is good reason to consider the consolidation of many of these functions in the proposed Commonwealth Environmental Protection Authority. To what extent this would involve the transfer of decision-making responsibilities from the Minister to this Authority would require further, detailed consideration, but, as a general principle, it is better for routine regulatory functions to be performed by an independent authority rather than by a Minister. In the case of the Commonwealth EAA process, the Panel believe that both public and industry confidence in this process would be enhanced by such an approach and that, at the very least, all decisions prior to the ultimate approval of a proposal should be handled by the proposed Authority rather than the Minister. Whether this final decision should also be made by the proposed Authority is a matter upon which opinions may well differ, and which it may be difficult to persuade any government to accept, but in principle APEEL support this approach.

Turning to the question of the level of independence from political direction to be accorded to the proposed Authority, it is suggested that similar considerations apply to those already canvassed above in relation to the proposed CEC. In particular, routine regulatory functions should be able to be performed by the authority free from any form of ministerial oversight or direction.¹⁷⁴

A significant aspect of the proposed Authority's regulatory role must be to ensure compliance and, where necessary, effective enforcement of the relevant Commonwealth environmental legislation. This will extend to the enforcement of conditions attached to any approvals issued by the Commission. Section 142 of the *EPBC Act* provides a financial civil penalty for any person (individual or corporation) whose taking of an action has been approved under Part 9 of the Act and who contravenes any condition attached to that approval. Sections 142A and 142B create criminal offences applicable to such persons if, by act or omission, they breach a condition. It is recommended that these three sections are worth keeping, but note that they are of limited value insofar as they apply only to the person to whom the approval was granted.¹⁷⁵

¹⁷⁴ APEEL acknowledge, however, that no statutory authority can be completely independent. It will usually be appropriate for appointments to be made by, or on the recommendation of, the government. Even if the authority has the benefit of a 'one-line' appropriation in the Commonwealth Budget, issues will necessarily arise in relation to the size of that appropriation. Tied up with this question is the Authority's staffing levels and, therefore, its capacity to perform its functions. Inevitably, these must be matters for discussion on a recurring basis and ultimately, the government's view will, and should, prevail.

¹⁷⁵ Typically, that person will be a corporation, in which case only a pecuniary penalty can be imposed. Any individual who was involved in the breach, no matter how intimately, but is not himself/herself the applicant for approval, cannot be prosecuted under any of these sections.

Second, and perhaps more importantly, none of these sections enable the Commonwealth to obtain rectification of any breach of a condition. It is recommended that one of the functions of a Commonwealth Environment Protection Authority ought to provide for the civil enforcement of conditions imposed under the Authority's approvals, usually by seeking a Federal Court injunction. Injunctive relief is a salutary remedy. The court could make orders, not only against a corporate applicant for approval, but also against individuals knowingly involved in the breach (such as officers of the corporation), requiring specified defendants to carry out particular remedial action, so long as that action is needed to remedy the applicant's act or omission. Failure to comply with the court's order constitutes a contempt of court and is punishable, if necessary (which it rarely is), by imprisonment.

As to the sources of revenue for this Authority, the Panel does not assume that all its funding would need to come from Commonwealth general revenue. There may be some scope for a 'user pays' approach. For example, the South Australian Environmental Protection Authority derives a significant portion of its budget from levies paid by users of the State's waste disposal system. Depending on the attitude of the government of the day, there may well be an opportunity for the Authority to earn at least a portion of its income from fees or levies related to its regulatory work.

3.3.3 A Commonwealth Environmental Auditor

As noted in the penultimate recommendation of Technical Paper 3, and as is also discussed in Technical Paper 8, 2017, the Panel believes there is a need for new integrity safeguards to be adopted and applied for the purpose of ensuring effective performance of environmental responsibilities by government authorities. This additional function requires some further explanation.

Australia, like most countries, has a long record of creating laws and other environmental governance interventions that have proved to be ineffective in practice. The achievement of continuing improvement requires objective review and transparent reporting of the performance of the environmental governance system. At present, there is no mechanism for carrying out integrity checking and reporting to the Australian public about the performance of environmental governance.¹⁷⁶

The establishment of such a mechanism would enable the consideration of both the positive and negative impacts of legal and policy measures on economic, social and environmental systems (paying particular attention to interests that are already marginalised). Completing such rigorous assessments could also serve as an important transparency tool by increasing knowledge about decisions being made, as well as promoting debates about the substantive issues in relation to implementation.¹⁷⁷ Ultimately, this mechanism could lay the grounds for an ongoing cycle of monitoring, feedback and review focused on continuous improvement (see Technical Paper 1) and reflected, amongst other means, in the development of new or revised strategic environmental instruments. This adaptive cycle could aspire to a continual flow of information, learning and improvement regarding implementation.¹⁷⁸

