

Submission to the Productivity Commission Review of National Competition Policy Arrangements

by the

Australian Conservation Foundation

The Australian Conservation Foundation is a non-profit, membership-based environment group. We take a solution-oriented approach to environmental issues, and seek to form partnerships with community groups, governments and business to achieve ecologically sustainable outcomes. Our work includes natural heritage protection, water resource management and global warming, endangered species, uranium mining and sustainable cities. We lobby governments and work to raise the level of awareness of environmental issues within Australia.

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National Competition Policy (NCP) has significant implication for the health and sustainability of Australia's natural environment. In some areas such as water resources and forests, there are potentially large environmental gains if NCP is implemented effectively. In other areas, such as electricity, the impact on the environmental of the NCP reforms is less clear. Ensuring access to the electricity grid can make it possible for suppliers of "green power" to compete with traditional power generators. However, if greater efficiencies increase the demand for electricity from coal-fired generation, for example, this would increase the output of greenhouse gasses. The current electricity reform agreements do not adequately address the environmental costs associated with power generation, because the costs to the environment are not taken into account the cost of power from generators that emit high amounts of greenhouse gasses is effectively subsidised and the producers of power from more environmentally friendly sources are disadvantaged.

Most of the NCP reforms (with the exception of the water reform program) were designed to increase competition, improve efficiency, and provide consumers with better quality goods and services at lower prices. They were not designed to achieve environmental objectives. The environmental impacts of such reforms need to be assessed on a case-by-case basis, as some would produce environmental benefits, while others would increase environmental damage. It is possible to consider four broad cases.

1. The output of the industry causes environmental damage — for example the pollution generated by cars. In this case increased production efficiency can reduce prices, increase demand and increase the activity that is damaging to the environment.
2. Production efficiency (narrowly defined as cost cutting) is achieved by cutting corners on environmentally friendly features — for example reducing the cost of residential housing by reducing insulation and other energy saving features. This type of cost cutting obviously has an adverse impact on the environment.
3. The use of inputs by the industry causes environmental damage — for example the use of water for irrigated agriculture in stressed systems. In this case improving the efficiency of irrigation can

reduce the use of water by irrigators. This can reduce environmental damage if the water savings are used to make more environmental water available. But it is not guaranteed that such savings will flow to the environment. An irrigator may take the water saved and use it to increase the area under irrigation.

Further, the relationship between improvements in efficiency and environmental impact can be highly complex. When water is pumped onto irrigated land some is absorbed by the plants. The rest re-enters the water system as run-off. Improvements in water use efficiency often reduce run-off and consequently reduce the amount of water re-entering the system to provide for environmental flows and the demands of other water users. Such improvements in the efficiency of water use can reduce the amount of water available to the environment.

4. Governments make goods and services available at sub-economic prices, contributing to unsustainable use and/or development. For example, government under-pricing of timber, water, mineral or energy resources, can serve to encourage exploitation at unsustainable levels, whilst at the same time undercutting the market for alternative or substitute suppliers.

In some cases it can mean exploitation of natural resources that would not otherwise be economic to utilise – for example remote-area old growth forests that are costly to access, water infrastructure where the costs exceed the market value of water derived, or electricity transmission systems that require inefficient cross-subsidies to pay their way. This in turn can create an implied obligation to governments of continuing inefficient and unsustainable policies.

In summary, reforms with an economic efficiency focus can provide environmental benefits in industries whose use of natural resources or other inputs is environmentally damaging. Improving efficiency can reduce the use of such inputs and provide benefits to the environment. But this link is not guaranteed. Often additional policies would be needed to ensure that such efficiency savings are shared with the environment.

The Australian Conservation Foundation's (ACF) contribution to NCP has been proactive over a number of years. The ACF has been involved in government negotiations on environmental issues relevant to areas of NCP such as water reform, it has contributed to the work of the National Competition Council (NCC) and undertaken its own research and analysis on NCP issues. The views in this paper are based on that experience. The

ACF's involvement with NCP has highlighted the strengths and weaknesses of the existing reform program and also the benefits that a process like the NCP assessment process could have for other key national environmental reform priorities.

This submission will concentrate on three issues: the implementation of water reforms under NCP; the failure to implement NCP reforms in the forestry industry; and the need for a more integrated approach to land use management and the potential to adopt the NCP model to such a national environmental reform program.

1 WATER REFORM

The NCP water reform program includes both economic and environmental objectives. It has delivered some environmental benefits and demonstrated how a program such as NCP can incorporate and address environmental issues. However, the benefits are still well below their full potential.

Effective management of Australia's water resources is critical to the health of our ecosystems. Australia has not managed its water resources well. The problems are clearly illustrated in the Murray–Darling Basin (see box 1). But these concerns are not isolated to the Murray. The damage to the environment caused by over-use and poor management is replicated in river systems across Australia. In 2001 the National Heritage Trust estimated that around 26 per cent of surface water management areas are (or close to) being overused, compared with sustainable flow regime requirements. Thirty per cent of groundwater management areas are (or close to) being overused compared with their estimated sustainable yield. A similar proportion are fully allocated or overallocated. (NLWRA 2001)

Box 1 The Murray–Darling Basin

The Murray–Darling Basin covers one-seventh of Australia and produces 40 per cent of our agricultural produce. It is Australia's food bowl, where 70 per cent of our irrigation takes place and 42 per cent of our farmland is located. It is fed by 408 000 kilometres of rivers. Only 6 per cent of our rain falls in the Murray–Darling Basin.

Water Use and Effects

We remove around 11 500 gegalitres (one gegalitre is roughly equal to 500 Olympic swimming pools) of water from the Murray and Darling Rivers per year, of its average total of about 14 000 gegalitres. Irrigation accounts for 95 per cent

of the water used. The Murray River supplies about 40 per cent of Adelaide's drinking water supply, and much more than this during dry years.

Where irrigation has been used, the water table has invariably risen, bringing with it tonnes of salt. Similarly, historic land clearing for cropping and grazing has also led to rising water tables and salinisation. It is now thought that between three and five million hectares of the basin will be salt-affected within this century. Irrigation can also damage the soil structure and degrade water quality. We have changed the natural high river flows from spring to summer and autumn, upsetting the natural breeding rhythms of many species.

Along about 1000 kilometres of lower Murray floodplain many thousands of hectares of river red gum and black box are dying from lack of water. Natural flooding once regularly soaked these trees, every 3.3 years on average. Now these trees are suffering from serious reductions to the frequency, height and duration of flooding, and most are showing severe signs of stress,

Flow regulation, reduced flooding and a range of other factors have devastated native fish and waterbird populations. Native fish populations have fallen to 10 per cent of their original numbers. One-third to a half of fresh water fish across the Basin are threatened with extinction. Australia's largest freshwater fish, the Murray cod, has been added to the national list of threatened species.

It is estimated that 50–80 per cent of wetlands in the Basin have been destroyed.

Dams and Weirs

There are 30 dams and around 3000 weirs in the Murray–Darling Basin. Nearly three times the annual average flow in the Murray River can be stored. The dams and weirs prevent fish movement up and down-stream for seasonal breeding and feeding. They also replace flowing river conditions with still, lake-like conditions, changing the essential habitat of many plant and invertebrate species.

The weirs provide ideal conditions for toxic blue-green algal blooms, and good habitat for European carp, (which have added to the pressures on native fish).

The Murray Mouth

Less than 20 per cent of its capacity now flows out of the River Murray mouth. The frequency of no flow at the mouth has increased from 1 in 20 years to 1 in 3 years. Median annual flows to the sea are now only 27 per cent of the median natural flow, possibly less.

Only 11 per cent of the natural estuary at the Murray mouth remains, most of it having been divided off by five 'barrages'. The internationally listed estuarine wetland, the Coorong, has lost 90 per cent of the migratory wader birds which once inhabited it.

Source: ACF 2004, *Murray–Darling Basin: The Facts*

When governments signed the NCP agreements in 1995 they agreed to bring within that program the strategic framework for the reform of the Australian water industry (agreed in February 1994). The water reform framework recognised environmental issues. In committing to that framework the Council of Australian Governments (CoAG) agreed:

1. that action needs to be taken to arrest widespread natural resource degradation in all jurisdictions occasioned, in part, by water use and that a package of measures is required to address the economic, environmental and social implication of future water reform; (NCC 1998, p.103)

That package was one of the first attempts at an integrated approach to reform. It recognised that economic and environmental outcomes are interrelated. For example action that reduces the environmental impact of water use improves water quality and the long-term health of the water system. This increases the value of property rights by ensuring good quality water will be available to water users in the future.

Most aspects of the reform program have the potential to affect environmental outcomes. For instances institutional reform that increases the independent scrutiny and accountability of water agencies is likely to improve the way they operate the water system and manage water and water systems. In addition, the water reform framework includes many elements that are directed specifically at the environment. These include requirements that the states and territories:

- formally allocate water to the environment, using the best scientific knowledge available;
- reduce consumptive use in stressed rivers and strike a better balance between consumptive and environmental needs;
- make water allocation decisions that are flexible and adaptable over time;
- improve management of water quality;
- protect rivers with high environmental values;
- undertake research into rivers and their requirements;

- review management of groundwater;
- require the environmental resource management costs incurred by the water services provider to be included in price;
- allow trading within the environmental constraints of catchments; and
- only invest in new rural infrastructure after it has been assessed as economically viable and ecologically sustainable.

Governments are now developing the National Water Initiative. They agreed on its scope in August 2003. This initiative also includes specific reforms focussed on improving environmental outcomes.

A key focus of the National Water Initiative will be to implement a robust framework for water access entitlements that encourage investment and maximises the economic value created from water use, while ensuring that there is sufficient water available to maintain healthy rivers and aquifers. The framework will be compatible between jurisdictions and reflect regional variability and the reliability of water supply and the state of knowledge underpinning regional allocation decisions.
(CoAG 2003, p.1)

To date the water reform package has delivered some important gains for the environment but there is much left to do. The deficiencies have arisen from both a failure to fully implement the existing reform program and significant gaps in the NCP reform agenda.

In 2000 Tim Fisher, the Land and Water Ecosystems Co-ordinator for the ACF, provided a paper to the Productivity Commission on *Water: Lessons from Australia's First Practical Experiment in Integrated Microeconomic and Environmental Reform*. That paper included a list of issues that were not covered by the NCP program. That list is still relevant. It also listed areas where reform was slow, or the environmental obligations were not being adequately accommodated. While progress has been made since that paper was written, particularly in developing statutory frameworks for water planning processes, many of those criticisms are relevant today. This submission focuses on four of the most significant deficiencies in the water reform program.

- The implementation of groundwater reforms has been protracted.

- The processes for assessing the economic viability and ecological sustainability of new investment are deficient.
- The allocation of water for the environment is slow and inadequate.
- Full cost recovery and environmental pricing have not been implemented fully.

Groundwater

Many groundwater resources are seriously depleted. In 2001 it was estimated that 161 of Australia's 538 groundwater management areas were either fully allocated or overallocated compared with their sustainable yield (NLWRA 2001). To date, with a few exceptions, much of the reform focus has been on surface water. Many groundwater resources have been neglected and environmental problems are worsening.

These risks are compounded by a lack of information on groundwater hydrology and ecology. As information improves it frequently illustrates that the problems associated with the depletion of groundwater resources are more acute than originally understood. Unlike surface water, it is possible to "mine" groundwater, that is use more water than is flowing into the system through recharge. Consequently, overuse in groundwater systems can be much worse than in surface water, and the levels of reduction in use needed to regain sustainability can be much higher. Groundwater systems also have strong links to other ecosystems. Many aquifers provide base flows for rivers, or supply wetlands, coastal estuaries or vegetation communities. These links are not well understood and are not considered within the current CoAG water reform framework.

A study of groundwater use in the Murray–Darling Basin revealed that, unlike surface water, the level of groundwater use is increasing and there is a likelihood that it will increase further.

Over the past two decades groundwater use has grown at a rate of 4% per annum. However with much tighter restrictions on surface water use in recent years, it is expected that the rate of growth of groundwater has far exceeded 4% in recent years.
(Evans 2004, p.4)

This increase in ground water use has a significant impact on the availability of surface water as there are strong links between groundwater and surface water resources in the Murray–Darling Basin. The

study looked at estimates of the amount the total streamflow is reduced by groundwater pumping. While this is difficult to estimate, the study concluded that a figure of 60 per cent should be adopted for planning purposes. Using that estimate, groundwater users are capturing 186GL/year of streamflow. This equates to about 2 per cent of the Cap. With increased groundwater development this could increase to 7 per cent of total surface water usage (Evans 2004, p.1). The paper concluded that the "large impact of groundwater use on river flows has the potential to undermine the Living Murray initiative, significantly affect river health and alter surface water availability". (Evans 2004, p.6)

While the existing water reform agreements theoretically cover groundwater the pace of reform has been much slower than for surface water. In the important area of establishing allocations and entitlements, so that the environment is allocated a share of the water, the agreements give priority to stressed and overallocated river systems. This is reflected in the prioritisation of reforms in the NCC's assessments. The NCC will not commence considering environmental allocations for groundwater systems until this year, when it will conduct a stocktake. The NCC's final assessment is currently scheduled for 2005. Given the delays in implementing environmental allocations for surface water, for example New South Wales is not due to commence its first round of water sharing plans until July 2004 (NCC 2003a, p.41), it is highly likely that there will be significant delays in the complex and difficult area of groundwater. Consequently, a process will be needed to ensure the implementation of these reforms beyond 2005, and that governments adequately monitor and adjust the approach to water management when monitoring indicates that environmental benchmarks are not being met.

As discussed in the later section on pricing, there has been inadequate implementation of full cost recovery and environmental pricing in all areas, including groundwater. An NCC discussion paper on pricing rural water outside irrigation districts noted the importance of environmental pricing in areas like groundwater.

New investment in rural water infrastructure

The development of water resources in Australia is littered with examples where infrastructure was planned and constructed with the aid of considerable public subsidies. In the last 50 years or so this government largesse funded large dam projects such as the Ord, Burdekin, Snowy, Eildon and Dartmouth, as well as the development of extensive gravity distribution systems in the Riverina in NSW and the Goulburn Valley in Victoria.

It is worthwhile breaking-down subsidies to the individual enterprise level to put them into perspective. The ACF's assessment of the Teemburra Creek dam near Mackay, is that combined State and Commonwealth subsidies for the scheme represent capital subsidies equal to \$250 000 (1995 dollars) for each of 60 canegrowers downstream from the dam. Similarly, a proposed (but never constructed) off-river storage near St George in Queensland would have provided a capital subsidy to around three dozen irrigators of between \$300 000 and \$500 000 each. (Fisher 2000, p.11)

The CoAG water reform agreements require:

that future investment in new schemes or extensions to existing schemes be undertaken only after appraisal indicates it is economically viable and ecologically sustainable; (NCC 1998, p.104)

While this requirement places some obligations on governments to assess the impact of dams and other infrastructure projects prior to construction, the ACF has significant concerns about deficiencies in these assessments.

