Parliament of the Commonwealth of Australia

National Environment Protection Measures (Implementation) Bill 1997

Report by the Senate Environment, Recreation, Communications and the Arts Legislation Committee

March 1998

Commonwealth of Australia

ISSN 1326-933X

This report was printed from camera-ready copy by the Senate Printing Unit,
Parliament House, Canberra

Senate Environment, Recreation, Communications and the Arts Legislation Committee

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NATIONAL ENVIRONMENT PROTECTION MEASURES (IMPLEMENTATION) BILL 1997

Background to the inquiry

The Bill was introduced into the Senate on 21 October 1997. On 19 November 1997 the Senate, on the recommendation of the Selection of Bills Committee, referred the bill to this Committee for inquiry and report by 10 March 1998. The Selection of Bills Committee flagged the following issues:

'• Examine whether the bill in fact would achieve its stated objective;
• Examine the effectiveness of the approach in the bill in achieving environmental protection goals;
• The extent and effect of exemptions provided to the Commonwealth by the bill.'[1]

The Committee advertised the inquiry in *The Weekend Australian* on 6 December 1997 and the closing date for submissions was 12 January 1998. Since the Committee had only received 3 submissions by the closing date, it decided not to call witnesses to a public hearing. By the tabling date, 12 submissions had been received and they are listed at APPENDIX 1.

Background to the bill

On 1 May 1992 the Commonwealth government, the State and Territory governments and representatives of local government concluded the Intergovernmental Agreement on the Environment (IGAE). The purposes of this are to facilitate -

• a co-operative national approach to the environment
• a better definition of the roles of the respective governments
• a reduction in the number of disputes between the Commonwealth and the States and Territories on environment issues
• greater certainty of government and business decision-making
• better environment protection.[2]

Among other things, the Commonwealth and the States/Territories agreed to establish national environment protection measures to ensure -

'• that people enjoy the benefit of equivalent protection from air, water and soil pollution and from noise, wherever they live;
• that decisions by business are not distorted and markets are not fragmented by variations between jurisdictions in relation to the adoption or implementation of major environment protection measures.'

[1] Senate Selection of Bills Committee, report 18 of 1997, 19 November 1997; Senate *Hansard*, 19 November 1997 p. 9137

[2] *Intergovernmental Agreement on the Environment*, May 1992, p. 2

They agreed to set up a Commonwealth/State ministerial council 'to be called the National Environment Protection Authority' to make national environment protection measures (NEPMs) on -

- ambient air quality
- ambient marine, estuarine and freshwater quality
- noise related to protecting amenity where variations in measures would have an adverse effect on national markets for goods and services
- general guidelines for the assessment of site contamination
- the environmental impacts associated with hazardous wastes
- motor vehicle emissions
- the re-use and recycling of used materials.

They agreed to enact complementary legislation to implement the measures in their various jurisdictions.[3]

The *National Environment Protection Council Act 1994* established the National Environment Protection Council (the IGAE's 'National Environment Protection Authority', renamed), and details its power to make national environment protection measures. NEPMs may include standards, goals, guidelines and protocols.[4] The Council has released for public comment draft NEPMs on:

- National Pollutant Inventory (draft June 1997; adopted 27 February 1998)
- ambient air quality (draft November 1997)
- transport of controlled [hazardous] waste (draft December 1997)

A proposed NEPM on contaminated sites is now at the scoping stage.

The bill

The present bill is the Commonwealth's response to its IGAE commitment to enact legislation to implement NEPMs in its jurisdiction. The scheme of the bill is:

- State/Territory laws implementing NEPMs do not apply to Commonwealth activities, except by declaration of the Commonwealth Environment Minister (clause 9). [Without this provision State laws might apply, either of their own force because of the limitations on Commonwealth immunity from State law, or because of the *Commonwealth Places (Application of Laws) Act 1970*, which applies State law to Commonwealth places in certain circumstances.]
- The Commonwealth Environment Minister may (subject to considerations of national interest or administrative efficiency) -
    - apply State laws implementing NEPMs to Commonwealth activities in Commonwealth places (Part 2); or
    - apply State laws implementing NEPMs to Commonwealth activities in other places (Part 3); or
    - implement NEPMs by regulations under this Act (Part 4); or

[3] *Intergovernmental Agreement on the Environment*, May 1992, p. 24ff
[4] *National Environment Protection Council Act 1994*, s14(3)

• implement NEPMs through environmental audits and environment management plans (Part 5).[5]

Consideration by Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills has a brief to inspect all bills to see whether (among other things) they trespass unduly on personal rights and liberties. The Committee considered and made no comment on this bill.[6]

Financial implications

The Government's explanatory memorandum to the bill comments:

'The management of the Commonwealth's compliance with NEPM's may entail costs in the first few years of the Act as management systems become established. The Government has decided that these costs should be managed by Departments within their budgetary allocation. It is possible that early costs incurred will in time be off-set by the general thrust of the NEPC legislation, and the Commonwealth's interest in particular, to achieve more harmony and uniformity in environmental outcomes across Australia.'[7]

The government's response

In the government's view:

'The Bill is breaking new ground and will establish stronger co-operation between the Commonwealth and the States and Territories in relation to environment protection initiatives. The Bill is being implemented concurrently with an examination of the division of responsibilities for the environment in the present Review of Commonwealth and State Roles and Responsibilities for the Environment. Among other things, the Review is examining the Commonwealth's compliance with State and Territory environment and planning laws consistent with the principles of competitive neutrality as agreed by the Council of Australian Governments.

It is envisaged that the mechanism of application of State and Territory laws will be the first option considered for the implementation of a national environment protection measure with regard to Commonwealth activities and sites.'[8]

Issues raised in submissions

As the Committee did not hold a public hearing into the bill, officers of the relevant government department did not have a forum in which to respond to criticisms of the proposed legislation that were made in submissions to the Committee. The Committee therefore invited Environment Australia to respond in writing to issues raised in submissions.

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[5] *National Environment Protection Measures (Implementation) Bill 1997*, section 4
[6] Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 15 of 1997, 29 October 1997 p. 13
[7] Hill, Senator the Hon. R (Minister for the Environment), *National Environment Protection Measures (Implementation) Bill 1997 - Explanatory Memorandum*, 1997
[8] Campbell, Senator the Hon. I, second reading speech, Senate *Hansard* 21 October 1997, p. 7720

Its response is reproduced as APPENDIX 2. Key points in response to issues raised in submissions are inserted in the following sections.

The Department of Defence supported the bill although it expressed concern with the resource implications of implementing NEPMs from its departmental budget.[9] Other submissions, namely six State/Territory governments and two non-government interest groups, had various concerns about it.[10] In particular, the States agreed that the lack of consultation over the legislation had been a problem.