APEEL is of the opinion that these integrity checking and reporting functions might best be performed by establishing an independent office of **Commonwealth Environmental Auditor** whose oversight role would extend to the operations of the proposed Commonwealth Environment Protection Authority, as well as any other Commonwealth bodies in terms of their performance of environmental responsibilities. As outlined above, this office also may be able to perform a role with respect to the provision of advice to the proposed CEC concerning the need to develop specific strategic environmental instruments.¹⁷⁹

176 This can be contrasted with the role of the Productivity Commission and the Australian Competition and Consumer Commission, each of which provide strong ongoing supervision of the integrity of markets and the economic efficiency of government operations.

177 P Martin et al., *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers* (2007) Australian Farm Institute <<http://www.farminstitute.org.au/publications-1/research-reports/developing-a-good-regulatory-practice-model-for-environmental-regulations-impacting-on-farmers>>.

178 M C Dorf and C F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.

179 Note that in Australian Panel of Experts in Environmental Law, *Democracy and the Environment* (Technical Paper 8, 2017), where the subject of integrity safeguards is also addressed, alternative institutional options are canvassed, including a National Integrity Commission that presumably would have a brief that extends beyond environmental matters, and also a National Environmental Commission. The idea of a Commonwealth Environmental Auditor is proposed on the assumption that the broader concept of a National Integrity Commission may not be adopted; the Panel also see an advantage in the proposed office being separate from the Commonwealth Environment Commission, to whom it is suggested it may render advice in some circumstances.

RECOMMENDATION 2.14

To ensure the effective implementation of the next generation of Commonwealth environmental laws, the Commonwealth should establish one or more new statutory authorities to perform functions that will complement, replace and expand upon the functions currently exercised by the Minister and Department for Environment and Energy and other existing Commonwealth statutory environmental authorities, with the following possibilities in mind:

- (i) a high-level (cf. Reserve Bank) **Commonwealth Environment Commission (CEC)** that would be responsible for: (a) administration of the system of Commonwealth strategic environmental instruments (see Recommendations 2.3-9); (b) a nationally coordinated system of environmental data collection, monitoring, auditing and reporting (including with respect to environmental sustainability indicators and trends); (c) the conduct of environmental inquiries of a strategic nature (akin to those conducted by the former Resources Assessment Commission); and (d) the provision of strategic advice to the Commonwealth government on environmental matters, either upon request or at its own initiative;
 - (ii) a **Commonwealth Environment Protection Authority (CEPA)** that would be responsible for: (a) administration of the Commonwealth's environmental assessment and approval system, including where conditional pre-emption of equivalent state legislation has occurred (see Recommendation 2.8); (b) the regulation of activities undertaken by Commonwealth authorities or by other parties on Commonwealth land; (c) the auditing of Commonwealth-required EISs (see Recommendation 2.13(iv)); and (d) any other environmental regulatory functions that may be appropriately assigned to the authority (see Recommendations 2.2 and 2.11); and
 - (iii) a **Commonwealth Environmental Auditor** that would be responsible for: (a) monitoring and reporting on the performance of CEPA, the Minister and Department for Environment and Energy and other Commonwealth bodies in relation to their performance of their statutory environmental responsibilities; and (b) providing recommendations to the Commonwealth Environment Commission on the need to develop new strategic environmental instruments (see Recommendation 2.9(i)).
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4. Ensuring adequate resources to support effective environmental governance

This final section of the paper provides some analysis concerning how to resource the extensive recommendations contained in this and other *Technical Papers* produced by the Panel. In so doing, it is recognised that the availability of funds and other resources to implement these recommendations, and to contribute to sound environmental governance, is only one of a much broader range of factors that can influence the contribution of the next generation of environmental laws to achieve sound environmental outcomes. These include the nature of the environmental challenges that are to be faced, the quality of the strategies adopted to implement laws (which is addressed at length above) and the degree to which industry, citizens and government are committed to achieving sound environmental outcomes.¹⁸⁰ A full exploration of all these matters is outside the scope of this report, but it is important to the credibility of the recommendations advanced by the Panel in this and other *Technical Papers* to provide some preliminary ideas concerning the question of how to generate the resources required for their implementation.

Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management Governance (Technical Paper 3, 2017) and Marine and Coastal Issues (Technical Paper 4, 2017) both discuss this resources challenge and refer to some of the prior studies that have considered these issues for Australia. Many different approaches are already in use, whilst others have been proposed but not yet fully tested, to access resources for the environment. This paper begins by suggesting that **unpaid action or investment by citizens** is pivotal, and that this is already occurring in many ways, including:

- using private resources to support the environment, for example, by protecting native habitat areas on private land or adopting purchasing and consumption patterns to be environmentally responsible or to provide a market signal to businesses;
- engaging in voluntary environmental work, such as conservation management on farms that is not required for production or by the law, or participation in the very many active community groups;
- environmental philanthropy, which is being used increasingly for biodiversity protection projects in Australia;¹⁸¹
- crowd-funding, which is being used for small projects (for example, Pozible Landcare & Environment Collection);¹⁸² and
- consumer or political action that increases support for the environment and responsible stewardship.

Industry too can be an important source of resources for the environment, whether by adopting environmental restraint and investing in systems of production and commerce that support sustainability, or by:

- environmental entrepreneurship, for example, by marketing low environmental impact products or services;
- adopting responsible production and market place standards, such as industry environmental codes of conduct, voluntary production standards and environmental branding;
- direct investment, such as through corporate philanthropy and social responsibility funds; and
- formation of, and participation in, markets that support the environment, such as participating in environmental services markets.

¹⁸⁰ See R N Stavins, 'Introduction to the Political Economy of Environmental Regulations' (Discussion Paper, Resources for the Future, Washington DC, 2014); D E James, 'Environmental Incentives: Australian Experience with Economic Instruments for Environmental Management' (Consultancy Report, Community Information Unit, Department of the Environment, Sport and Territories, 1997). For effectiveness evaluations of the Precautionary and Participatory Principles, including in Australia, see P Martin and J Williams, 'Next Generation Rural Natural Resource Governance: a Careful Diagnosis' in V Mauerhofer (ed), *Legal Aspects of Sustainable Development: Horizontal and Sectorial Policy Issues* (Springer Publishers, 2015).

¹⁸¹ See for example, The Nature Conservancy Australia, *Nature Conservancy* (2017) <<http://www.natureaustralia.org.au>>.

¹⁸² See Pozible, *Landcare and Environment Collection* (2017) <<http://www.pozible.com/collection/detail/109>>.

As detailed in Technical Paper 3, **government investment** serves many purposes, including as a catalyst and supporter for citizen and industry action, but also by:

- providing infrastructure for environmental initiatives, such as water markets and regional natural resource management programs;
- through policy and regulation, underpinning the social norms that are essential to good governance; and
- investment in research and development, and the dissemination of knowledge, to strengthen the national ability to act as more effective environmental stewards.

There is an argument for equating government investment in the protection of the national assets to at least the same level as the target of 2% of the gross domestic product (GDP) that has been adopted for military spending in this country for some years. Such a level of commitment of public funds would of itself radically alter the capacity of both the Commonwealth and state governments to effectively manage Australia's natural resources and would have flow-on effects into regional and local levels of government also.

APEEL is of the opinion that the fundamental problem with respect to resourcing environmental management in Australia is the lack of an institutional framework to focus the potential sources of funding and other resources into a coherent, comprehensive investment program for the environment. Such a program could support the operation of the various Commonwealth institutions proposed above and also provide much-needed financial assistance to the states to enable them to effectively implement Commonwealth environmental strategies, however fundamental challenges exist in establishing such a program.

For large areas of Australia, there is probably insufficient economic activity to fund effective long-term stewardship from within the specific regions. There are also many people with land stewardship obligations who lack the economic or other capacity to do what is expected of them. The capacity of Aboriginal Australians to invest sufficiently to protect and restore the large areas where they now have legal custodianship is likely to be a continuing social and environmental concern for all Australians, given the entrenched social disadvantage under which many of these land stewards labour. Where there is sufficient economic intensity, such as in urban, industrial or mining areas, the incentives and institutional mechanisms for directing resources into environmental stewardship are not sufficiently effective. Government funding is unlikely to be sufficient by itself to overcome these challenges.

Significant innovation is needed to reduce the resulting investment gap for the environment. This will require a powerful institutional framework, so that the complex issues can be understood and strategies developed and implemented to reduce the environmental funding gap. For this reason the Panel propose the establishment of an **Environmental Investment Commission**, with a limited term, for the purposes of developing an investment strategy for the Australian environment.¹⁸³ For the purpose of debate this paper suggests the following:

- the Commission would be constituted by representatives of industry, civil society, and government. Ideally it would have high-level commercial, as well as policy and economic, skills;
- the Commission would have the brief of developing a national strategy through deep cross-sectoral engagement, including negotiation with key stakeholders to develop specific investment strategies and investment products;
- the Commission would be responsible for developing proposals to address fundamental challenges to effective investment, including strategies to reduce the transaction cost of market and market-like instruments (and other programs) which limit their effectiveness and attractiveness, and providing a viable framework of incentives for private investment (including taxation reform and efficient investment structures); and
- the Commission would also consider the most appropriate role for public funding and other public interventions to support a more effective investment climate for the environment. This may include consideration of hypothecated environmental funding, which could ensure more reliable programmatic support for long-term strategies (for further details in this regard, see Technical Paper 3).