The requirement to assess the economic viability and ecological sustainability of new investment applies only to rural infrastructure. There is no equivalent obligation to assess objectively proposals for new urban infrastructure.

The ACF is also concerned about the objectivity and rigor in these assessments. Under the current approach there is no independent verification of the analysis of economic viability and ecological sustainability. The NCC relies primarily on reports that have been commissioned by governments looking to justify their commitment to the development of the infrastructure. Governments are not required to independently verify their assessments and the NCC does not conduct its own analysis of the details of these reports. This is a significant flaw in the current water reform agreements, which will continue as new investments are considered in the future.

The Burnett Water Infrastructure Project (Paradise Dam) provides a good illustration of the current problem. In 2003 the NCC concluded that Queensland had met its NCP obligations in relation to the Burnett Water Infrastructure Project. That assessment was based on studies commissioned by the Queensland government, after it was already publicly committed to the project. Some of the information in these

studies was commercial in confidence and, therefore, not subject to public scrutiny. The NCC did not commission any independent analysis of the Queensland reports and, according to the Queensland Conservation Council, there appears to be Queensland reports that were critical of the project that were not considered by the NCC.

The economic viability of the project is contingent on assumptions that new horticultural enterprises will quickly move into the region and pay a premium for water once the dam is built. Weaknesses in any of these assumptions would bring the viability of the project under question. For instance these new enterprises may be attracted to other regions where the price of water is lower. Or, equally possible, the rate of 'take-up' of water resources from this scheme could be at a significantly slower rate than hoped for by the Queensland Government.

In addition the ACF does not believe that environmental issues have not been adequately addressed. It supports the views of the Wide Bay Burnett Conservation Council.

The Queensland Environmental Protection Agency calculated (Nov. 2001) that the Burnett River Dam would increase inundation of the Lower Burnett from 43% to 71%, and that the cumulative impact would result in somewhere between 50% and 80% irreversible loss of critical habitat (IUCN ranking) for lungfish, (already listed as vulnerable) and the Elseya sp. freshwater turtle (which is expected to be listed as endangered). (source: attachment to correspondence from EPA Director- General, James Purtill to Mr Ross Rolfe, Coordinator-General, Department of State Development, 9.11. 01). (Wide Bay Burnett Conservation Council 2004, p.2)

The obligations to assess the economic viability and ecological sustainability of investment in new water infrastructure are important principles. They are essential for good economic and environmental decision making. There is, however, a lack of independence, transparency and rigor in the decision making under the current NCP processes.

Allocations and Entitlements

The current water reform framework requires governments to:

Where they have not already done so, States, would give priority to formally determining allocations or entitlements to water,

including allocations for the environment as a legitimate user of water; (NCC 1998, p.105)

While this has led to more explicit consideration of the environment, the outcomes to date have often fallen well short of the environmental needs identified by the best available science. In 2003, the NCC assessment raised significant concerns about New South Wales, for example. The NCC questioned the trade-offs made when the amount of water identified for environmental flows was less than the best available science recommended. New South Wales had not provided information on the extent or rationales for these trade-offs.

Currently, in many systems there is no solid guidance on when, or if, the environmental requirements of the water system will be met.

- Environmental allocations sometimes appear to be a token re-labelling of passing flows or diversion rules (rather than flows for any specific ecological purpose), and are seriously deficient in meeting real ecological objectives.
- Environmental allocations are often made available for consumptive use, (both by default and by stated intent), and are rarely – if ever – accompanied by reductions to ‘capped’ diversions.
- Minimum flow rules are arbitrary, often far lower than levels recommended by independent scientific advice.
- Monitoring of compliance with flow plans appears minimal or non-existent, and flow ‘success’ indicators are sometimes highly inappropriate;
- The bases for trading-off environmental gains to minimise socio-economic impact are lacking in objectivity, rigor and transparency.
- Few mechanisms or triggers for enforcement of environmental flow arrangements exist.
- Clear ecological objectives are often not articulated.
- Monitoring of ecological trends (including those in response to changed flow regimes) is deficient.

- Provision for periodic reviews are not evident across all systems.

At a policy level, the focus on clear plans that will meet minimum environmental targets is increasing. The scope for the National Water Initiative agreed by CoAG in August 2003 notes that water access entitlements will be developed within a framework that includes “firm pathways and open processes for returning overallocated surface and groundwater systems to environmentally sustainable levels of extraction” (CoAG 2003, p.1). The NCC’s 2004 water assessment framework states that it intends to use the benchmark of a healthy working river to assess States and Territories environmental allocations in 2004. Although, it also accepts that governments may want time to achieve the objective of a healthy working river.

In some cases, recognition of the existing rights of other water users may mean that governments need time to implement appropriate environmental flow arrangements and river health activities. The Council considers that a period of transition may be appropriate, provided arrangements are likely to achieve the healthy working river objective of a sustainable balance between consumptive and environmental uses within a reasonable period. Where a transition period is proposed, the Council will look for the relevant government to outline its program and timetable for meeting environmental objectives and provide robust arguments supporting the length of the transition period. (NCC 2003a, p.39)

The NCC also notes that the committees that make decisions on these tradeoffs should represent all interests that are affected by water allocations. The ACF stresses that environmental interests are extremely important in this process. The NCC notes that decision-making process should be open and transparent, with full information available to the committee and the general community, including information on the environmental impact of any trade offs. The assessment framework recognises that environmental water allocations and activities to maintain river health may need to be adjusted as more information is available on river health and ecological outcomes. The ACF supports this approach. Ecological monitoring programs need to be instituted and governments need to respond to the results of that monitoring.

The assessment framework prepared by the NCC does appear to address several issues important to maintaining river health, these are:

- an overall objective of achieving a healthy river within the shortest practical timeframe;
- robust processes for allocating water to the environment and determining activities to improve the environmental health of rivers; and
- processes for ongoing monitoring and modifying the approach in response to improved information.

This approach, however, is some way from that which governments have adopted to date. Further, as the security of property rights is increased, it will become increasingly difficult to claw back the water necessary to achieve healthy working rivers. Governments will, in many cases, need to allocate sufficient funds to buy back water, or pay compensation to increase environmental allocations. It is not clear whether this money will be made available.

Finally, it is not clear how Australia will manage the future risk of reduced water availability. Many factors: climate change, reforestation, increased groundwater use, farm dams, bushfires and reductions in return flows will reduce the availability of water in the Murray–Darling Basin, without any further change in the water use strategies. The most likely reduction in system inflows is estimated at 21 per cent by 2053. Preliminary modelling indicates that 17 per cent of this reduction would be borne by irrigators. The environment would bear the remaining 83 per cent (MDBC (undated), pp.4-5). Government policy needs to incorporate these future risks into planning; otherwise any environmental gains achieved now will be quickly unravelled in the future.

Pricing

The current CoAG water reforms require urban and rural water authorities to implement full cost recovery and consumption based pricing. There are economic and environmental benefits from implementing pricing reforms. From an economic perspective:

- water users take into account all the costs of delivering water and managing the environmental consequences of water use when deciding when and how to use water;
- the public receives a fair return for the use of water resources and the capital invested in water infrastructure;

- competitive neutrality is maintained because prices reflect the efficient costs of using water from different sources. So that water users favour sources of water with low delivery and environmental costs over other sources of water where these costs are higher;
- industries, such as water technology, private water infrastructure, and any other industry related to water-efficient agriculture, are not disadvantaged by subsidised water available through State and Territory agencies;
- consumption based prices encourage greater water conservation and trading excess water so it is applied to its highest value use; and
- there is an added financial discipline to prevent uneconomic investments by water resource management agencies.

From an environmental perspective:

- subsidised water encourages both over-use of water and its inappropriate or inefficient use; and
- ongoing subsidies for new water infrastructure encourage greater proliferation of such infrastructure, causing environmental damage.

As noted previously, however, the environmental benefits of pricing reform will only be realised if water savings are directed to the environment and not to increasing consumptive use.

In rural areas, prices are still well below full cost in many schemes. The progress report on rural pricing in the NCC's 2003 assessment illustrated that in all States and Territories, where the Council was provided with information, there were schemes that were not recovering full cost. It is clear that full cost recovery will not be achieved by 2005 when the NCC assessments are due to end. The price paths for a number of schemes do not guarantee when full cost recovery will be reached. This is another area of the current NCP reforms that will need ongoing attention.

In addition, the environmental pricing obligations in the existing reforms are minimal. They only require water businesses to cover the environmental management costs imposed on and incurred by the service provider. They do not include the environmental costs born by other government agencies.

Water users should be obliged to meet a greater share of the costs of mitigating the environmental impact of water use. This would be consistent with an impacter pays approach to water pricing. While an impacter pays approach may not be appropriate for all types of environmental costs, the low level of environmental pricing indicates there is a clear underuse of impacter pays. An impacter pays approach ensures that water users face all of the costs of their activities, including any environmental costs that are a consequence of those activities. In some cases these costs will be passed on to the water users' customers. Therefore, if applied appropriately, this approach encourages water users and the consumers of products that use water to favour activities that have lower levels of environmental impact. Moreover pricing schemes that reward water users for reducing their environmental impact will also encourage users to change their production techniques and reduce their impact on the environment. (Cope 2002, p.7)

There is an obvious need to consider more comprehensive approaches to environmental pricing.

Environmental pricing is particularly important for rural water outside irrigation districts. The NCC discussion paper (2003b) analyses these issues in some detail.

Many water users outside irrigation districts extract water directly from the water source and therefore do not buy water from a water business. In these cases the minimum CoAG requirements would mean that such water users would not face any environmental costs. The Council encourages all governments to take a broader view of environmental costs when considering pricing water supplied outside of irrigation districts than the minimum CoAG requirement. Taking a broader view, prices should incorporate two aspects of the cost of water: the cost of delivering water; and the cost of managing the environmental consequences of using water where it is appropriate for these costs to be paid by water users. (NCC 2003b, p.7)

The importance of environmental pricing is illustrated by considering a groundwater pumper in a stressed aquifer. The water users pay directly for most of the delivery costs, as they supply and maintain their own pump. The only outstanding economic costs are the administration costs of issuing, managing and enforcing licences. These administration costs do not vary with water use and the costs of maintaining the pump are unlikely to be large enough to encourage the irrigator to conserve water. Consequently, an

environmental charge, that reflects that those who use more water place more pressure on the environment, is the only mechanism that would drive consumption based pricing and encourage water conservation.

2 FORESTRY

The outcomes of NCP in the forestry sector are disappointing. The failure to fully implement competitive neutrality and legislation review reforms in forestry has meant that the environmental issues have not been addressed.

The logging of Australian forests is a significant environmental problem. Since European settlement three quarters of rainforests and 90 per cent of old-growth forests have been logged. Australia's native old-growth forests perform many vital functions, not just for local eco-systems but also for the global environment. Old-growth forests provide us with a place of learning and recreation, they house a wealth of plant and animal species and provide us with clean water.

Sixteen thousand, five hundred and thirty-two higher plants and 3 817 animal species are considered forest-dependent species (defined as needing forest habitat for part of the life cycle.) ... Eighty-eight animal and 771 higher plant taxa are considered critically endangered, endangered or vulnerable under the Australian Government Environment Protection and Biodiversity Conservation Act 1999. (BRS 2003, p.v)

However, what many people do not realise, is that these forests are major stores of carbon and therefore vital for maintaining climatic stability. When old-growth forests are destroyed and replaced with commercial plantations it leads to a significant increase in the amount of carbon dioxide (CO₂) in the atmosphere. The CO₂ released from the annual clearing of old-growth forest areas in the East-Gippsland region, alone, is substantial. The clearing and the breakdown of this area's forest timber will release an amount of CO₂ equivalent to 2 per cent of Australia's total emissions in 1990 — equal to the annual emissions of a coal fired power station.

Unlike water there is no specific package of reforms covering the forestry sector. Forestry is, however, subject to the general NCP framework, including the review of legislation and the application of competitive neutrality principles. These reform obligations require that governments

review and, where appropriate, reform legislation that contains restrictions on competition.

- 5.(1) The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:*
- (a) the benefits of the restriction to the community as a whole outweigh the costs; and*
 - (b) the objectives of the legislation can only be achieved by restricting competition. (NCC 1998, p.19)*

The NCP framework also requires governments to introduce competitive neutrality policies and principles for all significant government business activities where there is actual or potential private sector competition. This is clearly the case for government forestry services as there is significant private sector management of both native and plantation forests. (NCC 2003c, p.1.92)

- 3.(1) The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities. (NCC 1998, p.17)*

For significant business activities, governments are obliged to corporatise these businesses where this is appropriate, and in all cases ensure that the businesses face, levels of taxation (or an equivalent arrangement), cost of debt, rates of return, costs and regulations that are equivalent to what an equivalent private sector firm would face.

Governments have failed to fully implement their NCP obligations in the forestry sector. The ACF commissioned Marsden Jacob in 2001 to review the application of NCP obligations to forestry in New South Wales, Victoria, Western Australia and Tasmania. That report concluded that there were major deficiencies in the application of NCP reforms¹. This conclusion is consistent with the NCC's 2003 assessment of the implementation of NCP.

The NCC's assessment of the review of forestry legislation noted that all governments, except New South Wales and the Northern Territory, had listed forestry legislation for review.

¹ A copy of the Marsden Jacob report is provided at attachment 1.

The New South Wales Government undertook a parallel review and reform of *Forestry Act 1916*. This program resulted in the *Forestry and National Park Estate Act 1998* and *Plantations and Reafforestation Act 1999*. The New South Wales Government argued that this new legislation and the Forestry Act are consistent with the legislation review guiding principle. (NCC 2002, p.1.128)

Of the remaining legislation, the NCC assessed that the Commonwealth, Queensland and Western Australia had not met their legislation review obligations. In assessing the review of forestry legislation the NCC concluded that the legislation that governs the management of State forests does not affect forestry activity on private land, and “generally does not of itself restrict competition in the supply of timber and other forest commodities except insofar as it leaves State forest agencies with considerable discretion in how they price and allocate these commodities” (NCC 2003c, p.1.94). The NCC concluded that this discretion allows valuable supply rights to be allocated anticompetitively, but it considered that these issues were more appropriately considered under an assessment of competitive neutrality.

The analysis in the Marsden Jacob report, however, raises questions about the conclusion that the restrictions on competition in forestry legislation are not significant.

State forestry acts contain many elements that are potential restrictions on competition. These include:

- *the requirement to log under logging licences;*
- *the term of logging licences;*
- *the allocation of logging licences;*
- *responsibility for forest management;*
- *the methodology for setting log prices/stumpage; and*
- *the role of sustainable yields and logging supplies.*

Logging licences generally require certain areas of forest to be logged or they restrict access to the ‘timber reserves’ for other uses. A consortium of say apiarists, environmentalists and tourism operators could not bid for a timber licence, pay the required royalties and then not cut the forest. Furthermore, they could not preserve the forests through, say, purchasing the land, since the forests are on Crown land.