Consultation with the States/Territories on the bill

Several States felt there had been inadequate consultation with them during drafting of the bill:

- '...the draft bill would have significantly benefited from consultation with States during its development.'[11]
- 'The need for such consultation is more than a courtesy in this instance, as the draft legislation in certain circumstances purports to involve State authorities or officers in the exercise of functions and powers relating to the Commonwealth and its authorities. Terms of the legislation must therefore be acceptable to all parties.'[12]
- The definition of 'national interest' requires further discussion with the States/Territories.[13]

In the Committee's view, consultation between the Commonwealth and the States/Territories on this bill would have been helpful and would have gone some way towards allaying the states' fears that the Commonwealth is not fully committed to implementing national environment protection measures in its jurisdiction.

The general scheme of the bill

The general scheme of the bill is that State laws implementing NEPMs apply to Commonwealth activities not routinely, but only after a positive declaration at the discretion of the Commonwealth Environment Minister. Several State submissions felt that this is 'not in keeping with the spirit of the Intergovernment Agreement on the Environment'[14] and/ or contrary to the intention of section 7 of the *National Environment Protection Council Act 1994*.[15]

- 'Clause 9 acts to suspend the operation of any State legislation [implementing a NEPM] unless it is specifically applied under the bill. However in taking this step the

[9] Department of Defence, submission 3 p. 1
[10] The Federal Chamber of Automotive Industries (submission 1) addressed the contents of NEPMs, a matter of interest but not relevant to this bill.
[11] Government of Victoria, submission 11 covering letter
[12] Government of South Australia, submission 9 p. 2
[13] Government of NSW, submission 7 p. 5
[14] Government of the Northern Territory, submission 8 p. 1
[15] Government of Tasmania, submission 4 p1. Section 7(2) of the NEPC Act says, '...the Commonwealth will apply, as Commonwealth law, designated laws used to implement each such measure in a participating jurisdiction, to the extent necessary to achieve the effect referred to in subsection (1) [ie, implementation of NEPMs]'

Commonwealth leaves a high level of doubt as to its intent and should therefore clearly provide in the bill that State law is the accepted primary mechanism for the implementation of NEPMs.'[16]

- 'The Bill's various exclusions of and qualifications on the application of State laws to Commonwealth activities give the Commonwealth great scope to 'pick and choose' which, if any, State laws it will apply to Commonwealth activities.'[17]
- 'The Bill seems more directed to ensuring the Commonwealth agencies are not bound by State and Territory laws to implement NEPMs than it is to giving effect to the environmental objectives...'[18]
- '...This is inconsistent with the approach taken by the Commonwealth in the current Council of Australian Governments' (COAG) Review of Commonwealth/State Roles and Responsibilities for the Environment, in which the Commonwealth is proposing increased compliance with State and Territory environmental laws.'[19]

The Department of Defence argued that 'Commonwealth sector activities should only be subjected to the requirements of State and Territory environmental legislation if the content of that legislation has been accepted by the National Environment Protection Council as a National Environment Protection Measure.... It is anomalous and inappropriate that the Commonwealth and Defence personnel should be exposed to liability under State environmental provisions - some of which were enacted many years ago with no expectation of application to the Commonwealth and which have not been subjected to the consultative processes of the National Environment Protection Council.'[20]

Response from Environment Australia:

- 'The structure of the Bill ensures that the Commonwealth Environment Minister considers the application of provisions of State or Territory environment law to Commonwealth activities before considering the use of Part 4. This is established by clause 4 of the Bill. It is envisaged that, under clauses 11 and 16, the only exception to this will relate to airspace and the on-ground management of airports where NEPMs will be implemented through the *Airports (Environment Protection) Regulations* made under the *Airports Act 1996*.'
- 'The inclusion of the present clause 9 does not purport to suspend all State environmental provisions, only those "implementing a NEPM". Clause 9, for example, would not suspend a whole piece of legislation, only the provisions of it that implemented the NEPM in question.'
- 'The Bill is consistent with paragraph 17 of the IGAE which relates to implementation and essentially provides that the Commonwealth and States will be responsible for the attainment and maintenance of NEPMs within their respective jurisdictions through 'appropriate' mechanisms.
- 'The Bill reflects the Commonwealth's intent to apply provisions of State and Territory environment law to Commonwealth activities under the [COAG] *Heads of Agreement* [on Commonwealth/State roles and responsibilities for the environment]'

[16] Government of South Australia, submission 9 p. 6
[17] Government of NSW, submission 7 p. 3
[18] Government of the ACT, submission 6 p. 1
[19] Government of the ACT, submission 6 p. 1. Similarly Government of South Australia, submission 9 p. 4; Government of Victoria, submission 11 covering letter.
[20] Department of Defence, submission 3 p. 1

- 'The Bill provides the framework by which the Commonwealth is able to implement NEPMs in all circumstances... the application of provisions of State or Territory environment law may not always achieve the most appropriate outcomes in all circumstances. The Commonwealth acknowledges and agrees that the implementation of NEPMs depends on State and Territory processes without which the implementation of NEPMs would not be possible. Consequently the Commonwealth will apply provisions of State and Territory environment law as the first option and wherever possible.'[21]

Scope of Environment Minister's discretion

In the bill the Commonwealth Environment Minister may, by declaration, re-apply State laws the operation of which was removed by Clause 9. Submissions felt that the bill contains inadequate or inappropriate criteria for the exercise of this discretion:

- 'There are no criteria or guidelines provided to direct the Minister in the exercise of his or her discretion. This, of course, raises serious problems for Ministerial accountability, in addition to the risk of politically expedient, but environmentally unjustified decisions.'[22]
- 'The availability of the mechanisms under Parts 2 and 3 turns on the exercise by the Commonwealth Environment Minister of broad and largely unfettered discretions... The bill gives little or no guidance on the matters to be taken into account in the exercise of these discretions and the terminology used to confer the discretion is not capable or reasonably precise definition. This creates the potential for disputes about the proper interpretation of the relevant provisions.'[23]
- 'A particular provision of State law will only be applied to an activity by the Commonwealth or a Commonwealth authority under Parts 2 and 3 where the Commonwealth Environment Minister declares that the provision is **both necessary** for the implementation of a NEPM **and desirable** (clauses 12 and 17)... the grounds for excluding State laws, that is 'administrative efficiency' or 'national interest', are extremely broad, while the test of necessity and desirability for applying those laws is very stringent....'[24]
- '...The requirement that a provision of State law must be **necessary** for the implementation of a NEPM shows a lack of understanding of the integrated nature of State environmental laws. In Victoria, NEPMs will be implemented through judicious application of the range of environment protection tools available... It is possible that none of these tools, on their own, would be considered 'necessary' for the implementation of the standard, but together they provide a comprehensive program...'[25]

Response from Environment Australia:

[21] APPENDIX 2, pp. 1-3
[22] Environmental Defender's Office Ltd, submission 5 p. 6
[23] Government of NSW, submission 7 p. 2
[24] Government of Victoria, submission 11 p. 2
[25] Government of Victoria, submission 11 p. 2