¹⁸³ See P Martin and K Werren, 'An industry plan for the Victorian environment?' (Discussion Paper, Department of Sustainability and Environment, Victoria, 2009) (referred to there as an 'Industry Plan for the Environment').

Arising out of the efforts of the Commission over its specified life-span, would be the establishment of an **Environmental Futures Fund** that would constitute a special financial account of the Commonwealth. The income from this Fund could be used by the proposed CEC to support the implementation of Commonwealth strategic environmental instruments through financial grants to the states. By way of comparison, this paper notes the structure and functions of the Clean Energy Finance Corporation (CEFC) established in 2012 by the *Clean Energy Finance Corporation Act 2012 (Cth)*, which has access to an annual appropriation of \$2 billion for five years to 2017 that is paid into a CEFC special Account, with a targeted total amount of \$10 billion. An Environmental Futures Fund could be established and funded by similar means, with additional funding hopefully becoming available through the efforts of the proposed Environmental Investment Commission.

RECOMMENDATION 2.15

*That the Commonwealth establish a **Commonwealth Environmental Investment Commission** that would be responsible for addressing fundamental challenges to the effective resourcing of environmental management in Australia by identifying strategies to generate increased private and public sector funding and to maximise community investment and by also establishing an **Environment Future Fund**.*

5. Conclusions

Whilst the title of this *Technical Paper* is 'Environmental Governance', its focus is primarily on the environmental federalism system. The paper argues for a fundamental change to this system to enable the Commonwealth to perform a strong national leadership role of a strategic nature in relation to environmental matters under the next generation of Commonwealth environmental laws. It has done so because APEEL believe this will lead to better and more dynamic outcomes than have been achieved to date under the current system of environmental federalism. In presenting the proposals for a new strategic role for the Commonwealth, the paper has also emphasised that these do not involve a major transfer of regulatory functions from the states to the Commonwealth and should not stifle innovative actions on the environment at the state, regional and local levels.

In urging this substantial reform, this paper has sought to demonstrate that there is ample constitutional authority for the performance of a strong, strategic role by the Commonwealth. This paper has also argued that long-standing political bargains which have resulted in the current, highly de-centralised system should be abandoned. In their place is proposed a system in which a CEC would be responsible for the development of strategic environmental instruments of both a national and regional character and for supervising the implementation of these instruments by both state governments and Commonwealth agencies.

To ensure effective implementation of these instruments at the state level, this paper has suggested the use of two mechanisms: first, the provision of grants to the states to assist their implementation of specific instruments; and second, the use of conditional pre-emption to allow for certain Commonwealth environmental laws to over-ride corresponding state laws on the same subject-matter where states have not acted to implement particular strategic environmental instruments.

Alongside the federalism-related reforms proposed in this paper, it has canvassed the possibilities with respect to the establishment of several new Commonwealth environmental institutions. These include a high-level CEC to administer the proposed system of Commonwealth strategic environmental instruments; a Commonwealth Environmental Protection Authority to perform a wide range of regulatory functions, including administration of the Commonwealth's EAA measures; and a Commonwealth Environmental Auditor, to provide an integrity and accountability mechanism.

Finally, this paper has also canvassed in a preliminary manner the wide range of possibilities that might be considered for the purpose of resourcing environmental management in this country, including the many reforms advocated both in this paper and the other APEEL *Technical Papers*. This paper has proposed the idea of creating a limited-term Commonwealth Environmental Investment Commission to identify strategies to generate the funds to be allocated to a special purpose Environmental Futures Fund.

APEEL acknowledges that this paper is lengthier than the other *Technical Papers*. Given the fundamental nature of the environmental governance reforms proposed in this paper, it is necessary to provide a thorough justification for its proposals and also to outline the legal mechanisms involved in some detail. In the accompanying *Background Paper*, the Panel has gone further by presenting a comparison with the systems adopted in a number of other countries that also have a federal constitutional system.