Logging and milling licences in NSW, Victoria and Western Australia are negotiated for up to 20 years, without recourse to open tenders. A further concern is that provisions of the forestry legislation regarding allocation of licences or contracts are very generally expressed. Consequently, the generality of the provisions means that the relevant agencies have considerable discretion in the design and the operation of the licensing system. Thus, even though the legislation in Victoria, Western Australia and Tasmania provides for the option of licences being issued through auctions or tenders, in practice only Tasmania has applied this option on a regular basis to quality sawlogs.

Forestry legislation in Victoria and Tasmania vests exclusive control and management of the policy, regulatory and commercial functions of the forest to a single agency or corporation. (Marsden Jacob 2001, pp.x-xi)

In assessing compliance with competitive neutrality obligations the NCC concluded that no State or Territory Government had fully met its obligations in regards to the forestry sector. With reform particularly slow in Victoria. The valuation of forests is a major ongoing issue and forestry businesses earn rates of return well below the long term government bond rate. Only South Australia and the Australian Capital Territory pay land tax and only South Australia pays local government rates.

Consistent with the NCC assessment, the ACF considers that the pricing of hardwood timber from native forests is a significant competitive neutrality issue. As noted previously, the forestry acts give the State forest agencies wide discretion in the methodologies used to set log prices and stumpage rates. There is a lack of independence, transparency and hence public confidence in pricing, particularly in New South Wales and Victoria.

Current pricing practices include the exclusive or combinatorial use of three methods:

- the cost of growing/production which provides a return to the community sufficient to pay for the cost of establishing and managing that forest in the first place (a similar method, the cost of replacement has a similar approach but gifts the forest to the forest industry);*
- the residual value pricing which subtracts 'reasonable' costs from the prevailing market price and may include differing transport costs to different forest areas. This method effectively estimates a derived demand curve for sawmills and chippers;*

- *auctions and tenders which sets prices based on what the market will bear. This method derives directly from the millers demand schedule.*

Each method, in isolation, focuses on either the implicit/explicit demand or supply curve for native forest timber. To obtain a more efficient price, the price used should reflect both aspects. (Marsden Jacob 2001, p.v)

There are particular problems with the use of residual valuations, which ignore the costs of supply. As noted in the Marsden Jacob report residual valuations affect:

- *the commercial performance of the suppliers of the forest, the State forest agencies, since it decreases their profits;*
- *alternative suppliers of hardwoods and suppliers of substitutes for hardwoods whose operating costs are considerably higher than those of the native forest dependent industry; and*
- *the value of the forest for other uses (e.g., conservation, water production and tourism) since the approach distorts the value of the forest for these purposes.*

Reliance on the residual value pricing method alone thereby increases the rate at which native forests are logged, especially in remote areas. It encourages State forest agencies to exploit native forests rather than to develop plantations or farm forestry. This would not happen under a fully commercial arrangement since the prices for timber that would be charged by a commercial enterprise would more closely reflect the costs of supply so that more remote forest resources would not be subject to utilisation. (Marsden Jacob 2001, pp.v-vi)

Efficient pricing of logs needs to be subsidy-free and recognise the full cost of production and the price of alternative uses. Full costs should include all of the elements required under the competitive neutrality reforms, such as commercial rates of returns and all government taxes and charges. It should also recognise the costs of reseedling and regrowing logged forests.

Government's policies strongly favour the exploitation of native forests. Residual valuation, which ignores the cost of supply, encourages the exploitation of more remote forest resources, these are often the old-growth forests. These policies disadvantage timber from plantations and

farm forestry. This lack of competitive neutrality has economic and environmental consequences as it:

- *makes private investment in farm forestry and plantations much less attractive;*
- *distorts the allocation of wood sources within the forests sector;*
- *encourages greater exploitation of the public native forests in each State;*
- *undercuts competing uses of public native forests; and*
- *worsens the Australian environment and resource base.* (Marsden Jacob 2001, p.ii)

Finally, the ACF believes that there has been insufficient focus on the structural reform components of the NCP agreements as they apply to forestry. While there have been no single decisions by governments to increase competition in the forestry sector, this sector was traditionally supplied by a public monopoly, and there has been a progressive and continuing increase in competition. NCP agreements include the following obligations on structural reform.

- (3) Before a Party introduces competition to a market traditionally supplied by a public monopoly, and before a Party privatises a public monopoly, it will undertake a review into:*
- (a) the appropriate commercial objectives for the public monopoly;*
 - (b) the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly;*
 - (c) the merits of separating potentially competitive elements of the public monopoly;*
 - (d) the most effective means of separating regulatory functions from commercial functions of the public monopoly;*
 - (e) the most effective means of implementing the competitive neutrality principles set out in this Agreement;*
 - (f) the merits of any community service obligations undertaken by the public monopoly and the best means of funding and delivering any mandated community service obligations;*
 - (g) the price and service regulation to be applied to the industry; and*
 - (h) the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including the rate of return targets, dividends and capital structure.*

These issues have not been adequately addressed in the forests sector. The ACF has particular concerns about the lack of transparency and the structural integration of the arrangements in Victoria. Forestry Victoria is service agency within the Department of Sustainability and Environment.

This department is also responsible for the regulation of forest management. Hence, there are no independent transparent processes for standards setting, monitoring or enforcement.

There are potentially significant economic and environmental gains from fully implementing NCP reforms. However, these obligations fall well short of a co-ordinated package of industry reform. Like water, the forestry sector would benefit from a detailed integrated reform package that considers both the economic and environmental requirements of the sector.

3 INTEGRATED ENVIRONMENTAL MANAGEMENT

The environmental problems facing Australia are large and effective action now will be necessary to avoid environmental disasters that also have enormous social and economic costs for future Australians. The 2001 *Australian State of the Environment Report* noted some areas where improvements have been made, but it also included many examples where Australia's environment is at risk and deteriorating (see box 2).

Box 2 Some key findings from the State of the Environment Report

The rate of land clearing accelerated, with as much cleared during the last 50 years as in the 150 years before 1945. In 1999, only four other countries exceeded the estimated rate of clearing of native vegetation in Australia.

Dryland salinity, one of the legacies of broadacre land clearing, is predicted to affect two million hectares of native vegetation by 2050.

Most indicators of resource consumption continue to outpace population growth. For example personal mobility, where vehicle kilometres travelled is increasing in metropolitan areas.

Australia has a high per capita level of greenhouse gas emissions by world standards. Greenhouse gas emissions increased by 16.9 per cent between 1990 and 1998.

Australian waters are more susceptible to exotic marine pests than previously thought, with threats to tropical and temperate habitats.

Pressures on Australia's coral reefs continue unabated from the downstream effects of land use and other human activities.

Water use increased by 65 per cent from 1985 to 1996-97 and water extracted for irrigation increased by 76 per cent. Water is overused in some regions.

River water in several catchments is predicted to have salinity levels that will exceed drinking water guidelines within the next 20 years.

Algal blooms in dams cost farmers more than \$30 million per year, and in rivers, storage and irrigation channels about \$15 million per year.

Source: Environment Australia 2002, *State of the Environment Report 2001 — Key findings*

It is clear that Australia faces many environmental threats and many of these threats are worsening. The current approach to dealing with environmental issues is not working effectively. To date this approach has been ad hoc and the success of the different initiatives is variable. Decision making is inefficient and slow, implementation is often ineffective and ongoing monitoring and accountability is inadequate. There is very little information on how effective programs, such as the National Heritage Trust, have been in delivering their environmental objectives.

Integrated planning

The broad-scale environmental challenges facing Australia, land and water degradation, climate change, and biodiversity loss, are very complex and interrelated. A successful reform framework needs to be highly integrated and co-ordinated across governments, over time, and across environmental issues.

Responsibility for many issues spans across the Commonwealth, State and Territory, and Local governments. Land use planning is an obvious example. Therefore, a successful reform framework needs to involve co-ordinated action by all governments.

Such a framework also needs longevity. Many issues, such as climate change, will take decades to resolve. The current ad hoc approach is often characterised by short term, and sometimes short-sighted, programs that cannot deal with long term problems.

Finally, the framework must be co-ordinated across environmental issues. Natural systems are highly integrated and the consequences of the approach taken in one area of reform often flow through to other areas. For instance, plantation forests can have a large impact on water use and run-off. Consequently, land use planning that governs the location of plantations must be integrated with water policy to ensure that the

location of plantation forests does not undermine water policy objectives. Similarly water quality and biodiversity, biodiversity and land use planning, and climate change and water availability are all linked.

Without a truly national approach we are unlikely to successfully manage the enormous broad-scale environmental challenges facing Australia. Such a national approach would also require effective national institutional arrangements.

Institutional arrangements

The development of effective national institutional arrangements is discussed in some detail in a paper commissioned by the ACF and prepared by Katherine Wells, an environmental law and policy consultant. That paper provides detailed recommendations on national institutional arrangements that would deliver effective environmental outcomes. The recommendations are included at appendix 1. A full copy of the report is included at attachment 2. Wells' analysis supports the need for significant improvements in the institutional arrangements dealing with environmental reform issues.

There are no doubt many reasons for this continued environmental deterioration, including societal expectations of material affluence, a lack of political will to tackle the problems, a lack of resources, and, at times, a lack of knowledge. However, it is likely that one of the most significant reasons for this situation, particularly when it comes to dealing with the broad-scale environmental challenges facing Australia, is a lack of truly effective institutional arrangements at the national level. (Wells 2004, p.2)

The lessons learned from the institutional arrangements used to implement NCP can help to inform the development of national arrangements to co-ordinate environmental reforms. The two processes have key similarities as they are both complex reform agendas that span all levels of government. Compared with other reform frameworks, implementation of the NCP reforms has been very successful, despite problems in a number of areas. NCP has maintained reform momentum for nine years, through changes in government in all jurisdictions, and vocal protests from those opposed to reform. Several aspects of the reform process contributed to its successes.

- The NCP reforms are based on a set of intergovernmental agreements that define the strategic direction of the reform program.
- The agreements set out clear reform targets, detailed obligations and the timetable for implementing the reforms.
- The reform program was agreed at the highest political level.
- An independent organisation provides accountability and transparency by monitoring the implementation of reform, reporting on progress and facilitating and encouraging reform.
- A payments system provides the States and Territories with financial rewards if they effectively implemented the reforms. States and Territories receive early advice about problems in performance, and are given time to take necessary policy changes.

The ACF believes that institutional arrangements with these characteristics would greatly increase the effectiveness of environmental reforms.

In her paper Wells suggests a model for national institutional arrangements that could be applied to environmental reforms. This model is summarised in diagram 1. The process she recommends involves establishing a National Environmental Sustainability Council that develops a robust reform agenda for addressing broad-scale environmental problems. The agenda would be developed with input from a Scientific Advisory Committee, a Community Advisory Committee and a community consultation process. The reform agenda would be approved, or modified and approved, by CoAG. Commonwealth, State and Territory governments then sign intergovernmental agreements that set out the reform agenda: with environmental sustainability units in the Department of Prime Minister and Cabinet, Premier and Cabinet, or the Chief Minister's Office in each jurisdiction co-ordinating the implementation of the reforms.

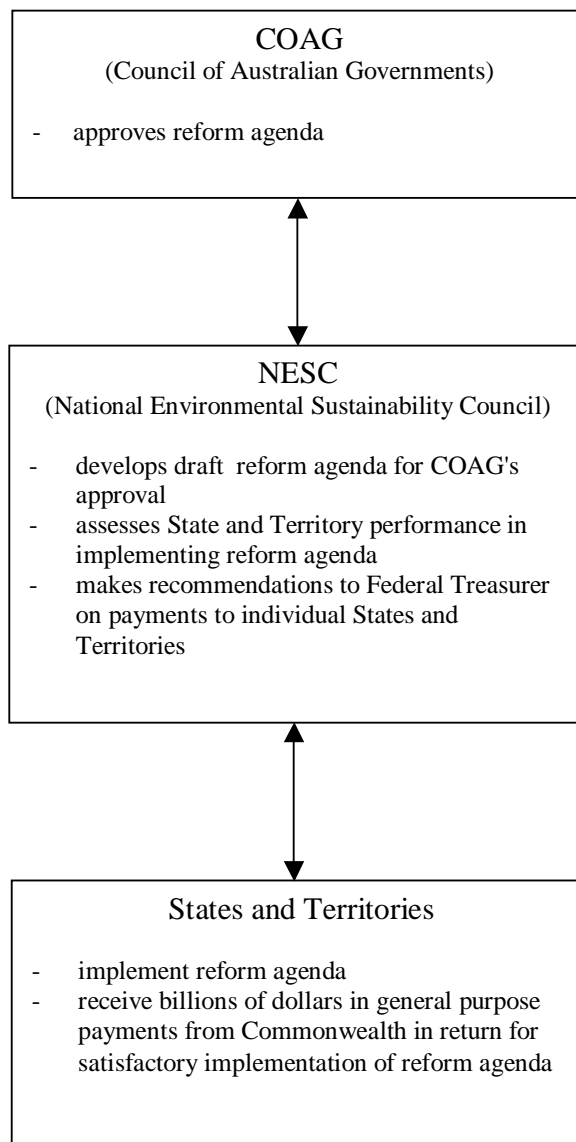
The National Environmental Sustainability Council would regularly assess progress in implementing reforms, and make recommendations to the Commonwealth Treasurer on whether Commonwealth funds should be paid to the individual States and Territories. Based on this recommendation the Commonwealth Treasurer would make, or delay or withhold payments to individual jurisdictions.

There are some key differences between this model and the current institutional arrangements for NCP. First, the National Environmental Sustainability Council would include specific environmental expertise to feed into both the development of the reform agenda, and the monitoring and implementation of reforms. Second, unlike the current competition policy payments, the payments under this scheme would be tied to the implementation of environmental reforms, as is much of the Commonwealth money currently available to the States and Territories through environmental programs. The approach is designed to ensure that continuing funding is contingent on governments meeting agreed targets and milestones and demonstrating through ongoing monitoring that environmental benefits are being realised.

Diagram 1

GREENING THE AUSTRALIAN FEDERATION

Diagram of Key Roles in Proposed Environmental Reform Arrangements



Source: Wells, K. 2004, *Greening the Australian Federation: A proposal for National Institutional Reform to promote environmental sustainability across Australia*, Prepared for the Australian Conservation Foundation, p.v

APPENDIX 1: GREENING THE AUSTRALIAN FEDERATION: TABLE OF RECOMMENDATIONS²

Rec. 1: *Base the reforms on the principles of ecologically sustainable development*

Base national institutional arrangements for environmental sustainability on the principles of ecologically sustainable development set out in the *Environment Protection and Biodiversity Conservation Act 1999 (C'th)*.