- 'The making of a declaration by the Commonwealth Environment Minister under Parts 2 and 3 of the Bill to apply those provisions that are *necessary* for the implementation of a NEPM is consistent with section 7(2) of the NEPC Act 1994. This section provides that the Commonwealth will apply, as Commonwealth law, *designated* laws (as opposed to *all* laws) *to the extent necessary* to implement a NEPM. The declaration as to which laws are *necessary* will be made after consultation with the States and Territories.'[26]
- 'Regarding the discretionary nature of the latter [the Minister's declarations applying State laws: clauses 11 and 16] and the concern of the EDO that there are no criteria or guideline to direct the Minister in the exercise of his or her discretion, the mechanisms under the Bill are structured to accommodate all foreseeable situations in which NEPMs will need to be implemented. While re-iterating the intention to apply State or Territory environment law as a first option, the level of discretion available to the Environment Minister reflects the need for flexibility in deciding which mechanism is likely to provide the most appropriate environmental outcomes.'[27]

Definition of terms

The scope of the Environment Minister's discretion depends on some terms which, it was argued, 'have potential to cause considerable uncertainty.'[28]

- '...the availability of mechanisms under the Bill for the application of State laws turns upon a number of terms in the Bill that will be difficult to interpret with any great precision... ['desirable'; 'alternative regime'; 'appropriate environmental outcomes'; 'national interest'; 'administrative efficiency'; 'operate effectively']'[29]

Exemptions from application of State laws: 'national interest'

Several submissions felt that the 'national interest' criterion for excluding the operation of the bill is too broad:

- '...It is a concern if the 'matters of national interest' criterion is used to avoid implementing NEPMs via regulation. The ability to avoid implementing NEPMs should be strictly limited to genuine emergency situations.'[30]
- 'It would however be possible to accommodate this ['national interest' concerns'] in a scheme that provided for the application of State laws to Commonwealth activities as a general rule. Such a scheme could make appropriate exceptions... to deal with cases of genuine Commonwealth concerns about such things as national security and defence.'[31]
- 'The fact that the Commonwealth and the States can agree to transform any matter - regardless of its nature - into a matter of 'national interest' by simple agreement, is

[26] Environment Australia submission, APPENDIX 2, p. 2
[27] Environment Australia submission, APPENDIX 2, p. 4
[28] Government of NSW, submission 7 p. 3
[29] Government of NSW, submission 7 p. 3. Similarly Government of the Northern Territory, submission 8 p. 1; Government of South Australia, submission 9 p. 7
[30] Government of Victoria, submission 11 p. 4
[31] Government of NSW, submission 7 p. 5

unacceptable. If national interest is going to provide an exemption from the law, its definition should be both narrowly tailored and certain...'[32]

The Department of Defence supported the 'national interest' exemptions as recognising its special functions.[33]

Response from Environment Australia:

- 'In drafting the Bill, every effort was made to reflect the content of the Compliance Schedule [of COAG's Heads of Agreement on Commonwealth/State roles and responsibilities for the environment], especially with regard to the definition of 'a matter of national interest'.[34]
- 'The definition is not intended to be the basis for widespread exemptions from the application by the Commonwealth of provisions of State and Territory law and total exemptions are expected to be rare. Any such site or activity which is exempted will be subject to an environmental audit and environment management plan under Part 5.'[35]

Exemptions from application of State laws: various issues

Submissions argued that:

- The definition of 'Commonwealth authority' (as basis for exemption from State laws which might otherwise apply by virtue of the *Commonwealth Places (Application of Laws) Act 1970* or case law) is too broad.[36] Exemptions from State law may give Commonwealth businesses unfair competitive advantages.[37]
- It is objectionable that payment of fees by Commonwealth bodies is voluntary (clause 37). 'It is unacceptable that Victoria would incur additional costs in regulating Commonwealth activities without guarantees that the relevant fees and charges will be paid.'[38]
- Even when State laws apply, provisions of State laws requiring preparation of an environmental impact statement do not (clauses 13 & 18). This exemption is unwarranted.[39]
- Even when State laws apply, provisions requiring planning approvals or permits do not (unless implementing a NEPM; clauses 13 & 18). 'Many important environment protection tools, notably works approval and licensing, may be excluded from applying to Commonwealth instrumentalities or modified to such an extent as to be unworkable.'[40]

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[32] Environmental Defender's Office Ltd, submission 5 p. 5. Refers to bill clause 5, definition of 'national interest': '...any other matter agreed between the Commonwealth, the States and the Territories.'
[33] Department of Defence, submission 3 p. 1
[34] Environment Australia submission, APPENDIX 2, p. 3
[35] Environment Australia submission APPENDIX 2, p. 4
[36] Government of Tasmania, submission 4 p2; Government of the ACT, submission 6 p2; Government of NSW, submission 7 p. 2
[37] Government of the ACT, submission 6 p. 4
[38] Government of Victoria, submission 11 p. 6; also Government of the ACT, submission 6 p. 3; Government of South Australia, submission 9 p. 8.
[39] Environmental Defender's Office Ltd, submission 5 p. 9
[40] Government of Victoria, submission 11 p. 2

- It is regrettable that the definition of 'activity' to which the bill applies, does not include decision-making. 'This may limit Victoria's ability to regulate a large range of behaviours, plans, systems and other non-physical activities which are increasingly becoming the focus of environment protection regimes across the world. It is desirable that NEPMs are proactive...'[41]

Response from Environment Australia:

- 'The definition of 'Commonwealth authority' (clause 5) does not 'maximise the number of bodies exempted from State laws' or 'exempt Commonwealth authorities from State law' (Tas). The intention is to apply provisions of State or Territory law to the Commonwealth and Commonwealth authorities to the fullest extent possible.'[42]
- 'Too broad a definition [of 'activity'] would extend the Bill to a range of circumstances not envisaged by Schedule 4 of the IGAE, the *Heads of Agreement* or section 7 of the NEPC Act. The definition does not exclude cumulative and indirect effects being taken into consideration in that these are better accommodated during the development of NEPMs.'[43]
- '...the Bill provides that the application of a provision of a State or Territory law does not 'require' an environmental impact statement (EIS). This is not intended to preclude an EIS in every circumstance and is thus not inconsistent with the Commonwealth's obligations relating to Environment Impact Assessment under the *Heads of Agreement*.'[44]
- 'The ACT submission... states that there should be a review of the Bill after two years to focus on any anti-competitive effects. This issue relates more specifically to the effect of particular NEPMs which are subject to regulation impact statements. Legislation is reviewed on an ongoing basis and amendments made if necessary.'[45]

Environmental audits & environmental management plans

In relation to environmental audits and environmental management plans, the States suggested that they should only be used as a last resort or for genuine reasons of national security. Both the Northern Territory and Victoria shared this point of view. [46] South Australia for example expressed concern that 'The use of environmental management plans outside the framework provided by State environmental protection laws may be perceived by the public as being substantially less credible unless restricted to, for example, matters affecting national security.'[47] The Environment Institute of Australia argued that some of the concerns about environmental audits would be allayed if the bill provided for the environmental auditor to have 'suitable qualifications'.[48]

Response from Environment Australia:

[41] Government of Victoria, submission 11 p. 2; also Environmental Defender's Office Ltd, submission 5 p. 4
[42] Environment Australia APPENDIX 2, p. 4
[43] Environment Australia submission APPENDIX 2, p. 5
[44] Environment Australia submission APPENDIX 2, p. 5
[45] Environment Australia submission, APPENDIX 2, p. 8
[46] Government of the Northern Territory, submission 8 p. 1; Government of Victoria, submission 11 p. 3
[47] Government of South Australia, submission 9 p. 7
[48] Environment Institute of Australia Inc, submission 2 p. 1

- '...it is intended that the use by the Commonwealth of environmental audits and environment management plans (EMPs) will be limited, for example, to a site or activity that has been exempted from Part 2 or 3 on the ground of 'a matter of national interest'.[49]

Enforcement; offences; administrative review

The bill exempts from criminal prosecution those parts of the Commonwealth that have 'the shield of the Crown' (clause 10(2)).[50] Those parts of the Commonwealth which do not have the shield of the Crown will be liable to prosecution for breaches of applied State laws, but this will be done under Commonwealth procedures and initiated by the Commonwealth Director of Public Prosecutions.[51] There is an administrative procedure for reporting a Commonwealth authority's non-compliance with an applied State law, which may culminate in the Commonwealth Environment Minister making recommendations to the responsible Minister, and the responsible Minister reporting back to the Environment Minister on what action has been taken (clause 10). Any application for review of administrative decisions, including decisions made under applied State laws, will be done in the Commonwealth system (Administrative Appeals Tribunal and Federal Court) (clause 33).

Submissions generally considered that the enforcement regime is weak. Arguments included:

- The exclusion of the Crown in right of the Commonwealth from criminal liability is of concern since 'it is frequently a matter of debate whether or not a particular authority has the 'shield of the Crown', but there is clearly scope for a significant number of Commonwealth authorities to be protected from criminal liability by the bill.'[52]
- In light of this, clauses 35 and 36 (which create offences by State officials for divulging certain information obtained on Commonwealth property), are objectionable: 'It is an inadequate proposition that the Commonwealth can provide for criminal liability to officers of this State, without assuming a similar responsibility in respect to its agents.'[53]
- Where a Commonwealth authority is liable to prosecution, the fact that this would be initiated by the Commonwealth Director of Public Prosecutions is of concern. '...the public of South Australia would need to be satisfied that Commonwealth business enterprises, or other agents, would gain no inadvertent favour by virtue of determinations as to whether or not to prosecute being made in another forum.'[54]
- To overlook the experience of specialised State courts is regrettable.[55]
- There should be a wide standing to take action against breaches.[56]

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[49] Environment Australia submission APPENDIX 2, p. 5

[50] For explanation of 'the shield of the Crown', see Senate Standing Committee on Legal and Constitutional Affairs, *The Doctrine of the Shield of the Crown*, December 1992.

[51] Explanatory memorandum, p. 7

[52] Government of NSW, submission 7 p. 4; similarly Government of South Australia, submission 9 p. 7; Government of Victoria, submission 11 p. 3

[53] Government of South Australia, submission 9 p. 8. Similarly Government of Victoria, submission 11 p. 4, Government of the Northern Territory, submission 8 p. 2

[54] Government of South Australia, submission 9 p. 8

[55] Government of the ACT, submission 6 p4; Government of Victoria, submission 11 p. 5

[56] Environmental Defender's Office Ltd, submission 5 p. 8

- The clause 10 administrative procedure for reporting Commonwealth breaches of applied State laws is cumbersome. 'This process separates the expertise of the State or Territory officers raising the matter from those responding to it.' There is no requirement to make clause 10 actions public.[57]
- The clause 10 procedure should allow for Commonwealth officials, not only State/Territory officials, to initiate a matter.[58]
- There are no 'realistic' sanctions against Commonwealth authorities which do not adequately implement an environmental management plan [Part 6, clause 32].[59]

Response from Environment Australia:

- 'Under Parts 2, 3 and possibly 4 of the Bill, the Commonwealth will apply provisions of State or Territory law as Commonwealth law. Therefore it is appropriate that decisions made by the Commonwealth are to be subject to Commonwealth judicial and administrative review processes. This will result in certainty for employees of the Commonwealth and Commonwealth authorities and a higher level of consistency than could be provided by eight different jurisdictional processes.'[60]
- '...the Bill is consistent with the current Commonwealth position relating to criminal liability of Commonwealth public servants.There is a distinction between imposing liability on the Crown as a body politic and imposing criminal liability specifically on servants of the Crown. Crown servants may be criminally liable under legislation expressed to bind the Crown but not rendering the Crown liable to prosecution, as long as the terms of the offence do not make the servant's guilt dependant on the commission of an offence by the Crown itself. Criminal liability may be imposed on servants of the Crown to ensure that they act according to law in the performance of their duties. Consequently, in response to the concern included in the submission from SA, the Bill is consistent with the *Environment Protection Act* (SA) which 'does not shield from criminal liability all agents of private business and local and State government'.'[61]
- 'The Commonwealth acknowledges that 'specialist expertise...exists in some State courts and tribunals' (ACT) but the existence of certainty and uniformity in the law for those carrying on activities on behalf of the Commonwealth in all jurisdictions is essential in the effective implementation of NEPMs.'[62]
- '...the Commonwealth assures SA that no favour will result from Commonwealth GBEs being prosecuted by the Commonwealth Director of Public Prosecutions should the GBEs not be open to prosecution by State and Territory legal officers.'[63]
- 'With regard to concerns relating clauses 35 and 36, these provisions will also result in certainty and uniformity in the law for those carrying on activities on behalf of the Commonwealth in all jurisdictions. Clause 35(1) concerns the disclosure of information

[57] Environmental Defender's Office Ltd, submission 5 p. 8; Government of the ACT, submission 6 p. 3
[58] Environment Institute of Australia, submission 2 p. 1
[59] Government of the ACT, submission 6 p. 4, Government of Victoria, submission 11 p. 5. Clause 32 provides that if the Environment Minister is satisfied that a responsible minister has not adequately implemented an environmental management plan, the Environment Minister may a written declaration to that effect which is published in the *Gazette*.
[60] Environment Australia submission APPENDIX 2, p. 5
[61] Environment Australia submission APPENDIX 2, p. 6
[62] Environment Australia submission APPENDIX 2, p. 6
[63] Environment Australia submission APPENDIX 2, p. 7

obtained from entry or search by a State or Territory environment officer. However, this is balanced by clause 35(2) which provides that this does not apply to a disclosure made in the performance of duties under an applied provision of an applied State law, under an applied provision of a law of a State or Territory or under regulations made under Part 4.'[64]

- [re the administrative procedures under clause 10 and part 6] 'An enforcement regime based on criminal sanctions would result in the illogical situation whereby the Commonwealth would need to bring prosecutions against the Commonwealth.'[65]
- '...the detailed description of the [clause 10] enforcement procedure is intended to provide certainty as to how it will operate.'[66]
- 'Environment Australia does not agree that it is 'unrealistic' (ACT) to expect any Environment Minister to publish, as a last resort, a declaration that a NEPM is not being adequately implemented by a Commonwealth department or authority. Such a provision reflects the Commonwealth's commitment to fulfil its obligations under the IGAE and the NEPC Act. Regarding the concern of the EDO that the public is not given the right to know under this procedure, such a declaration will be published in the *Gazette* (clause 32(5)).'[67]