Appendix I: Current Commonwealth Environmental Legislation

1. Environmental planning and protection

a. General

Environment Protection and Biodiversity Conservation Act 1999

National Environment Protection Council Act 1994

National Environment Protection Measures (Implementation) Act 1998

b. Chemicals and other risk assessment

Agricultural and Veterinary Chemicals (Administration) Act 1992

Agricultural and Veterinary Chemicals Act 1994

Agricultural and Veterinary Chemicals (Code) Act 1994

Asbestos Safety and Eradication Act 2013

Food Standards Australia and New Zealand Act 1991

Gene Technology Act 2000

Industrial Chemicals (Notification and Assessment) Act 1989

Therapeutic Goods Act 1989

c. Waste management/recycling

Hazardous Waste (Regulation of Exports and Imports) Act 1989

Product Stewardship Act 2011

d. Marine

Environment Protection (Sea Dumping) Act 1981

Protection of the Sea (Civil Liability) Act 1981

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act (2008)

Protection of the Sea (Harmful Anti-Fouling Systems) Act 2006

Protection of the Sea (Oil Pollution Compensation Fund) Act 1993 (and related Acts)

Protection of the Sea (Powers of Intervention) Act 1981

Protection of the Sea (Prevention of Pollution from Ships) Act 1983

Sea Installations Act 1987

e. Nuclear

Atomic Energy Act 1953

Australian Radiation Protection and Nuclear Safety Act 1998

Comprehensive Nuclear Test Ban Treaty Act 1998

National Radioactive Waste Management Act 2012

Nuclear Non-proliferation (Safeguards) Act 1987

Nuclear Safeguards (Producers of Uranium Ore Concentrates) Act 1993

South Pacific Nuclear Free Zone Treaty Act 1986

f. Transport

Aircraft Noise Levy Act 1995

Fuel Quality Standards Act 2000

Motor Vehicle Standards Act 1989

2. Biodiversity and cultural heritage

a. Antarctica

Antarctic Marine Living Resources Conservation Act 1981

Antarctic Treaty (Environment Protection) Act 1980

b. Biodiversity

Biological Control Act 1984

Environment Protection and Biodiversity Conservation Act 1999

Environment Protection (Alligator Rivers Region) Act 1978

Great Barrier Reef Marine Park Act 1975

Lake Eyre Basin Intergovernmental Agreement Act 2001

Biosecurity (Consequential Amendments and Transitional) Act 2015

Wet Tropics of Queensland World Heritage Area Conservation Act 1994

c. Aboriginal and Cultural Heritage

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Australian Heritage Council Act 2003

Historic Shipwrecks Act 1976

Natural Heritage Trust of Australia Act 1997

Protection of Moveable Cultural Heritage Act 1986

Sydney Harbor Federation Trust Act 2001

3. Natural resources management

a. Fisheries

Fisheries Administration Act 1991

Fisheries Management Act 1991

Torres Strait Fisheries Act 1984

b. Forests

Illegal Logging Prohibition Act 2012

Regional Forests Agreement Act 2002

c. Minerals and Petroleum

Offshore Minerals Act 1994

Offshore Petroleum and Geothermal Gas Storage Act 2006

Petroleum (Submerged Lands) Amendments Acts 2001/2003

Petroleum (Timor Sea Treaty) Act 2003

d. Water

Water Act 2007

Water Efficiency Labelling and Standards Act 2005

e. Other (financial assistance)

Note various financial assistance Acts have been adopted over many years: for example, *Urban and Regional Development (Financial Assistance) Act 1974*; and *Natural Resources Management (Financial Assistance) Act 1992*; still current is the *Natural Heritage Trust of Australia Act 1997*.

4. Climate change, ozone depletion and energy

a. Climate change

Australian National Registry of Emissions Units Act 2011

Carbon Credits (Carbon Farming Initiative) Act 2011

Climate Change Authority Act 2011

Greenhouse and Energy Minimum Standards Act 2012

National Greenhouse and Energy Reporting Act 2007

b. Ozone depletion

Ozone Protection and Synthetic Greenhouse Gases Management Act 1989

c. Energy

Australian Energy Market Act 2004

Australian Renewable Energy Agency Act 2011

Building Energy Efficiency Disclosure Act 2010

Clean Energy Finance Corporation Act 2012

Clean Energy Regulator Act 2011

Customs And Excise Amendment (Diesel Fuel Rebate Scheme) Act 1999

Energy Grants (Cleaner Fuels) Scheme (Consequential Amendments) Act 2004

Renewable Energy (Electricity) Act 2000

Renewable Energy (Electricity) (Charge) Amendment Act 2000

Renewable Energy (Electricity) (Large-scale Generation Shortfall Charge) Act 2000

Renewable Energy (Electricity) (Small-scale Technology Shortfall Charge) Act 2010

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