Rec. 2: *Focus on the key broad-scale environmental problems facing Australia*

Focus institutional arrangements for environmental sustainability at the national level on the environmental issues which are too large, complex, difficult or controversial for individual jurisdictions to address adequately. This paper nominates the following broad-scale environmental problems as currently falling within that category:

- climate change
- land and water degradation
- biodiversity loss, and
- the protection of Australia's oceans.

Future references in this paper to 'the key broad-scale environmental problems facing Australia' should be read as references to these problems.

Rec. 3: *Ensure that the top decision-making level of each government drives the agenda*

Ensure that the major institutional arrangements adopted to address the key broad-scale environmental problems facing Australia are adopted and driven by the top decision-making level of each of the Commonwealth, State and Territory governments. This is likely to be the most effective way to ensure that the political will exists to address these problems, and that these institutional arrangements are adopted and implemented through whole-of-government processes.

² Wells, K 2004, *Greening the Australian Federation: A proposal for National Institutional Reform to promote environmental sustainability across Australia*, Prepared for the Australian Conservation Foundation

In order to assist this to occur, establish or continue the following bodies, tasked with driving these problems forward:

- an environmental sustainability unit within the Department of Prime Minister and Cabinet, and a Cabinet sub-committee chaired by the Prime Minister, and
- environmental sustainability units within each Department of Premier and Cabinet or Chief Minister's Department, and Cabinet sub-committees chaired by the relevant Premier or Chief Minister.

Within the intergovernmental context, ensure that the major institutional arrangements adopted to address the key broad-scale environmental issues facing Australia are adopted through and driven by COAG, rather than by Councils made up of relevant Commonwealth, State and Territory Ministers.

Note that in the recommendations set out below, references to 'States' should be taken to include the Australian Capital Territory and the Northern Territory as well.

Rec. 4: Ensure strong national leadership by the Commonwealth

Ensure that the Commonwealth takes a strong national leadership role on the key broad-scale environmental problems facing Australia today. This should involve the following three features:

- ensuring that there is a process in place to develop a comprehensive and robust environmental reform agenda at the national level in relation to the key broad-scale problems facing Australia
- the provision of billions of dollars of Commonwealth funding to the States in return for the States' implementation of that reform agenda, and
- a greater use of the Commonwealth's Constitutional powers where this co-operative approach fails.

Each of these points is discussed in more detail below.

Rec. 5: Establish an independent, statutory National Environmental Sustainability Council

In order to ensure that there is a process in place to develop a comprehensive and robust environmental reform agenda at the national level, have the Commonwealth take the lead role in establishing an

independent, statutory, expertise-based National Environmental Sustainability Council, the purpose of which is to:

- develop and make recommendations to COAG on a robust national environmental reform agenda aimed at addressing the key broad-scale problems facing Australia
- once an agenda is agreed by COAG (in the form of one or more intergovernmental agreements), assess, at regular intervals, State progress in meeting the reform targets, and
- based on those assessments, make recommendations to the Federal Treasurer on whether or not Commonwealth funds should be made available to individual States. The final funding decisions would be made by the Federal Treasurer.

The National Environmental Sustainability Council should be funded by the Commonwealth, and required to report annually to the Commonwealth Parliament.

A Scientific Advisory Committee should be established to inform the National Environmental Sustainability Council's deliberations, particularly the development of national targets. In addition, the Council should provide opportunities for public input into the development of the reform agenda, both in the form of regular consultation with the community (including business, academia, professional bodies and civil society organisations), and through a Community Advisory Committee established for that purpose. The Scientific Advisory Committee, the Community Advisory Committee and the requirement for community consultation should all have a statutory basis.

The National Environmental Sustainability Council's role should not extend to *implementing* the reform agenda; that should be the responsibility of the various governments party to the intergovernmental agreements (Commonwealth and State). The environmental sustainability units discussed in Recommendation Four (within the Departments of Prime Minister and Cabinet, and Premier and Cabinet) should co-ordinate the implementation of the reforms within each jurisdiction.

The National Environmental Sustainability Council should be supported by a Secretariat, the main functions of which should be:

- providing advice and analysis at the Council's direction on matters related to the implementation of the reform agenda, and

- representing the Council in dealings with Commonwealth and State government officials and other parties with interests in the reform agenda.

The need for and the operation of the National Environmental Sustainability Council should be reviewed periodically.

Rec. 6: Develop national principles and targets for each of the key broad-scale problems

Include in the reform agenda developed by the National Environmental Sustainability Council robust national principles and targets aimed at addressing climate change, land and water repair, biodiversity loss and the management of Australia's oceans. These principles and targets should be included in legislation. The targets should be measurable, time-bound and achievable, and focussed on outcomes rather than processes. They should be reviewed every five years. Commonwealth funding should be dependent on the targets being met (see below).

Rec. 7: Review all Commonwealth and State laws for inconsistency with the national principles and targets

Include in the reform agenda developed by the National Environmental Sustainability Council a requirement that all Commonwealth and State laws be reviewed for inconsistency with the national principles and targets developed under that agenda. This review should, amongst other things, check for subsidies which are inconsistent with the national principles and targets, and laws which incorrectly value (or which fail to value) environmental assets.

Laws which are inconsistent with the national principles and targets should, where appropriate, be reformed within a specified period of years. A 'guiding principle' similar to that used in the competition review should be formulated to assist in determining when reform is appropriate. In addition, all proposed new laws should be reviewed for inconsistency with the national principles and targets, and a review of all inconsistent laws undertaken periodically.

Rec. 8: Introduce national laws for each of the key broad-scale problems

Include in the reform agenda developed by the National Environmental Sustainability Council the introduction of national laws for each of the key broad-scale problems facing Australia. These laws should, as a minimum,

set out the national principles and targets developed by the National Environmental Sustainability Council for each area. Other matters to be covered by the laws would depend on the reforms developed by the National Environmental Sustainability Council for the particular area.

Rec. 9: Provide opportunities to review the reform agenda

Provide periodic opportunities to review the reform agenda (say, every five to ten years), to ensure its continued relevancy and provide flexibility in the reform arrangements if necessary.

Rec. 10: Provide substantial Commonwealth funding to the States in return for satisfactory implementation of the reform agenda

Make billions of dollars of Commonwealth funding available over a twenty-year period to the States in the form of general purpose grants. The provision of this funding should be conditional upon the States satisfactorily implementing the reform agenda (and specifically, meeting the national targets) developed by the National Environmental Sustainability Council.

This funding could be raised in a number of ways, including, for example, measures such as:

- re-directing some of the billions of dollars currently spent each year on government subsidies to industry that either directly or indirectly damage the environment
- introducing new revenue sources such as 'green taxes' (taxes that discourage unsustainable resource use and environmentally damaging production and consumption, such as energy and carbon taxes, landfill taxes and air and water pollution taxes and charges), and
- a national environment repair levy on taxable income.

The measures chosen should be structured so as not to be socially regressive, and to provide maximum stability of funding over the twenty-year period.

Rec. 11: Make more extensive use of the Commonwealth's Constitutional powers if this co-operative approach fails

Where genuine attempts to take the co-operative approach described above fail, ensure that the Commonwealth makes more extensive use of its Constitutional powers to achieve appropriate national outcomes in relation to the broad-scale environmental problems facing Australia.

Rec. 12: Include a specific environment power in the Constitution

If the opportunity arises, include a specific environment power in the Constitution in order to make the broad scope of the Commonwealth's environmental powers quite clear.

Rec. 13: Ensure that environmental considerations are taken into account in national economic processes

Reform national economic institutions to ensure that environmental considerations are taken into account in national economic processes.

Assist this process by establishing a Bureau of Ecological Economics to undertake strategic environmental economics policy research, or alternatively, ensure that such research is undertaken by existing bodies such as the Commonwealth Treasury, the Australian Bureau of Statistics, or the Productivity Commission. Wherever the function is placed, it should have a statutory basis to provide greater permanence, and should be adequately funded by the Commonwealth.

Rec. 14: Ensure adequate environmental data collection, analysis, monitoring and dissemination

Ensure that there is adequate collection and dissemination of environmental data at the national level by continuing and refining the existing Commonwealth State of the Environment reporting process, and co-ordinating it with State-based SOE processes.

Complement this with a National Environmental Sustainability Research Institute, the purpose of which is to co-ordinate long-term ecological research, analysis and monitoring at the national level, and to disseminate the resulting data. Alternatively, ensure that these functions are undertaken by existing agencies such as the National Land and Water Resources Audit, or the Commonwealth Scientific and Industrial Research Organisation. Wherever the functions are placed, they should be statutorily-based, to provide greater permanence and independence, and should be adequately funded by the Commonwealth.

Rec. 15: Ensure independent auditing of governmental environmental performance

Strengthen the Commonwealth Auditor-General's powers to audit the environmental performance of Commonwealth Government bodies in

relation to the key broad-scale environmental problems facing Australia, by giving an explicit statutory mandate to a new Office of the Environmental Auditor within the Australian National Audit Office, requiring it to conduct a systematic program of Commonwealth agency environmental performance audits in relation to these problems. Ensure that the office is adequately resourced by the Commonwealth.

Establish similar arrangements at the State level within State Auditor-General's offices.

Ensure that specific agency performance targets are developed for each relevant governmental agency, against which its performance can be audited. These performance targets should aim to address the principles and targets established for each of the key broad-scale environmental problems facing Australia.

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GREENING THE AUSTRALIAN FEDERATION

A proposal for
national institutional reform
to promote environmental sustainability
across Australia

**Prepared for
the Australian Conservation Foundation**

May 2004

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GREENING THE AUSTRALIAN FEDERATION

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GREENING THE AUSTRALIAN FEDERATION

Synopsis

As the 2001 Australian State of the Environment Report demonstrates, while some progress is being made in addressing the environmental problems facing Australia, Australia's environment continues to deteriorate across key indicators

There are no doubt many reasons for this. However, it is likely that one of the most significant reasons for it - particularly when it comes to dealing with the broad-scale environmental challenges facing Australia - is a lack of truly effective institutional arrangements at the national level.

The purpose of this paper is to examine ways in which Australia's institutional arrangements at the national level can be improved in order to deliver a greater level of environmental sustainability, particularly in relation to the broad-scale environmental problems facing Australia.

It looks, firstly, at the history of Commonwealth/State environmental relationships, focussing on:

- the Constitutional Conventions, and in particular the reasons why the Australian States decided to unite
- the initial Constitutional allocation of environmental powers between the Commonwealth and the States, and the expansion, over the last three decades, of the Commonwealth's Constitutional environmental powers
- the Commonwealth's reluctance to use its powers unilaterally to address environmental issues at the national level, and its strong preference for co-operative arrangements with the States, and
- the adequacy of the two most significant institutional arrangements implemented so far at the national level to deal with environmental issues - Ministerial Councils and the Council of Australian Governments.

The paper then discusses where Australia, as a federation of States, might head from here. (Note that references to 'States' should be taken to include the Australian Capital Territory and the Northern Territory as well.) It sets out a theoretical framework for institutional arrangements for environmental sustainability, based on the principles for institutions for sustainability developed by Stephen Dovers.

It then develops, in fifteen recommendations, a proposal for national institutional reform to promote environmental sustainability across Australia. Key elements of the reform proposal are based on the experience of the institutional arrangements developed over the 1990's around the National Competition Policy.

The core of the proposal is as follows. Firstly, the paper recommends that an independent, statutory National Environmental Sustainability Council be established, tasked with developing a robust national environmental reform agenda for the key

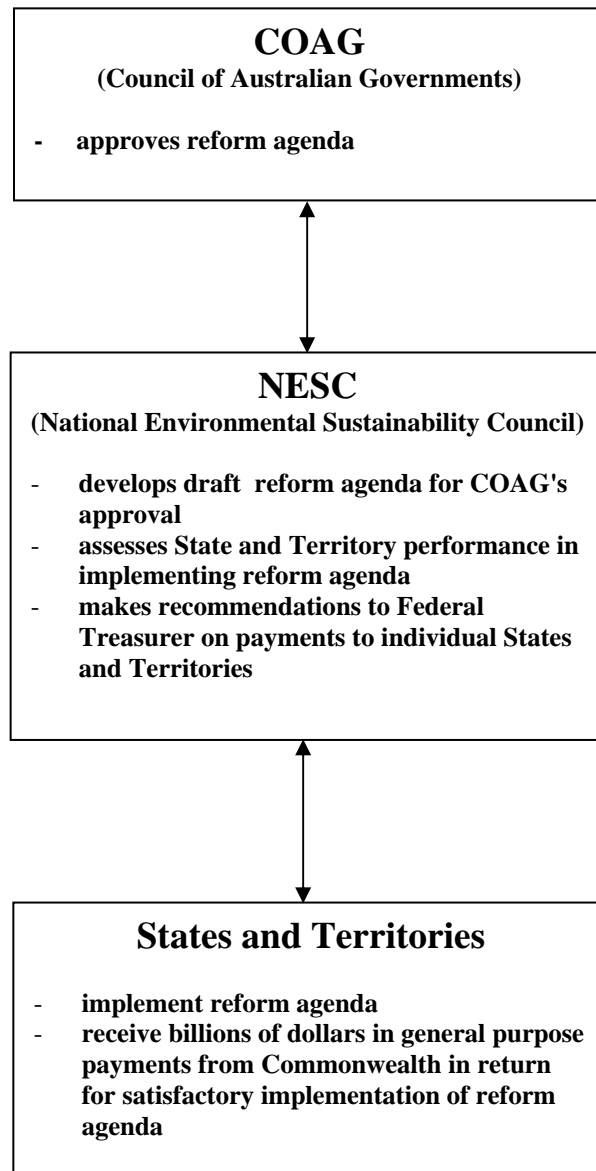
broad-scale environmental problems facing Australia. The paper nominates climate change, land and water degradation, biodiversity loss, and the protection of Australia's oceans as the current key broad-scale environmental problems facing Australia. The reform agenda would be developed for approval by the Council of Australian Governments. It would include national principles and targets for each of the key broad-scale problems, a review of all Commonwealth and State laws for inconsistency with these principles and targets, and national laws for each of the key broad-scale problems.

Secondly, the paper recommends that billions of dollars of Commonwealth funds be made available to the States over a twenty-year period in the form of general purpose grants, on the condition that the States satisfactorily implement this reform agenda. These Commonwealth payments to the States could be funded in a variety of ways, including the re-direction of some of the billions of dollars spent each year on environmentally-damaging government subsidies, the introduction of new revenue sources such as 'green taxes', and the introduction of a national environment repair levy. The National Environmental Sustainability Council proposed above would be tasked with assessing State progress in meeting the reform targets, and based on its assessments, making recommendations to the Federal Treasurer on whether or not Commonwealth funds should be made available to individual States.