Accountability and public participation

There was a strong feeling in submissions that the bill did call for strong accountability mechanisms to be put in place and certain groups argued for greater public scrutiny of Commonwealth actions in relation to the implementation of NEPMs. In particular, the Environmental Defender's Office deplored the lack of a clear obligation on the Commonwealth to monitor and report publicly on how well the goals of an environmental management plan are being achieved.[68]

Response from Environment Australia:

- '...the Environmental Management Plans must provide for the participation of, and for consultation with, the community in the development of the plan (clause 30(2)(f)) while, unless the regulations provide otherwise [which may only be for reasons of 'national interest], the environment manager is to make the EMP available for inspection and purchase by the public (clause 31(1)(f)). The environmental audit is not 'secretive' [argument of Environmental Defender's Office Ltd, submission 5] in that it provides the basis of the EMP which is open to public scrutiny. The audit report is inadmissible as evidence in proceedings against the Commonwealth (clause 28) in that it ensures the information provided by a particular Commonwealth Department is both frank and fearless. Such information is more likely to result in the delivery of appropriate environmental outcomes.'[69]

[64] Environment Australia submission APPENDIX 2, p. 7
[65] Environment Australia submission APPENDIX 2, p. 7
[66] Environment Australia submission APPENDIX 2, p. 7
[67] Environment Australia submission APPENDIX 2, p. 8
[68] Environmental Defender's Office Ltd, submission 5 p. 10
[69] Environment Australia submission APPENDIX 2, pp. 5-6

- 'With regard to monitoring and reporting on how well the goals in the EMP have been met [argument of Environmental Defender's Office Ltd], clause 30(2)(g) provides for monitoring and reporting on the implementation of the plan.'[70]
- 'It has been suggested (EIA) that a provision be made for a Commonwealth department or authority to indicate how it is applying a NEPM in its own annual report in accordance with the *Public Service Act 1922*. A department or authority is already obliged to indicate its progress in implementing a NEPM in an annual report to the Environment Minister to be laid before Parliament (clause 39) and this, in itself, will ensure the required accountability and transparency.'[71]

Recommendation

The Committee reports to the Senate that it has considered this Bill and it recommends that the bill proceed.

Senator Kay Patterson
Chairman

References

Prest J (Commonwealth Parliamentary Library Information & Research Service), *National Environment Protection Measures (Implementation) Bill 1997*, Bills Digest no. 113, 1997-98

[70] Environment Australia submission APPENDIX 2, p. 6
[71] Environment Australia submission APPENDIX 2, p. 7-8

National Environment Protection Measures (Implementation) Bill 1997

Minority Report

Senator Lyn Allison
Australian Democrats

The Australian Democrats take the view that the Bill as presently drafted is unsatisfactory and requires amendment. We do not concur with the recommendation contained in the majority report. The explanations offered by Environment Australia in that majority report do not allay our concerns with the Bill's inadequacies.

1. Exempting Commonwealth authorities from State law.

The essence of the Bill is to exempt Commonwealth activities from State laws implementing NEPMs, unless the Federal Minister decides to apply those laws to the Commonwealth using the mechanisms under parts 2,3,4 or 5 of the Bill.

The Bill therefore does not make a clear commitment to the adoption of State laws that implement NEPMs in respect to Commonwealth places and activities.

On the contrary, the intent as set out in Section 7 of the NEPC Act is for this to occur.

In addition, a COAG communique in November 1997 stated as a key benefit of the outcome of the review of Commonwealth / State roles and responsibilities on the environment that it was expected to result in improved compliance by the Commonwealth.....with State environment and planning legislation.

The Bill does not provide certainty in clarifying the preferred Commonwealth approach in the implementation of NEPMs in relation to Commonwealth places and activities on Commonwealth land.

The Australian Democrats favour a new approach to environmental protection which sees a leadership role for the Commonwealth and which results in unifying legislation requiring a general duty of care for the environment in all jurisdictions. In the absence of such legislation, we believe the Commonwealth should be prepared in the meantime to commit its activities to both proper Commonwealth and State legislation.

The general exemption provided to the Commonwealth under the Bill, unless the Minister decides otherwise, is not consistent with a leadership role being taken by the Commonwealth on environmental matters. Leadership must start, as a minimum, with the Commonwealth's own activities and the Commonwealth should be prepared to be similarly bound on environmental protection mechanisms as are other parties.

Recommendation one : the Bill be amended to include the Commonwealth being bound by State legislation implementing NEPMs with one national interest exemption (see recommendation two).

2. Exemptions.

The Bill further exempts the Commonwealth from the application of part 2 of the Bill applying State laws to Commonwealth activities if there is a declaration by the Environment Minister on the grounds that the activity involves a specified matter of national interest, or for administrative efficiency.

Noting recommendation one above, we believe exemptions should be so defined to remove unnecessary and unwarranted discretion. The definition should be one which provides as much certainty as possible.

Recommendation 2 : That the Bill be amended to provide one exemption for Commonwealth activities from the application of State laws implementing NEPMs. This exemption be on the grounds of it being in the national interest. This national interest exemption only be available where such an exemption is warranted as a matter of public health and safety or national security.

3. The Bill is overly complex.

Recommendation 3 : The Bill be simplified to reflect recommendations one and two above.

4. Definition of Commonwealth activities.

The definition of activity under the Bill is too narrow.

Recommendation 4 : the definition of activity under the Bill be broadened to include the formulation of environmental policy, environmental decision making, cumulative effects and indirect effects.

5. Enforcement

The Bill does not provide for an adequate enforcement regime given that the Bill in clause 10 (2) provides that nothing in it renders the Crown in right of the Commonwealth liable to be prosecuted for an offence.

Recommendation 5 : that the Bill be amended to provide for an adequate enforcement regime which sees all Commonwealth authorities liable to be prosecuted for an offence against the environment. This may be a Commonwealth enforcement system at least equivalent to that in the States and be overseen by a section of Environment Australia.

6. Disclosure.

The Bill provides for a conviction punishable by imprisonment for up to 2 years for a person who directly or indirectly discloses information obtained from a search of land occupied by the Commonwealth or Commonwealth authority. The Bill also seeks to do away with the production of potential evidence in a court. While these clauses do provide exceptions, we believe these measures are not in the spirit of full and true disclosure in environmental performance matters.

Recommendation 6 : that the Bill be amended to remove limitations on the disclosure of information about Commonwealth activities.

Senator Lyn Allison
Australian Democrats

National Environment Protection Measures (Implementation) Bill 1997

Opposition Comments on the Report by the Senate Environment, Recreation, Communications and the Arts Legislation Committee

The Opposition expressed its concerns regarding this Bill when it was first introduced. At a formal briefing with the Department of the Environment, the Shadow Minister observed that the Commonwealth would in fact be likely to be bound by State and Territory laws to a greater degree in respect of its activities if in fact this Bill were not introduced.