A diagram and a flow-chart demonstrating these arrangements follow, together with the full set of recommendations.

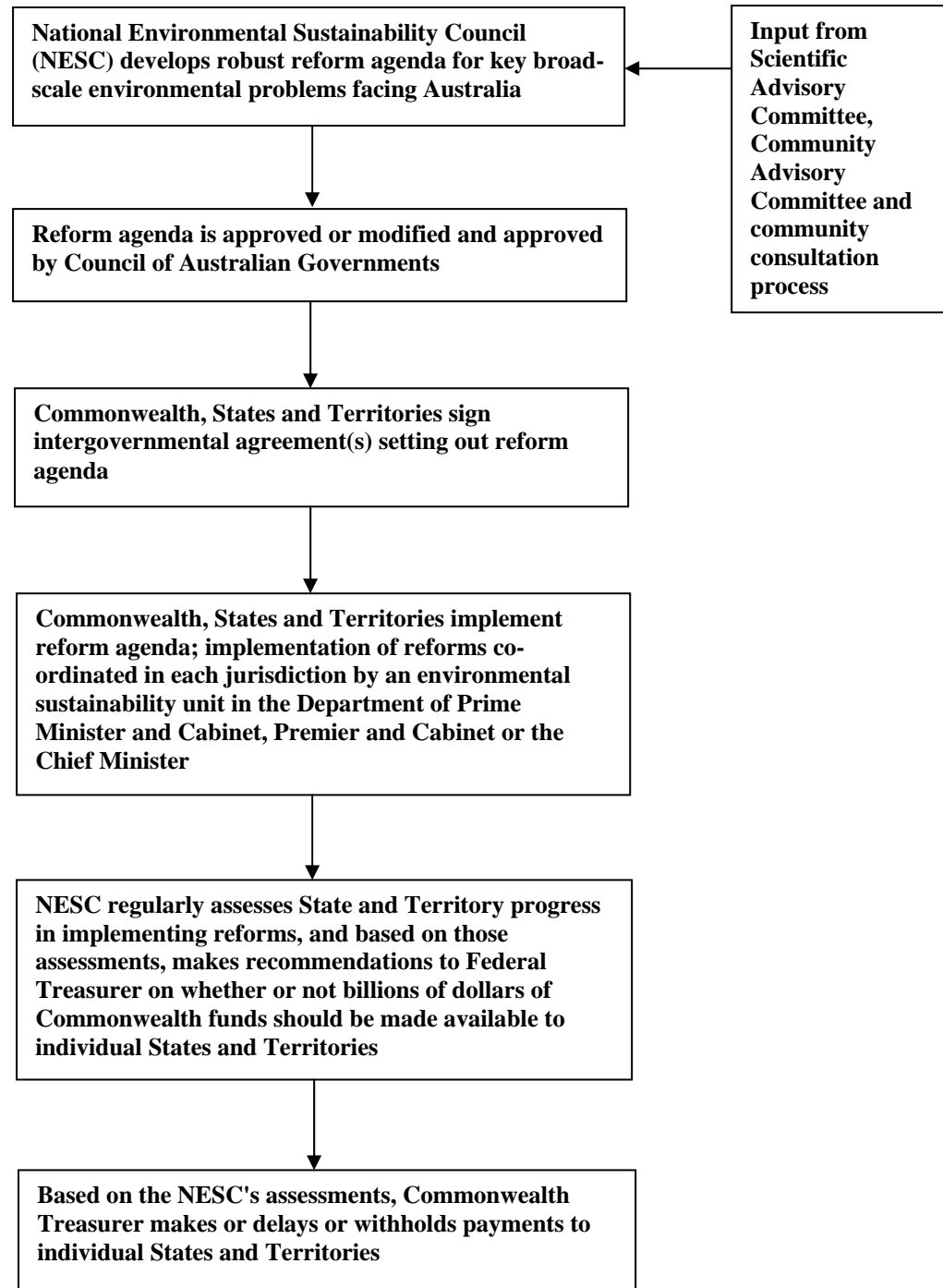
GREENING THE AUSTRALIAN FEDERATION

Diagram of Key Roles in Proposed Environmental Reform Arrangements



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Flow Chart of Key Processes in Proposed Environmental Reform Arrangements



GREENING THE AUSTRALIAN FEDERATION

Table of Recommendations

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Base national institutional arrangements for environmental sustainability on the principles of ecologically sustainable development set out in the *Environment Protection and Biodiversity Conservation Act 1999 (C'th)*.

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Focus institutional arrangements for environmental sustainability at the national level on the environmental issues which are too large, complex, difficult or controversial for individual jurisdictions to address adequately. This paper nominates the following broad-scale environmental problems as currently falling within that category:

- climate change
- land and water degradation
- biodiversity loss, and
- the protection of Australia's oceans.

Future references in this paper to 'the key broad-scale environmental problems facing Australia' should be read as references to these problems.

Rec. 3: Ensure that the top decision-making level of each government drives the agenda

Ensure that the major institutional arrangements adopted to address the key broad-scale environmental problems facing Australia are adopted and driven by the top decision-making level of each of the Commonwealth, State and Territory governments. This is likely to be the most effective way to ensure that the political will exists to address these problems, and that these institutional arrangements are adopted and implemented through whole-of-government processes.

In order to assist this to occur, establish or continue the following bodies, tasked with driving these problems forward:

- an environmental sustainability unit within the Department of Prime Minister and Cabinet, and a Cabinet sub-committee chaired by the Prime Minister, and
- environmental sustainability units within each Department of Premier and Cabinet or Chief Minister's Department, and Cabinet sub-committees chaired by the relevant Premier or Chief Minister.

Within the intergovernmental context, ensure that the major institutional arrangements adopted to address the key broad-scale environmental issues facing

Australia are adopted through and driven by COAG, rather than by Councils made up of relevant Commonwealth, State and Territory Ministers.

Note that in the recommendations set out below, references to 'States' should be taken to include the Australian Capital Territory and the Northern Territory as well.

Rec. 4: Ensure strong national leadership by the Commonwealth

Ensure that the Commonwealth takes a strong national leadership role on the key broad-scale environmental problems facing Australia today. This should involve the following three features:

- ensuring that there is a process in place to develop a comprehensive and robust environmental reform agenda at the national level in relation to the key broad-scale problems facing Australia
- the provision of billions of dollars of Commonwealth funding to the States in return for the States' implementation of that reform agenda, and
- a greater use of the Commonwealth's Constitutional powers where this co-operative approach fails.

Each of these points is discussed in more detail below.

Rec. 5: Establish an independent, statutory National Environmental Sustainability Council

In order to ensure that there is a process in place to develop a comprehensive and robust environmental reform agenda at the national level, have the Commonwealth take the lead role in establishing an independent, statutory, expertise-based National Environmental Sustainability Council, the purpose of which is to:

- develop and make recommendations to COAG on a robust national environmental reform agenda aimed at addressing the key broad-scale problems facing Australia
- once an agenda is agreed by COAG (in the form of one or more intergovernmental agreements), assess, at regular intervals, State progress in meeting the reform targets, and
- based on those assessments, make recommendations to the Federal Treasurer on whether or not Commonwealth funds should be made available to individual States. The final funding decisions would be made by the Federal Treasurer.

The National Environmental Sustainability Council should be funded by the Commonwealth, and required to report annually to the Commonwealth Parliament.

A Scientific Advisory Committee should be established to inform the National Environmental Sustainability Council's deliberations, particularly the development of national targets. In addition, the Council should provide opportunities for public input into the development of the reform agenda, both in the form of regular consultation with the community (including business, academia, professional bodies and civil society organisations), and through a Community Advisory Committee established for that purpose. The Scientific Advisory Committee, the Community Advisory

Committee and the requirement for community consultation should all have a statutory basis.

The National Environmental Sustainability Council's role should not extend to *implementing* the reform agenda; that should be the responsibility of the various governments party to the intergovernmental agreements (Commonwealth and State). The environmental sustainability units discussed in Recommendation Four (within the Departments of Prime Minister and Cabinet, and Premier and Cabinet) should co-ordinate the implementation of the reforms within each jurisdiction.

The National Environmental Sustainability Council should be supported by a Secretariat, the main functions of which should be:

- providing advice and analysis at the Council's direction on matters related to the implementation of the reform agenda, and
- representing the Council in dealings with Commonwealth and State government officials and other parties with interests in the reform agenda.

The need for and the operation of the National Environmental Sustainability Council should be reviewed periodically.

Rec. 6: Develop national principles and targets for each of the key broad-scale problems

Include in the reform agenda developed by the National Environmental Sustainability Council robust national principles and targets aimed at addressing climate change, land and water repair, biodiversity loss and the management of Australia's oceans. These principles and targets should be included in legislation. The targets should be measurable, time-bound and achievable, and focussed on outcomes rather than processes. They should be reviewed every five years. Commonwealth funding should be dependent on the targets being met (see below).

Rec. 7: Review all Commonwealth and State laws for inconsistency with the national principles and targets

Include in the reform agenda developed by the National Environmental Sustainability Council a requirement that all Commonwealth and State laws be reviewed for inconsistency with the national principles and targets developed under that agenda. This review should, amongst other things, check for subsidies which are inconsistent with the national principles and targets, and laws which incorrectly value (or which fail to value) environmental assets.

Laws which are inconsistent with the national principles and targets should, where appropriate, be reformed within a specified period of years. A 'guiding principle' similar to that used in the competition review should be formulated to assist in determining when reform is appropriate. In addition, all proposed new laws should be reviewed for inconsistency with the national principles and targets, and a review of all inconsistent laws undertaken periodically.

Rec. 8: Introduce national laws for each of the key broad-scale problems

Include in the reform agenda developed by the National Environmental Sustainability Council the introduction of national laws for each of the key broad-scale problems facing Australia. These laws should, as a minimum, set out the national principles and targets developed by the National Environmental Sustainability Council for each area. Other matters to be covered by the laws would depend on the reforms developed by the National Environmental Sustainability Council for the particular area.

Rec. 9: Provide opportunities to review the reform agenda

Provide periodic opportunities to review the reform agenda (say, every five to ten years), to ensure its continued relevancy and provide flexibility in the reform arrangements if necessary.

Rec. 10: Provide substantial Commonwealth funding to the States in return for satisfactory implementation of the reform agenda

Make billions of dollars of Commonwealth funding available over a twenty-year period to the States in the form of general purpose grants. The provision of this funding should be conditional upon the States satisfactorily implementing the reform agenda (and specifically, meeting the national targets) developed by the National Environmental Sustainability Council.

This funding could be raised in a number of ways, including, for example, measures such as:

- re-directing some of the billions of dollars currently spent each year on government subsidies to industry that either directly or indirectly damage the environment
- introducing new revenue sources such as 'green taxes' (taxes that discourage unsustainable resource use and environmentally damaging production and consumption, such as energy and carbon taxes, landfill taxes and air and water pollution taxes and charges), and
- a national environment repair levy on taxable income.

The measures chosen should be structured so as not to be socially regressive, and to provide maximum stability of funding over the twenty-year period.

Rec. 11: Make more extensive use of the Commonwealth's Constitutional powers if this co-operative approach fails

Where genuine attempts to take the co-operative approach described above fail, ensure that the Commonwealth makes more extensive use of its Constitutional powers to achieve appropriate national outcomes in relation to the broad-scale environmental problems facing Australia.

Rec. 12: Include a specific environment power in the Constitution

If the opportunity arises, include a specific environment power in the Constitution in order to make the broad scope of the Commonwealth's environmental powers quite clear.

Rec. 13: Ensure that environmental considerations are taken into account in national economic processes

Reform national economic institutions to ensure that environmental considerations are taken into account in national economic processes.

Assist this process by establishing a Bureau of Ecological Economics to undertake strategic environmental economics policy research, or alternatively, ensure that such research is undertaken by existing bodies such as the Commonwealth Treasury, the Australian Bureau of Statistics, or the Productivity Commission. Wherever the function is placed, it should have a statutory basis to provide greater permanence, and should be adequately funded by the Commonwealth.

Rec. 14: Ensure adequate environmental data collection, analysis, monitoring and dissemination

Ensure that there is adequate collection and dissemination of environmental data at the national level by continuing and refining the existing Commonwealth State of the Environment reporting process, and co-ordinating it with State-based SOE processes.

Complement this with a National Environmental Sustainability Research Institute, the purpose of which is to co-ordinate long-term ecological research, analysis and monitoring at the national level, and to disseminate the resulting data. Alternatively, ensure that these functions are undertaken by existing agencies such as the National Land and Water Resources Audit, or the Commonwealth Scientific and Industrial Research Organisation. Wherever the functions are placed, they should be statutorily-based, to provide greater permanence and independence, and should be adequately funded by the Commonwealth.

Rec. 15: Ensure independent auditing of governmental environmental performance

Strengthen the Commonwealth Auditor-General's powers to audit the environmental performance of Commonwealth Government bodies in relation to the key broad-scale environmental problems facing Australia, by giving an explicit statutory mandate to a new Office of the Environmental Auditor within the Australian National Audit Office, requiring it to conduct a systematic program of Commonwealth agency environmental performance audits in relation to these problems. Ensure that the office is adequately resourced by the Commonwealth.

Establish similar arrangements at the State level within State Auditor-General's offices.

Ensure that specific agency performance targets are developed for each relevant governmental agency, against which its performance can be audited. These performance targets should aim to address the principles and targets established for each of the key broad-scale environmental problems facing Australia.

GREENING THE AUSTRALIAN FEDERATION

A proposal for national institutional reform
to promote environmental sustainability
across Australia

1. Introduction*

1.1 The state of Australia's environment

As the 2001 Australian State of the Environment Report (**the 2001 SOE Report**) demonstrates, while some progress is being made in addressing the environmental problems facing Australia,¹ Australia's environment continues to deteriorate across key indicators.²

For example, dryland salinity is continuing to spread. At least 2.5 million hectares are now affected by it (an estimated additional 500 000 hectares of land has become salt-affected since 1996), and the National Land and Water Resources Audit estimates that this could rise to 17 million hectares at the current rate of increase.

Increasing pressures to extract surface and groundwater for human use are leading to the continuing deterioration of the health of water bodies. Water use for irrigation increased by 76% from 1985 to 1996/7, and about 26% of Australia's surface water management areas are close to, or have exceeded, sustainable extraction limits. And water quality is continuing to decline. For example, the increase in salinity in the Murray-Darling Basin and other areas is expected to result in river water in several catchments having salinity levels that will exceed drinking water guidelines within the next 20 years.

Greenhouse gas emissions increased by 16.9% between 1990 and 1998. Australia has a high per capita level of greenhouse gas emissions by world standards.