The Opposition's initial concerns have been confirmed and elaborated on by a number of submitters including State and Territory governments and interest groups.

The Opposition reiterates its concerns and echoes the further concerns articulated by submissions to the Committee.

The Bill:

- focuses more on exemption of the Commonwealth from the application of State and Territory laws than it does on compliance;

- provides the minister with unfettered discretion;

- contains little or no accountability measures; a search through the Bill for any enforcement mechanism would only find a reporting requirement. Even then the public would have no way of knowing that a report has been filed. A requirement for public reporting is one example where the Government could have demonstrated a preparedness to include transparency and accountability;

- expressly exempts the Commonwealth from prosecution for an offence; and

- the heaviest penalty would fall on an individual disclosing information whilst inspecting or searching premises occupied by the Commonwealth or a Commonwealth authority; in other words the heaviest penalty would fall on a 'whistle blower'.

The Bill does contain some novel mechanisms, such as requirement for Environmental Audits and Environment Management Plans, which arguably have the potential to bring about more effective improvements than a regulatory framework; however it does not exploit those measures to any significant degree.

In short, the Bill has structural weaknesses and problems. It fails to satisfactorily explain many significant definitions it uses, notably the 'national interest', and it fails the accountability and transparency test.

Moreover, rather than clarifying State/Commonwealth responsibilities, by its unnecessary complexity it further blurs and confuses those responsibilities.

The Opposition finds that the response to concerns expressed in many submissions to the Committee by Environment Australia fails to provide satisfactory answers to those concerns.

Senator Chris Schacht
Australian Labor Party

Appendix 1

List of Submissions

No.	Submission by -	Name and Address
1	Federal Chamber of Automotive Industries	Mr Rex Scholar Chief Engineer Federal Chamber of Automotive Industries 6th Floor Perpetual Trustees Building 10 Rudd Street Canberra ACT 2600
2	Environment Institute of Australia Inc.	Mr Simon R Molesworth AM QC Honorary National President Environment Institute of Australia Inc. Suite 123, 1st Floor 98-100 Elizabeth Street Melbourne VIC 3000
3	Department of Defence	The Hon Ian McLachlan AO MP Minister for Defence Parliament House Canberra ACT 2600
4	Government of Tasmania	The Hon. Sue Napier MHA Acting Premier GPO Box 123B Hobart TAS 7001
5	Environmental Defender's Office Ltd & others	Mr Donald K Anton Policy Officer Environmental Defender's Office Ltd Level 9, 89 York Street Sydney NSW 2000
6	Government of the ACT	Mr Rod Gilmour, Chief Executive ACT Department of Urban Services GPO Box 158 CANBERRA ACT 2601
7	Government of New South Wales	Mr Roger Wilkins Director General, the Cabinet Office Level 39, Governor Macquarie Tower 1 Farrer Place Sydney NSW 2000
8	Northern Territory Government	The Hon. Shane Stone, Chief Minister GPO Box 3146 Darwin NT 0800
9	Government of South Australia	The Hon Dorothy Kotz MP Minister for Environment and Heritage GPO Box 2269 Adelaide SA 5001
10	Environment Australia	Ms Anthea Tinney Head, Environment Protection Group Environment Australia box E305 Kingston ACT 2604
11	Government of Victoria	Ms Meredith Sussex Acting Secretary Department of Premier & Cabinet 1 Treasury Place Melbourne VIC 3002
12	Department of Transport	Mr W R Ellis Department of Transport & Regional Development GPO Box 594 Canberra ACT 2601

Appendix 2

Response by Environment Australia
to Submissions to the Senate Inquiry on the
National Environment Protection Measures (Implementation) Bill 1997

Application by the Commonwealth of State and Territory Environment Law

There is general perception in all submissions that the options for the implementation of national environment protection measures (NEPMs) available to the Commonwealth under the *National Environment Protection (Implementation)Bill 1997* (the Bill) suggests that the Commonwealth does not intend to apply provisions of State or Territory environment law to its activities as a first option for implementation. However, flexibility in the Bill's operation is intended to ensure that the Commonwealth is able to implement NEPMs in all foreseeable circumstances.

The structure of the Bill ensures that the Commonwealth Environment Minister considers the application of provisions of State or Territory environment law to Commonwealth activities before considering the use of Part 4. This is established by clause 4 of the Bill. It is envisaged that, under clauses 11 and 16, the only exception to this will relate to airspace and the on-ground management of airports where NEPMs will be implemented through the *Airports (Environment Protection) Regulations* made under the *Airports Act 1996*.

If, for example, a State disallows a NEPM or decides not to participate in the development of a particular NEPM and the Commonwealth Environment Minister is unable to make a declaration under Part 2 or Part 3 for the application of State law as Commonwealth law, then he or she will consider the use of Part 4 which enables self-regulation by the Commonwealth under clause 21(5). Such regulations may apply provisions of a law of any State or Territory, even if the activity is not carried on in that State or Territory (clause 21(8)).

The final mechanism available under the Bill for the implementation of NEPMs by the Commonwealth is the use of an environment management plan. It is intended that this option will be used where an activity or premises have been exempted from Parts 2, 3 or 4 on the ground of 'a matter of national interest'.

The following responds more specifically to concerns raised in the submissions with regard to this issue.

Inclusion of Clause 9

In short, this clause provides that State and Territory laws implementing NEPMs will only apply to the Commonwealth or Commonwealth authorities to the extent that they apply under the Bill. This is perceived by States as the Commonwealth moving away from its commitment to apply State environment laws under the *Intergovernmental Agreement on the Environment 1992*, section 7 of the *National Environment Protection Council Act 1994* and the *Heads of Agreement* (see below).

The inclusion of the present clause 9 does not purport to suspend all State environmental provisions, only those "implementing a NEPM". Clause 9, for example, would not suspend a whole piece of legislation, only the provisions of it that implemented the NEPM in question.

Intergovernmental Agreement on the Environment 1992

A number of submissions (ACT, NT, SA, NSW) conclude that the Bill is not within the 'spirit' of the *Intergovernmental Agreement on the Environment* (IGAE). The mechanisms under the Bill reflect the Commonwealth's intention to fulfil its obligations under Schedule 4 of the IGAE, especially with regard to the objectives of establishing NEPMs. The Bill is consistent with paragraph 17 of the IGAE which relates to implementation and essentially provides that the Commonwealth and States will be responsible for the attainment and maintenance of NEPMs within their respective jurisdictions through 'appropriate' mechanisms.

Section 7 of the National Environment Protection Council Act 1994 (C'wth)

Four submissions (ACT, NT, SA, NSW) include the concern that the Bill is inconsistent with section 7 of the *National Environment Protection Council Act 1994 (C'wth)* (the NEPC Act). Firstly, the Bill is consistent with section 7(1) of the NEPC Act in that the Bill will enable the Commonwealth to *implement, by such arrangements as are necessary,* each NEPM in *respect of activities that are subject to Commonwealth law.*

The making of a declaration by the Commonwealth Environment Minister under Parts 2 and 3 of the Bill to apply those provisions that are *necessary* for the implementation of a NEPM is consistent with section 7(2) of the NEPC Act 1994. This section provides that the Commonwealth will apply, as Commonwealth law, *designated* laws (as opposed to *all* laws) *to the extent necessary* to implement a NEPM. The declaration as to which laws are *necessary* will be made after consultation with the States and Territories. Without such consultation, it is unlikely that the Commonwealth will be able to implement a NEPM efficiently and effectively.