And many of the key threats to biodiversity identified in the 1996 Australian State of the Environment Report, such as salinity, changing hydrological conditions, land clearing and fragmentation of ecosystems, still persist. For example, the rate of land clearing has accelerated, and the Australian Greenhouse Office calculates that in

* The author wishes to thank John Connor, Charlie Sherwin, Megan Dyson, Charlie Hargroves, Mike Smith and Mike Krockenberger for their comments on drafts of the paper. The views expressed in the paper remain, naturally, the responsibility of the author.

¹ For example, a further 17.6 million hectares of marine protected areas have been established since the 1996 Australian State of the Environment Report, urban air quality has generally improved or remained constant since 1996, and streetscapes and parks in most urban centres have been improved significantly. Australia State of the Environment Report 2001 - Key Findings and related Fact Sheets, available at <http://www.ea.gov.au/soe/2001/key-findings> and <http://www.ea.gov.au/soe/2001/fact-sheets>, accessed 8 November 2002.

² The following facts and figures are taken from Australia State of the Environment Report 2001, Key Findings and related Fact Sheets (ibid).

1999, 469,000 hectares of woody vegetation was cleared nationally.³ The loss and depletion of plant species through clearance destroys the habitat of thousands of other species.

1.2 The need for more effective national institutional arrangements

There are no doubt many reasons for this continued environmental deterioration, including societal expectations of material affluence, a lack of political will to tackle the problems, a lack of resources, and, at times, a lack of knowledge.⁴ However, it is likely that one of the most significant reasons for this situation, particularly when it comes to dealing with the broad-scale environmental challenges facing Australia, is a lack of truly effective institutional arrangements at the national level.

As is discussed in more detail below, the broad-scale environmental challenges facing Australia, such as land and water degradation, climate change and biodiversity loss, are highly complex. They often cross political and administrative boundaries, and will take decades to address. They also possess a range of other attributes not often shared by other areas of policy. For example, they can lead to irreversible impacts, and they may involve new moral considerations (such as the rights of other species, or future generations). In addition, their problem causes are usually systemic, embedded in patterns of production, consumption, settlement and governance. And last - but by no means least - they will usually require a very substantial amount of money in order to be successfully addressed.

Consequently, these broad-scale problems do not lend themselves easily to resolution at the sub-national level. They need concerted attention at the national level, whether from the Commonwealth and State⁵ governments acting together or the Commonwealth Government acting on its own. And while the Commonwealth and State governments would no doubt argue that they are, jointly, tackling the problems, the evidence is, so far, that this is not occurring successfully enough. As the 2001 SOE Report reveals, the broad-scale problems - most of which have been with us for decades - are still with us, and continue to increase in magnitude and severity.

1.3 A brief outline of the rest of this paper

What can be done, then, to try to improve Australia's institutional arrangements at the national level in order to deliver a greater level of environmental sustainability, particularly in relation to the broad-scale environmental problems facing Australia?

The rest of this paper attempts to provide some answers to this question.

³ Indeed, it has been estimated that since 1996 approximately half a million hectares of woody vegetation per year - or some 3 million hectares in total - has been cleared across Australia. 'Briefing Note on Clearing', Sherwin, C., Australian Conservation Foundation, June 2003.

⁴ A lack of knowledge is particularly likely in relation to the status of many marine species and habitats, and the deep sea environment.

⁵ References in this paper to 'States' should be taken to include the Australian Capital Territory and the Northern Territory.

It looks, firstly, at the history of Commonwealth/State environmental relationships, focussing on the Constitutional Conventions, the way in which the Commonwealth has used its environmental powers to date, and the key co-operative Commonwealth/State institutions established so far to progress environmental issues at the national level.

The paper then looks at where Australia, as a federation of States, might head from here. It sets out a theoretical framework for institutional arrangements for environmental sustainability, based on the principles for institutions for sustainability developed by Stephen Dovers.

It then develops, in fifteen recommendations, a proposal for national institutional reform to promote environmental sustainability across Australia. Key elements of the reform proposal are based on the experience of the institutional arrangements developed over the 1990's around the National Competition Policy.

2. The history of Commonwealth/State environmental relationships

2.1 The Constitutional Conventions of the 1890's

It seems astonishing, now, that in the lead-up to federation, the environment was regarded as of so little importance on a national scale that Australia's fledgling Constitution made almost no mention of it.

At the time, however, this was quite understandable. Australia's founding fathers had other things on their minds during the Constitutional Conventions of the 1890's⁶. Principal among these was the need to do away with competing State tariffs⁷, and as a consequence, a significant part of the Constitution was devoted to finance and trade, and the new Commonwealth's powers in these areas. There was also a range of other areas which the delegates to the Conventions fairly readily agreed were best tackled at the national level, such as military and naval defence, the postal service, and the quarantine service. Appropriate Commonwealth powers for each of these areas were also included in the Constitution.

The colonies were, however, fiercely independent, and unwilling to contemplate handing over their powers except where absolutely necessary. After all, this was a peace-time union of colonies used to a great deal of freedom, a union unforced by war or other external calamity. As Sir Samuel Griffith said: '... it will be necessary to explain, when bringing the subject before our several parliaments, that it is not intended to transfer to the Executive Government anything which could be as well done by the separate governments of the colonies.'⁸

And environmental matters, as they were understood in the 1890's, were regarded as falling squarely within the domain of the States. The Federation Debates make it clear that to the extent the environment was considered at all by the delegates to the Conventions, it was considered as an almost boundless resource, owned primarily by the States, and therefore to be exploited primarily by them.⁹ The States saw no reason to hand such a resource to the new Commonwealth Government. The potential for environmental *problems* - and particularly problems which might need to be managed at the national level in order to be addressed effectively - was hardly touched upon.¹⁰

⁶ (1890, 1891, and 1897-8).

⁷ One of the key drivers for federation was the desire for a customs union amongst the States so that inter-State trade would no longer be subject to 'hostile tariffs'. See the Hon. Andrew Clark (Tasmania), Federation Debates, 11 February 1890, at p. 33. The Debates are available at www.aph.gov.au/senate/pubs/records.htm, accessed 15 January 2003.

⁸ The Hon. Sir Samuel Griffith (Queensland), Federation Debates (ibid), 10 February 1890, at p.11.

⁹ The one exception to this was fisheries beyond the territorial limit, which the colonies were happy for the new Commonwealth to deal with.

¹⁰ One of the few exceptions to this was Sir Alfred Deakin, in the debates about the Murray-Darling. (The Hon. Alfred Deakin (Victoria), Federation Debates (see Footnote 7), 3 April 1891, at p.691.)

While the Federation debates of the 1890's do not explicitly address the reasons why so little attention was given to potential environmental problems, it seems fair to assume that one of the main reasons would have been simply that the level of understanding about the potential problems and their extent was substantially lower then than it is today.

Illustrating this, the only area of significant environmental debate during the Conventions concerned the Murray-Darling river system - and the debate was primarily about the *use* of the river system, not its preservation. South Australia feared that it would lose its riverboat trade if the States upstream withdrew too much water from the river system. As a consequence, it wanted the Commonwealth Government's navigation power to include control of the nation's rivers. New South Wales, however, was concerned that it would not be able to use the waters of the Murray-Darling system for conservation¹¹ and irrigation purposes if this occurred. After a hard-fought debate which continued throughout the Constitutional Conventions, a provision was included in the Constitution, section 100, which stated that the Commonwealth could not, through any law of trade or commerce, deny a State 'the reasonable use of the waters of rivers for conservation or irrigation'.¹²

2.2 The Constitution and the Commonwealth's environmental powers

The consequence of all of this was that 'the environment', as we use that term today, was not addressed in the Constitution, and there was certainly no attempt to include an environmental power in section 51 of the Constitution, the section which lists most of the Commonwealth Government's powers. Indeed, the only provision in the Constitution which directly canvasses an environmental topic remains section 100, concerning the nation's rivers (although section 51(x), which allocates the Commonwealth a fisheries power in Australian waters beyond State territorial limits, is also worth noting).

This was significant, because in the original scheme of things, it was intended that powers not specifically enumerated in the Constitution as Commonwealth powers would be left to the States. Since the Constitution said nothing specific about the environment, for many decades most environmental management occurred at the State level, and a plethora of State agencies relating to the environment sprang up across Australia.

a) The expansion of the Commonwealth's Constitutional environmental powers

However, since the 1970's both the Commonwealth Government and the High Court have taken an increasingly expansive view of the Commonwealth Government's environmental powers. As a consequence, the Commonwealth Government has played a more active role in environmental affairs. Amongst other things, it has legislated in a range of environmental areas, mostly (but not always) with the concurrence of the States. It has also taken on some environmental management functions.

¹¹ 'Conservation' was treated by many of the delegates as equivalent to 'storage for use', as Prof. James Crawford has noted. (Crawford J., 'The Constitution', in Bonyhady T., ed., *Environmental Protection and Legal Change* (1992), pp 2-3.)

¹² Section 100, Australian Constitution. This clause, with the exception of the word 'reasonable', was inserted at the insistence of the NSW delegates. The word 'reasonable' was added at the last minute in response to pressure from the South Australian delegates. Ironically, of course, the issue at the heart of the debate, riverboat trade, ceased to have much importance shortly after federation, as the rivers were superseded by railways and roads.

The reason the Commonwealth Government has been able to do this is that it has various other Constitutional 'heads of power' which it has been able to use to act in the environmental sphere.¹³ Many of these powers, such as the powers to regulate corporations, trade and commerce, taxation and external affairs, are found in section 51 of the Constitution. Other useful powers are found elsewhere in the Constitution, such as the power to legislate for the Territories, the power to provide financial assistance to the States, and the power to expend money 'for the purposes of the Commonwealth'.¹⁴

Importantly, the High Court has made it clear that provided a Commonwealth law is a law with respect to one of its granted heads of power, the fact that it also has the practical effect of regulating the environment will not invalidate it.¹⁵ Indeed, as Professor James Crawford has noted: 'There is no requirement that Commonwealth legislation be exclusively about one of the granted heads of power. Indeed, there is no requirement that in terms of its intent or practical effect, the legislation be primarily, predominantly or even substantially concerned with the granted head of power. The point is obvious under the taxation power (section 51(ii)); governments use taxation for all sorts of purposes other than revenue raising, both in encouraging and discouraging particular activities.'¹⁶

The external affairs power has been particularly useful. For example, under this power, the Commonwealth has ratified such broad-reaching international conventions as the Convention on Biological Diversity, and the Framework Convention on Climate Change. This has given it both wide-ranging powers and wide-ranging obligations in relation to these conventions.

The upshot of all of this is that it is now well accepted that despite the lack of specific environment power in the Constitution, the Commonwealth has, in effect, extensive environmental powers. It could, if it chose to, legislate in many, and probably most, environmental areas to at least some extent, and such legislation, providing it was constructed to fall validly within one of the Commonwealth's heads of power, would prevail over inconsistent State laws.¹⁷

b) The Commonwealth's co-operative approach to environmental issues

However, the history of Commonwealth/State relationships on the environment has had two defining characteristics ever since the Commonwealth's powers began to be interpreted more widely.

¹³ See, for example, the High Court decisions of *Murphyores Inc Pty Ltd v Commonwealth* (1976) 133 CLR 1, *Commonwealth v Tasmania* (1983) 46 ALR 625, and *Richardson v The Forestry Commission (Tas)* and *Anor* (1988) 62 ALJR 158.

¹⁴ Sections 122, 96 and 81-83 of the Australian Constitution, respectively.

¹⁵ See, for example, *Murphyores Inc Pty Ltd v Commonwealth* (see Footnote 13).

¹⁶ Crawford, J., 'The Constitution and the Environment' (1991) 13 Sydney Law Review 11, at p. 14.

¹⁷ As Professor James Crawford has commented: 'The lesson of a careful study of the last fifteen years experience is that the Commonwealth has, one way or another, legislative power over most large-scale mining and environmental matters.' *Ibid*, at p. 30. On the inconsistency point, see section 109 of the Australian Constitution.

Firstly, the States have fiercely guarded their rights in this area, which has traditionally been seen as a matter for the States to regulate.

Secondly, the Commonwealth has demonstrated a considerable reluctance to legislate unilaterally. With the exception of the Whitlam years, from 1972 to 1975,¹⁸ the Commonwealth Government has preferred a co-operative approach to environmental matters, and has only rarely legislated in the face of State opposition.¹⁹ There has also been the practical consideration that the States (with considerable variation across States and issues) have detailed infrastructures on the ground to manage environmental issues, whereas the Commonwealth does not.

These factors taken together have acted to substantially limit the scope of Commonwealth environmental legislation to date.

For example, in the 1970's, the Whitlam Government passed laws which claimed for the Commonwealth sovereignty over the seas and seabed of the continental shelf and territorial sea. The laws relied on international conventions, and the external affairs power, for their validity. They were challenged by all six States. The High Court upheld their validity, deciding that the external affairs power applies to anything physically external to Australia and Tasmania beyond the low water mark, or the baseline of internal waters, where applicable.²⁰

This was an excellent opportunity for a consistent set of laws to be applied to the whole of Australia's marine jurisdiction. From an environmental perspective, such an approach would have been an invaluable improvement on the complexities of the Commonwealth/State arrangements which applied at the time.

However, the High Court's decision was considered problematic for Commonwealth/State relationships, because until then, the States had had jurisdiction over coastal waters out to the three mile limit. The States were fiercely opposed to losing this control. Consequently, the incoming Fraser Government passed laws which gave effect to a political agreement with the States, and returned control of coastal waters to the States.²¹

This is proving to be a significant obstacle to the effective implementation of marine ecosystem management under the Commonwealth's Oceans Policy, which currently does not apply to State waters.

¹⁸ From 1972 to 1975, the Commonwealth Government passed a suite of environmental laws in areas such as environmental impact assessment, the protection of national parks, and heritage protection.

¹⁹ This has applied to Commonwealth Governments of both major party persuasions. Philip Toyne makes the point in his book 'The Reluctant Nation' that Commonwealth governments are particularly unwilling to intervene in State environmental matters when parties of the same political persuasion are in government in both Canberra and the relevant State. Toyne, P., 'The Reluctant Nation: Environment, law and politics in Australia', Australian Broadcasting Corporation, Sydney, 2001, pp 5, 11.

²⁰ *Seas and Submerged Lands Case* (1975) 135 CLR 337.

²¹ See the *Coastal Waters (State Powers) Act 1980 (C'th)* and the *Coastal Waters (State Title) Act 1980 (C'th)*. The first of these two Acts also gives the States some jurisdiction in waters adjacent to coastal waters in respect of certain activities, such as fisheries (see Rothwell, D., and Kaye, S., 'A Legal Framework for Integrated Oceans and Coastal Management in Australia', 18 EPLJ, 278 at 280). It would be possible for the Commonwealth to repeal this legislation and overturn the political agreement with the States - but this seems unlikely to happen.

2.3 National institutional arrangements for the environment to date

The key point to emerge from the discussion above is that although the High Court has taken an increasingly expansive view of the Commonwealth Government's environmental powers, the Commonwealth Government has been reluctant to use these powers unilaterally to address environmental issues at the national level, preferring a co-operative approach with the States in almost all cases.

This co-operative approach has been evident in the institutional arrangements implemented at the national level to deal with environmental issues. A number of different arrangements have been tried to date. The two which have been arguably the most significant are Ministerial Councils and the Council of Australian Governments (COAG).

It is useful, in structuring future institutional arrangements, to understand some of the key strengths and shortcomings of these councils.

a) Ministerial Councils

One of the most commonly-used mechanisms has been that of Ministerial Councils. These Councils are used across the whole spectrum of governmental activities, and involve Ministerial representatives from each participating Government (Commonwealth and State) meeting to co-ordinate actions at the national level.²² Ministers generally meet once or twice per year, and are supported by standing committees of officials.²³

For current purposes, the two most relevant Ministerial Councils, historically, have been the Australian and New Zealand Environment and Conservation Council (ANZECC), and the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ), and their predecessors, which date back to the 1970's. Changes made to these Ministerial Council arrangements in June 2001 saw, amongst other things, the creation of:

²² Some of the Councils also include representatives of the governments of New Zealand and Papua New Guinea, and the Australian Local Government Association. The number of these Councils has varied; in the early nineties, for example, there were some 45 Ministerial Councils. In 1992 this number was reduced to 21. The number has now risen again to approximately 40. The foreword to 'Commonwealth-State Ministerial Councils: A Compendium', June 2002 (**the Ministerial Compendium**), states that: 'The role of Ministerial Councils is to facilitate consultation and cooperation between governments, to develop policy jointly, and to take joint action in the resolution of issues which arise between governments in the Australian Federation. Ministers carry the authority of their governments and those Ministers convened as a Ministerial Council may, where appropriate, determine to finality all matters in their field of concern.' The Ministerial Compendium, produced by the Department of Prime Minister and Cabinet, is available at www.coag.gov.au/compendium/compendium.pdf.

²³ The officials tend to meet more regularly - often three to four times a year - to develop issues for the consideration of their Ministers, as well as to consider and settle less significant issues within the responsibility of their councils. 'The State of Inter-Governmental Relations', Max Moore-Wilton, (then) Secretary, Department of Prime Minister and Cabinet, paper delivered to the National Policy Forum, Brisbane, 26 November 1999, p. 6 (available from the Department of Prime Minister and Cabinet).

- a new Natural Resource Management Ministerial Council tasked with addressing the natural resource management issues from ANZECC, ARMCANZ and the Ministerial Council on Forestry, Fisheries and Aquaculture, and
- a new Environment Protection and Heritage Council formed by amalgamating the non-NRM (ie, environment protection) component of ANZECC, the National Environment Protection Council (**the NEPC**), and the Heritage Ministers' Meeting.²⁴

For current purposes, there are also a number of other relevant Ministerial Councils and Ministerial Fora (which are specific to particular geographical areas).²⁵ Probably the most important of these has been the Murray-Darling Basin Ministerial Council (**the MDBMC**), which was established in 1985, and consists of Ministers from the Commonwealth and the governments of New South Wales, Victoria, South Australia, Queensland and the ACT (the latter in a non-voting capacity).²⁶

These Ministerial Councils have, over time, achieved some useful environmental results at the national level. For example, between 1992 and 2000, ANZECC and ARMCANZ were jointly responsible for the introduction of the National Water Quality Management Strategy. Other positive policy work has included the development, under ANZECC's auspices, of the National Framework for the Management and Monitoring of Australia's Native Vegetation 2000, and ARMCANZ's work on natural resource management, which included an important 1999 discussion paper, 'Managing Natural Resources in Rural Australia for a Sustainable Future'.²⁷

²⁴ Agreed at the Council of Australian Governments meeting 8 June 2001. (COAG Communiqué 8 June 2001; www.dpmc.gov.au/docs/coag080601_council_review.cfm, accessed 25 January 2003.) The Natural Resource Management Ministerial Council's objective is to promote the conservation and sustainable use of Australia's natural resources. Its terms of reference are set out on p. 67 of The Ministerial Compendium (see Footnote 22). The Environment Protection and Heritage Council's objective is to ensure the protection of Australia's environment and heritage. Its terms of reference are set out on p. 45 of The Ministerial Compendium (see Footnote 22 and http://www.ephc.gov.au/ephc/vision_state.html, accessed 18 January 2003).

²⁵ Other relevant Ministerial Councils include the Ministerial Council on Mineral and Petroleum Resources, the Ministerial Council on Energy, the Primary Industries Ministerial Council, the Local Government and Planning Ministers' Council, the Gene Technology Ministerial Council, and the Ministerial Council for Aboriginal and Torres Strait Islander Affairs. Relevant Ministerial Fora include, for example, the Great Barrier Reef Ministerial Council and the Lake Eyre Basin Ministerial Forum.

²⁶ The MDBMC's objective is to promote and coordinate effective planning and management for the equitable, efficient and sustainable use of the land, water and environment resources of the Murray-Darling Basin. (The Ministerial Compendium, Department of Prime Minister and Cabinet (see Footnote 22), p. 97.) It is supported by the Murray-Darling Basin Commission, which consists of Commissioners and Deputy-Commissioners from each of the participating governments, and which forms the executive arm of the Ministerial Council.

²⁷ The National Water Quality Management Strategy encompasses documents such as the Australian and New Zealand Guidelines for Fresh and Marine Water Quality, the Australian Drinking Water Guidelines, the Australian Guidelines for Water Quality Monitoring and Reporting, and the Guidelines for Groundwater Protection. Information concerning the Strategy is available at www.affa.gov.au. The National Framework for the Management and Monitoring of Australia's Native Vegetation 2000 is available at <http://www.deh.gov.au>, and 'Managing Natural Resources in Rural Australia for a Sustainable Future' is available at <http://www.napswq.gov.au/publications>.

However, these Ministerial Councils suffer from a number of draw-backs. Firstly, while some of them (such as the NEPC²⁸) have a statutory basis, most of them do not; they are simply constituted on the basis of administrative arrangements. This can lead to a lack of stability in arrangements over the long-term.

Secondly, there is a lack of consistency in processes and outcomes within and across the Councils. For example, Councils often adopt measures without securing them in legislation, and sometimes fail to take other meaningful steps to secure the goals set out in those measures.²⁹ (A notable exception to this has been the development of National Environment Protection Measures (NEPM's) by the NEPC. NEPM's, once agreed to by all participating jurisdictions, are set out in complementary Commonwealth/State legislation.)

The lack of consistency can also result in wide variations in openness and accountability. Some Councils produce minutes and others only communiques after their meetings; some (for example, the NEPC) are required to report to participating Parliaments, and some have no reporting requirements at all.

Thirdly, as Philip Toyne has noted, while the Ministerial Council process is aimed at better co-operation and co-ordination, 'the States retain significant control and exercise it in their own 'self-interest'. This results in slow and cumbersome processes to agree common standards, strategies and guidelines.'³⁰

An example of this can be seen in the arrangements set in place under the MDBMC to try and address environmental problems in the Murray-Darling.³¹ The MDBMC has agreed to a range of useful initiatives, such as the 1990 Natural Resources Management Strategy and the 1996 Basin Sustainability Plan, which together form the foundation of the MDBMC's Basin-wide planning process for natural resource management, and a broad range of policies and strategies under this process, such as the document Integrated Catchment Management in the Murray-Darling Basin 2001 - 2010, and the 2001 - 2015 Basin Salinity Management Strategy. In 1995 the MDBMC introduced a Cap on diversions of water from the Basin. And most recently, the

²⁸ The NEPC is a statutory body with law-making powers established under the *National Environment Protection Council Act 1994 (C'th)*, and corresponding legislation in the other jurisdictions. It will remain a statutory body within the Environment Protection and Heritage Ministerial Council. Its main purpose is to develop a common approach across Australia through environmental measures ensuring that people enjoy the benefit of equivalent protection from air, water and soil pollution and noise, wherever they live in Australia. The NEPC was established as a result of the 1992 Inter-Governmental Agreement on the Environment (**the IGAE**) signed by all States and the Commonwealth. It is interesting to note that the IGAE was one of the outcomes of a specific attempt by the Commonwealth to foster co-operative federalism (Prime Minister Bob Hawke's 'New Federalism' approach).

²⁹ For example, under ANZECC's auspices, the National Strategy for the Conservation of Australia's Biological Diversity 1996 was developed. Under its commitments it contains, amongst other things, a statement that by the year 2000, Australia will have arrested and reversed the decline of remnant native vegetation, and avoided or limited any further broad-scale clearance of native vegetation to those instances in which regional biological diversity objectives are not compromised. (National Strategy for the Conservation of Australia's Biological Diversity 1996, Actions: 7.1.1, Priorities and time frames, l) and m), available at <http://www.ea.gov.au/biodiversity/publications/strategy/>, accessed 13 February 2003.) Since 1996, the rate of land-clearing has increased (see, for example, the figures given in 'Blueprint for a Living Continent: A Way Forward from the Wentworth Group of Concerned Scientists', November 2002, p. 10, available at www.wwf.org.au, accessed 13 February 2003).

³⁰ 'The Reluctant Nation', Toyne, P. (see Footnote 19), p. 9.

³¹ The following documents and initiatives are available at www.mdbc.gov.au.

MDBMC initiated the 2002 Living Murray initiative, which to date has resulted in agreement to focus on maximising environmental benefits for six significant ecological assets within the River Murray system. Part of this program will include the restoration of 500 GL of water per year to the river system by 2009.³²

However, progress has been slow, at best, and hampered by the sorts of disputes between States which so bedeviled the Constitutional Convention debates over the nation's river systems. Queensland, for instance, did not sign the 1992 Murray-Darling Basin Agreement until 1996, and has still not signed up to the Cap, even though a significant part of the Basin falls within its borders. And it is clear from the scientific evidence that despite the initiatives mentioned above, insufficient progress has been made under the MDBMC's guidance to halt (much less reverse) the land and water degradation occurring within the Basin.³³

The tendency for States to act in their own self interest on these Ministerial Councils can also result in a lowest-common-denominator approach. This is evident, for example, in the 1999 analysis by Streets and Di Carlo of the first three NEPM's produced by the NEPC. Of the NEPM concerning Ambient Air Quality, for example, they said: 'Overall the AAQ Measure may be said to be doing little more than marking time in that it adopts standards already in use and being observed in most jurisdictions.'³⁴ While they applauded the creation of a national body with the power to make national measures, they concluded: 'The standards and goals agreed upon by participating jurisdictions, generally speaking, reflect the lowest common denominator.'³⁵

b) Council of Australian Governments

Some of the same issues are evident with COAG. On balance, however, COAG appears to be a more effective forum for achieving significant environmental results at the national level.

Prior to 1992, Commonwealth-State relations at the Heads-of-Government level were conducted through ad-hoc Premiers' conferences. Since then, COAG has been the formal vehicle for dealing with non-financial matters.³⁶

COAG consists of the Prime Minister, the State Premiers, the Territory Chief Ministers and the President of the Australian Local Government Association.³⁷ It is

³² MDBMC Communique of meeting held 14 November 2003, <http://www.thelivingmurray.mdbc.gov.au/content/index.phtml/itemId/4440>, accessed 14 May 2004.)

³³ See, for example, the National Land and Water Resources Audit's Australian Water Resources Assessment 2000 and Australian Dryland Salinity Assessment 2000 (www.audit.ea.gov.au, accessed 15 February 2003), and the Murray-Darling Basin Commission's 1999 'Salinity Audit of the Murray-Darling Basin: A 100-Year Perspective' (www.mdbc.gov.au, accessed 15 February 2003).

³⁴ 'Australia's First National Environmental Protection Measures: Are We Advancing, Retreating or Simply Marking Time?', Streets, S. and Di Carlo, A., 16 EPLJ 25, at p. 44.

³⁵ Ibid, at p. 50.

³⁶ 'The State of Inter-Governmental Relations', Moore-Wilton, M. (see Footnote 23), at p. 1. Other arrangements apply to financial matters as a consequence of the introduction of the GST under the 1999 Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations (although financial matters which are unable to be resolved in the Ministerial Council established under that Agreement are still able to be sent to COAG for resolution).

chaired by the Prime Minister and meets, on average, once a year for approximately two days at a time. It is supported by the COAG Senior Officials' Group.³⁸

Its role is to:

- increase co-operation among governments in the national interest
- facilitate cooperation among governments on reforms to achieve an integrated, efficient national economy and single national market
- continue structural reform of government and review of relationships among governments consistent with the national interest, and
- consult on major issues by agreement, such as:
 - major whole-of-government issues arising from Ministerial Council deliberations, and
 - major initiatives of one government which impact on other governments.³⁹

COAG has dealt with a number of significant environmental issues since it first met.⁴⁰ For example, in 1994 it agreed to a national water reform program which included: more accurate water pricing; the establishment of clearly specified water entitlements, and arrangements to enable trade in those entitlements, institutional reform and the allocation of water to the environment. Considerable progress has since been made in implementing this program under the auspices of the National Competition Policy framework. In 2003 COAG also agreed to the National Water Initiative, which is designed to further progress the 1994 water reform program, and which concentrates on improving the security of water access entitlements, encouraging the expansion of water trading, and protecting ecosystem health at a whole-of-basin, aquifer or catchment scale.⁴¹

In 1997 COAG agreed to endorse the Commonwealth's international negotiating position on climate change, which was subsequently taken to the negotiations on the Kyoto Protocol. In that year it also gave in-principle agreement to a Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment, which amongst other things agreed upon the scope of the Commonwealth's environmental impact assessment role, and ultimately led to important new Commonwealth legislation concerning environmental impact assessment.⁴²

In 2000 COAG agreed to the National Action Plan for Salinity and Water Quality (**the National Action Plan**), the goal of which is to enable regional communities to

³⁷ Below the formal COAG structure are the Ministerial Councils discussed above. Max Moore-Wilton has noted: 'Ministerial Councils are able to initiate, develop and monitor policy reform jointly in [their specific policy] areas. In particular, Ministerial Councils may develop policy reforms for consideration by COAG, and oversee the implementation of policy reforms agreed to by COAG.' 'The State of Inter-Governmental Relations', Moore-Wilton, M. (see Footnote 23), at p. 6.

³⁸ This group meets on an 'as required' basis and usually once or twice in the months prior to each Council meeting to discuss the agenda and arrangements for the meeting. The Ministerial Compendium (see Footnote 22), p. 13.

³⁹ The Ministerial Compendium (see Footnote 22), p. 13.

⁴⁰ See the Communiqués issued by COAG after each COAG meeting, available at www.pmc.gov.au or from the Department of Prime Minister and Cabinet.

⁴¹ The National Competition Policy framework, and the water reforms carried out under its auspices, are discussed further at 4.6, below.