Heads of Agreement on Commonwealth-State Roles and Responsibilities on the Environment

The submissions from the ACT and SA also include reference to the Council of Australian Governments' (CoAG) *Heads of Agreement.* The former suggests that the Bill takes the approach that only the Commonwealth should make laws to apply NEPMs to its activities and that this approach is inconsistent with the Heads of Agreement. The

SA submission states that the adoption of South Australian laws as the primary mechanism is consistent with the *Heads' of Agreement* inclusion of improved compliance by the Commonwealth of State environment and planning legislation.

The Bill reflects the Commonwealth's intent to apply provisions of State and Territory environment law to Commonwealth activities under the *Heads of Agreement*. In drafting the Bill, every effort was made to reflect the content of the Compliance Schedule, especially with regard to the definition of 'a matter of national interest'.

Previous commitments to, and communications with, the States

The SA submission refers to both a letter from then Prime Minister Keating to then Premier Arnold on 8 October 1993 and negotiations between the States and Commonwealth in 1995 which identified State concerns. Regarding the former, the intention is to apply provisions of State and Territory environment law as the first option but, in a letter of 8 October 1993 to the then Premier Fahey, the then Prime Minister Keating made it clear that only: 'those laws and regulations .... identified as relevant to achieving obligations set by NEPC will be taken up and applied as Commonwealth law'.

Practical application of the Bill

The submission from NSW questions how the Bill will aid the implementation of the first three expected NEPMs in that they will all rely on State and Territory processes for implementation. The Bill provides the framework by which the Commonwealth is able to implement NEPMs in all circumstances. As stated above, the application of provisions of State or Territory environment law may not always achieve the most appropriate outcomes in all circumstances.

The Commonwealth acknowledges and agrees that the implementation of NEPMs depends on State and Territory processes without which the implementation of NEPMs would not be possible. Consequently the Commonwealth will apply provisions of State and Territory environment law as the first option and wherever possible.

Exemptions from the Bill

The issues raised in submissions concerning the Commonwealth exempting itself from the application of provisions of State and Territory environment law have been addressed above. However, concerns of a more specific nature were also raised relating to exemptions and these are addressed below.

'A matter of national interest'

As stated earlier, the present definition of 'a matter of national interest' (clause 5) attempts to reflect the approach taken with regard to the Compliance Schedule under the *Heads of Agreement*. The suggestions that it would be preferable to use only national interest where 'public health and safety would be endangered' (Environmental Defenders Office) and that the definition 'should apply to national security matters, telecommunications, airspace and airports activities' (Environment Institute of Australia) would be inconsistent with the *Heads of Agreement*.

The definition is not intended to be the basis for widespread exemptions from the application by the Commonwealth of provisions of State and Territory law and total exemptions are expected to be rare. Any such site or activity which is exempted will be subject to an environmental audit and environment management plan under Part 5. It is not possible to respond to the view that exempting activities from the application of NEPMs is outside the terms of the IGAE (NSW) without further clarification.

'Administrative efficiency' and 'desirability' (EDO)

'Administrative efficiency' is a criterion whereby the Commonwealth Environment Minister may make a declaration that an alternative Commonwealth regime is to be used by the Commonwealth for a particular activity (clauses 11(1) and 16(1)). It is intended to ensure that the costs of administration relating to a NEPM remain as cost-effective as possible in achieving the required environmental outcomes. This is consistent with the *National Competition Policy* and Schedule 4 of the IGAE which provides that 'Any proposed measures must be examined...to ensure simplicity, efficiency and effectiveness in administration'.

Under Parts 2 and 3 of the Bill the Commonwealth Environment Minister, after consultation with relevant Ministers, may make a declaration that the application by the Commonwealth of a provision of State or Territory law is both 'necessary' and 'desirable' (clauses 12(1) and 17(1)). Regarding the discretionary nature of the latter and the concern of the EDO that there are no criteria or guideline to direct the Minister in the exercise of his or her discretion, the mechanisms under the Bill are structured to accommodate all foreseeable situations in which NEPMs will need to be implemented. While re-iterating the intention to apply State or Territory environment law as a first option, the level of discretion available to the Environment Minister reflects the need for flexibility in deciding which mechanism is likely to provide the most appropriate environmental outcomes.

Definition of 'Commonwealth authority' (ACT, Tas)

The definition of 'Commonwealth authority' (clause 5) does not 'maximise the number of bodies exempted from State laws' or 'exempt Commonwealth authorities from State law' (Tas). The intention is to apply provisions of State or Territory law to the Commonwealth and Commonwealth authorities to the fullest extent possible.

Activities carried on by contractors (ACT) and tenants (SA)

The purpose of section 7 is to ensure that activities carried on by contractors are included in the operation of the Bill ie they will be subject to the same provisions of State or Territory law as the Commonwealth or Commonwealth authority on behalf of which they are carrying on an activity. The submission from SA expresses support for the inclusion of this clause.

With regard to tenants, the Bill is consistent with the Commonwealth's agreement under the *Heads of Agreement* whereby tenants not acting for the Commonwealth or a Commonwealth authority and persons undertaking activities on Commonwealth land will be subject to State environment and planning laws.

Definition of 'activity' (EDO)

The definition of 'activity' (clause 5) ensures that the provisions of the Bill are capable of operating within the object of the Bill (clause 3) which provides for the implementation of NEPMs in respect of certain activities carried on by or on behalf of the Commonwealth or a Commonwealth authority. Too broad a definition would extend the Bill to a range of circumstances not envisaged by Schedule 4 of the IGAE, the *Heads of Agreement* or section 7 of the NEPC Act.

The definition does not exclude cumulative and indirect effects being taken into consideration in that these are better accommodated during the development of NEPMs. Such effects are likely to be picked up by the NEPMs relating to ambient air and water quality. Similarly the precautionary approach is better addressed during the development of a NEPM.

Qualifications on the application of State and Territory law relating to the preparation of an environment impact statement and judicial or administrative review of a decision (EDO).

With regard to the qualification on the application of State and Territory law relating to the preparation of an environmental impact statement (clause 13(1)(d) and 18(1)(d)), the Bill provides that the application of a provision of a State or Territory law does not 'require' an environmental impact statement (EIS). This is not intended to preclude an EIS in every circumstance and is thus not inconsistent with the Commonwealth's obligations relating to Environment Impact Assessment under the *Heads of Agreement*.

Under Parts 2, 3 and possibly 4 of the Bill, the Commonwealth will apply provisions of State or Territory law as Commonwealth law. Therefore it is appropriate that decisions made by the Commonwealth are to be subject to Commonwealth judicial and administrative review processes. This will result in certainty for employees of the Commonwealth and Commonwealth authorities and a higher level of consistency than could be provided by eight different jurisdictional processes.

Environmental audits and environment management plans

As stated above it is intended that the use by the Commonwealth of environmental audits and environment management plans (EMPs) will be limited, for example, to a site or activity that has been exempted from Part 2 or 3 on the ground of 'a matter of national interest'. The matters set out in clause 30(2) will be able to provide a comprehensive scheme for giving effect to NEPMs under an EMP (ACT) and will enable an EMP to fulfil regulatory requirements (EDO).

With regard to the plans being made readily available to the public (EDO), the EMPs must provide for the participation of, and for consultation with, the community in the development of the plan (clause 30(2)(f)) while, unless the regulations provide otherwise, the environment

manager is to make the EMP available for inspection and purchase by the public (clause 31(1)(f)).

The environmental audit is not 'secretive' (EDO) in that it provides the basis of the EMP which is open to public scrutiny. The audit report is inadmissible as evidence in proceedings against the Commonwealth (clause 28) in that it ensures the information provided by a particular Commonwealth Department is both frank and fearless. Such information is more likely to result in the delivery of appropriate environmental outcomes.

With regard to monitoring and reporting on how well the goals in the EMP have been met (EDO), clause 30(2)(g) provides for monitoring and reporting on the implementation of the plan.

Environment Australia notes the suggestion of the EIA that the environmental auditor should be a national professional association (clause 25).

Liability

Commonwealth employees

With regard to the Department of Defence's concern over potential exposure of Commonwealth personnel to liability under State environmental provisions without being subject to NEPC consultative processes, the Bill is consistent with the current Commonwealth position relating to criminal liability of Commonwealth public servants.

There is a distinction between imposing liability on the Crown as a body politic and imposing criminal liability specifically on servants of the Crown. Crown servants may be criminally liable under legislation expressed to bind the Crown but not rendering the Crown liable to prosecution, as long as the terms of the offence do not make the servant's guilt dependant on the commission of an offence by the Crown itself. Criminal liability may be imposed on servants of the Crown to ensure that they act according to law in the performance of their duties.

Consequently, in response to the concern included in the submission from SA, the Bill is consistent with the *Environment Protection Act* (SA) which 'does not shield from criminal liability all agents of private business and local and State government'.

Use of Commonwealth legal mechanisms

Most submissions include the general concern that the Commonwealth, in applying State or Territory environment law as Commonwealth law, intends to use Commonwealth legal mechanisms when issues of legal liability arise. As stated above this will result in certainty for employees of the Commonwealth and Commonwealth authorities and a higher level of consistency than could be provided by jurisdictional legal processes. The Commonwealth acknowledges that 'specialist expertise...exists in some State courts and tribunals' (ACT) but the existence of certainty and uniformity in the law for those carrying on activities on behalf of the Commonwealth in all jurisdictions is essential in the effective implementation of NEPMs.

Regarding the liability of Commonwealth government business enterprises (GBEs), the Commonwealth assures SA that no favour will result from Commonwealth GBEs being

prosecuted by the Commonwealth Director of Public Prosecutions should the GBEs not be open to prosecution by State and Territory legal officers.

State and Territory Officers

With regard to concerns relating clauses 35 and 36, these provisions will also result in certainty and uniformity in the law for those carrying on activities on behalf of the Commonwealth in all jurisdictions. Clause 35(1) concerns the disclosure of information obtained from entry or search by a State or Territory environment officer. However, this is balanced by clause 35(2) which provides that this does not apply to a disclosure made in the performance of duties under an applied provision of an applied State law, under an applied provision of a law of a State or Territory or under regulations made under Part 4.

Enforcement

Administrative Enforcement Regimes

The administrative enforcement regimes under clause 10 and under Part 6 are the subject of concern in the submissions from the ACT, EDO and NSW. Such regimes exist to ensure that NEPMs are implemented and that appropriate environmental outcomes are achieved. An enforcement regime based on criminal sanctions would result in the illogical situation whereby the Commonwealth would need to bring prosecutions against the Commonwealth.

As the submission from the ACT points out, clause 10 involves State and Territory officials raising a matter. The fact that it is left to the Commonwealth to respond to the matter is related to the issue of enforcement outlined in the previous paragraph. The steps underlying the regime under clause 10 are described as 'very cumbersome' and 'complex' in the ACT submission but the detailed description of the enforcement procedure is intended to provide certainty as to how it will operate.

The EIA suggests making provisions for Commonwealth officers to report contraventions with respect to the Commonwealth and for 'a body' to be given authority to form opinions that the NEPM is not being implemented in respect of the activities of the Environment Department. The latter Department is specifically included in this regime under clause 10(6). Both are noted but may be inappropriate in that, in practice, the inclusion of such provisions is unlikely to add to intention and operation of the regime.

Similarly, it may be impractical to stipulate that the Environment Secretary should ask for comments from the Secretary of the Department or the chief executive officer within ten days under clause 10(5)(b)(ii) (EIA). Ten days may be appropriate in some cases but would hinder investigations in those which are more complex.

It has been suggested (EIA) that a provision be made for a Commonwealth department or authority to indicate how it is applying a NEPM in its own annual report in accordance with the *Public Service Act 1922*. A department or authority is already obliged to indicate its

progress in implementing a NEPM in an annual report to the Environment Minister to be laid before Parliament (clause 39) and this, in itself, will ensure the required accountability and transparency.

Regarding the administrative regime under Part 6, Environment Australia does not agree that it is 'unrealistic' (ACT) to expect any Environment Minister to publish, as a last resort, a declaration that a NEPM is not being adequately implemented by a Commonwealth department or authority. Such a provision reflects the Commonwealth's commitment to fulfil its obligations under the IGAE and the NEPC Act. Regarding the concern of the EDO that the public is not given the right to know under this procedure, such a declaration will be published in the *Gazette* (clause 32(5)).

It is intended that decisions will be subject to the *Administrative Appeals Tribunal Act 1975* (clause 33) and the *Administrative Decisions (Judicial Review) Act 1977* (EDO).

Resource Implications

Regarding the Department of Defence's concern with the resource implications of the Bill, it is intended that costs of implementing NEPMs are to be met out of existing departmental budgetary allocations.

The submission from SA expects that the Commonwealth and its authorities and tenants gain no advantage from lower charges than those to which other operators in South Australia are subject. The submission refers to the fact that the Commonwealth may pay a fee or a charge to a State or Territory and to a State or Territory authority. Additionally, clause 38(3) enables the Commonwealth Environment Minister to make an arrangement, including a financial arrangement, with an appropriate Minister of a State or Territory.

Competitive Neutrality Issues

The ACT submission expresses the concern that there may be potential for competitive issues to arise where Commonwealth agencies are exempt from provisions of State and Territory environment law under the Bill. If this is the case, the Bill should require the Commonwealth to demonstrate such a restraint on trade was justified. The ACT submission also states that there should be a review of the Bill after two years to focus on any anti-competitive effects.

This issue relates more specifically to the effect of particular NEPMs which are subject to regulation impact statements. Legislation is reviewed on an ongoing basis and amendments made if necessary.