⁴² (The *Environment Protection and Biodiversity Conservation Act 1999* (*C'th*).)

address dryland salinity and improve water quality. This program involves new expenditure by the Commonwealth and State governments of \$1.4 billion over 7 years, and is being implemented (albeit slowly) at present.

These decisions demonstrate that COAG has the potential to be an effective forum for achieving environmental outcomes at the national level. The primary reason for this, it seems fair to assume, is the seniority of the decision-makers involved. These decisions have had major environmental consequences and have persisted over time, and some have involved significant expenditure.

This is not to say, of course, that all of the policy outcomes listed above are desirable from an environmental point of view. Some of COAG's policy positions, such as the climate change position adopted by COAG in 1997, are clearly not desirable. This, however, merely points to the main problem inherent in any essentially political forum such as COAG, and that is that such a forum - even where it has demonstrated that it can deliver outcomes, which is a valuable achievement in itself - is subject to all sorts of competing pressures, such as economic pressure applied by industry, 'States' rights' positions taken by the States, and the ideological position adopted by the Commonwealth government. These competing pressures make it extremely unlikely that COAG will support the most appropriate environmental solutions all the time. However, it is not clear that within a federation of States such as Australia - and within a democracy - there is an alternative to such a body at the top of the decision-making structure.

Nor is the COAG process free of other problems. For example, it seems fair to say that although COAG has considered a number of major environmental problems, it has by no means been systematic in its examination of the serious environmental problems facing Australia. Nor are all of its decisions implemented as effectively as they could be.⁴³

In addition, COAG does not meet often, and when it does, it issues only communiques, and not minutes of meetings. It can also be difficult to have an issue placed on COAG's agenda. This may be partly explained by the comment from Max Moore Wilton, former Secretary to the Department of Prime Minister and Cabinet, that there needs to be a reasonable prospect of the agenda item being resolved before it can be put on the agenda. 'It is not realistic to try to resolve highly contentious issues at a face-to-face COAG meeting without adequate preparation. Trying to do so will only undermine the effectiveness of COAG as a forum.'⁴⁴

c) Moving forward

Consequently, while COAG appears to be more effective than Ministerial Councils as a forum for national environmental decision-making, it is clear that both Ministerial Councils and COAG have some problems. Significant issues which need to be considered in moving forward include:

⁴³ A contributing factor to this may be that COAG consists, of course, of its constituent governments, and their priorities may change from time to time.

⁴⁴ 'The State of Inter-Governmental Relations', Moore-Wilton, M. (see Footnote 23), at p. 15. Such preparation can be carried out, for example, by Senior Officials, or relevant Ministerial Councils.

- finding ways to bring greater stability to key institutional arrangements for the environment at the national level
- ensuring that the key institutional arrangements for the environment at the national level systematically examine the serious environmental problems facing Australia, and
- ensuring that when national measures are adopted to address these environmental problems, meaningful steps are taken to achieve the goals set out in those measures.

These themes run through the discussion in Parts 3 and 4 of the paper, below.

3. Future directions: a theoretical framework for institutions for sustainability

As noted at the beginning of this paper, Australia's environment continues to deteriorate across key indicators. The broad-scale problems are still with us, and continue to increase in magnitude and severity. The discussion above reveals some of the institutional reasons why this is so.

What can be done, then, to try to improve Australia's institutional arrangements at the national level in order to deliver a greater level of environmental sustainability, particularly in relation to the broad-scale environmental problems facing Australia?

A useful theoretical framework for addressing this question is provided by the principles for institutions for sustainability developed by Stephen Dovers.

In discussing the complexity of the broad-scale environmental issues we are now dealing with, Dovers commented that amongst other things, they often cross political and administrative boundaries, and will take decades to address. In developing this theme, he noted that:

'Problems like biodiversity, integrated land and water management, climate change and environment-population linkages display attributes encountered less often, and especially in combination, than in many other policy fields (say, service delivery or economic policy):

- broadened and variable spatial scales;
- deepened and variable temporal scales;
- the possibility of ecological limits to human activity;
- irreversible impacts;
- complexity within and connectivity between problems;
- pervasive risk, uncertainty and ignorance;
- important environmental assets not traded or valued in markets;
- often cumulative rather than discrete impacts;
- new moral considerations (eg, other species or future generations);
- 'systemic' problem causes, embedded in patterns of production, consumption, settlement and governance;
- lack of accepted research methods, policy instruments and management approaches;
- lack of defined policy, management and property rights and responsibilities;
- demands for increased community participation; and
- sheer novelty as a set of policy problems.⁴⁵

As a consequence, he says, '...sustainability problems will require policy and management approaches that match these attributes, and these approaches will of necessity have to emerge from institutional arrangements that are different from those fashioned around traditional policy problems. Existing institutions are inadequate

⁴⁵ Dovers, S., 'Institutions for Sustainability', a paper in the Australian Conservation Foundation's Tela series, April 2001 (available at www.acfonline.org.au), at p. 11.

because they are not adapted to sustainability problems. ... To achieve sustainability, we need to plan and act for the longer term, across traditional sectors, issues and political boundaries.⁴⁶

Dovers then discusses the nature of institutions, and in particular institutions suitable to the current environmental challenges. (He defines an institution as 'an underlying, durable pattern of rules and behaviour'.) He argues that what is necessary now, in order to address the challenges posed by the quest for sustainability, is 'adaptive institutions and policy processes', and says that being adaptive 'demands that we have the confidence to implement decisions, but also the humility to recognise the limits of our knowledge and to constantly learn and seek improvement'.⁴⁷

He identifies five key principles for adaptive institutions:

- persistence, where efforts are maintained over time, enabling learning from experience, rather than the past pattern of *ad hoc*ery
- purposefulness, where efforts are supported by stated principles and goals
- information-richness and sensitivity, where the best information is sought and made widely available
- inclusiveness, where the full range of stakeholders are involved in policy formulation and in management, and
- flexibility, where there is a preparedness to experiment, preventing persistence and purposefulness from becoming rigidity.⁴⁸

He then identifies a set of more specific design features which can be used to inform discussion on how to improve institutional and policy capacities in relation to sustainability issues. (He notes that not every design feature would need to be fulfilled in every instance; for example, a requirement might be fulfilled by linkages across institutions and policy processes). These design features include:

- having a vision and set of goals, and a mandate to pursue them
- possessing sufficient longevity to persist, experiment, learn and adapt
- having sufficient human, financial and informational resources
- having a clear basis in statute law
- possessing a degree of independence from short term political pressures
- placing a high priority on information generation, use and wide ownership, with an emphasis on long-term monitoring and evaluation
- having a degree of applied or grounded focus to ensure that actions and prescriptions are operational
- integrating environmental, social and economic aspects
- maintaining links to other institutions and processes in related areas
- being aware of and capable of handling issues and processes that cut across political and administrative boundaries
- having a participatory structure and process
- having a mandate and the ability to experiment with approaches and methods

⁴⁶ Ibid, at p. 12.

⁴⁷ 'Institutions for Sustainability', Dovers, S. (see Footnote 45), at p. 13.

⁴⁸ 'Institutions for Sustainability', Dovers, S. (see Footnote 45), at p. 13.

- having political support at government, community and industry levels to enable establishment and favour persistence.⁴⁹

⁴⁹ 'Institutions for Sustainability', Dovers, S. (see Footnote 45), at p. 14.

4. A proposal for national institutional reform to promote environmental sustainability across Australia

4.1 Introduction

Dovers' design features are useful when considering how best to structure national institutional reform in order to deliver a greater level of environmental sustainability across Australia. While it is not possible in a paper of this size to address all of his requirements, the reform proposal set out below attempts to address some of the key design features listed above, and in particular:

- the need for a vision and goals
- the need for political acceptance of any proposal within government
- the need to address geographic scales with institutions which can cross political and administrative boundaries
- the need for sufficient resources
- the need to address time scales with institutions which can provide certainty (through legislation) and longevity
- the need for independence from short term politics
- the need to integrate environmental, economic and social concerns
- the need to place a high priority on information generation and use, with an emphasis on long-term monitoring and evaluation, and
- the need for participatory structures.

The reform proposal also attempts to make use of, or build on, existing structures where possible.

How, then, might national institutional principles and arrangements be structured in order to deliver greater environmental sustainability across Australia?

4.2 Base the reforms on the principles of ecologically sustainable development

An important requirement for institutional arrangements for sustainability is that they be purposeful; that is, that they be based on a set of identifiable principles and goals. Dovers suggests using the principles of ecologically sustainable development (ESD).

A great many versions of ESD principles have been proposed over the last decade. ESD principles were first agreed upon by the Commonwealth and State governments in the 1992 Inter-Governmental Agreement on the Environment (**the IGAE**).⁵⁰ A different set of ESD principles was subsequently agreed upon in the 1992 National Strategy on Ecologically Sustainable Development. In 1999, ESD principles largely based on the IGAE were incorporated in Commonwealth legislation in the following form:

"The following principles are *principles of ecologically sustainable development*:

⁵⁰ The IGAE is discussed briefly in Footnote 28.

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle of inter-generational equity - that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.⁵¹

Other versions of these principles have been proposed, many now simply using the terms 'sustainable development' or 'sustainability' instead of 'ecologically sustainable development' (see, for example, Western Australia's State Sustainability Strategy⁵²).

While it is important for sustainability principles to address economic and social considerations as well as environmental ones, it is suggested that the use of the term 'ESD' (or at the very least 'environmental sustainability') be maintained, so that the focus on the environment is retained. It is also suggested that the principles of ecologically sustainable development set out above be used as the basis for an institutional framework for environmental sustainability at the national level, since these principles have the advantage of already being enshrined in important Commonwealth legislation.⁵³

Recommendation 1:

Base national institutional arrangements for environmental sustainability on the principles of ecologically sustainable development set out in the *Environment Protection and Biodiversity Conservation Act 1999 (C'th)*.

4.3 Focus on the key broad-scale environmental problems facing Australia

While it is clear that environmental sustainability principles and arrangements should be applied across all areas of endeavour within the Australian Federation, there are many actors in the sustainability debate - Commonwealth, State and local governments, regional institutions, industry, the community and special interest groups. Some areas of endeavour are undoubtedly best managed, not as national

⁵¹ Section 3A, *Environment Protection and Biodiversity Conservation Act 1999 (C'th)*.

⁵² Hope for the Future: The Western Australian State Sustainability Strategy', September 2003, available at www.sustainability.dpc.wa.gov.au.

⁵³ Note that the definition could be strengthened in a number of ways - in particular by including a principle promoting public participation in decision-making, and by making the definition an exclusive one.

issues, by the Commonwealth and State governments, but as regional or local issues, by other stakeholders.⁵⁴

Having said that, there are also undoubtedly some areas which are best managed as national issues - and which the Commonwealth and State governments acting in concert at the national level, or the Commonwealth government if necessary, should take the key role in managing.

What are these areas? They can perhaps best be identified by asking the following question: What is it crucial for the Australian federation, *as a body of federated States*, to do?

The answer to that, in the environmental context, seems clear; the federation should address the environmental issues which are too large, complex, difficult or controversial for individual jurisdictions to address. This is in keeping with the spirit of Federation; the States federated because they recognised that there were certain issues which required a united, national approach if they were to be adequately addressed.

These types of environmental issues are fairly readily identified. This paper nominates the following broad-scale problems as currently falling within that category:

- climate change
- land and water degradation
- biodiversity loss, and
- the protection of Australia's oceans.

These problems all share, as a minimum, a number of key features. They apply to vast geographical areas which cross administrative and political boundaries, and they require highly complex policy approaches over at least a number of decades in order to be adequately addressed. In addition, they have important environmental impacts or assets which are not currently valued in economic terms, and they are often highly controversial, with stakeholders presenting very different competing perspectives on the same issue.

Future references in this paper to 'the key broad-scale environmental problems facing Australia' should be read as references to these problems.⁵⁵

Recommendation 2:

Institutional principles and arrangements for environmental sustainability at the national level should concentrate on the environmental issues which are too large, difficult, complex or controversial for individual jurisdictions to address. This paper nominates the following broad-scale environmental problems as currently falling within that category:

⁵⁴ For example, municipal waste is undoubtedly best managed by local government.

⁵⁵ It is important, however, to recognise that the key issues for the Federation may change over time, and to establish arrangements which can be adapted to take account of this. See 4.6 and 4.7(d), below.

- climate change
- land and water degradation
- biodiversity loss, and
- the protection of Australia's oceans.

Future references in this paper to 'the key broad-scale environmental problems facing Australia' should be read as references to these problems.

4.4 Ensure that the top decision-making level of each government drives the agenda

An important factor in ensuring that Australia adequately addresses the key broad-scale environmental problems facing it is making sure the top decision-making level of each of the Commonwealth and State and Territory governments drives the agenda. This needs to happen both within individual jurisdictions, and in an intergovernmental context.

There are a number of reasons for this. The key broad-scale problems are each critical problems for the nation which will only continue to grow in importance as the environmental situation deteriorates; they are broad-reaching in geographic scale and sectoral impacts; and they are also often highly contentious. The involvement of the first ministers of each of the relevant jurisdictions is required to provide the political will to address these problems, to demonstrate the importance placed by each of the governments on addressing them, to provide momentum, and to resolve any differences within and between jurisdictions.⁵⁶

Put another way, it is important to have political support within government to enable the establishment of appropriate institutions, and favour their persistence. Having the top decision-making level of government drive the agenda appears to go a long way towards achieving that support.

Having the top decision-making level of government drive the agenda is also important because it is likely to be the most effective way to ensure that the major institutional arrangements adopted to address the key broad-scale environmental problems facing Australia are adopted and implemented through whole-of-government processes. This is true both within individual jurisdictions, and in an intergovernmental context.

David Yencken, in discussing the need for a whole-of-government approach to environmental policy, has noted that:

'The current approach to environmental policy is to vest the responsibility for environmental change in one environment portfolio. No matter how able the Minister and his or her department and no matter how enlightened the policy

⁵⁶ (As the discussion above concerning COAG demonstrates, the involvement of first ministers does not guarantee good environmental outcomes. However, it seems that it does raise the likelihood of such outcomes occurring.)

proposals stemming from the portfolio, such an approach to environmental policy can evidently not bring about the [necessary] changes.'⁵⁷

The reasons he gives for this include the following cross-portfolio impacts of environmental problems:

- The changes now recognised as being necessary to achieve sustainability (for example, reductions of energy use) are not within the scope of the environment portfolio alone
- The opportunities relating to the economic transformations taking place in response to environmental degradation belong primarily to the economic portfolios (Treasury, Industry, Trade, Energy)
- The employment opportunities flowing from environmental industries are primarily the responsibility of the employment and training portfolios
- Health, social equity, human settlement, transport and consumer issues relating to the environment are, similarly, primarily the responsibility of other portfolios.⁵⁸

These comments certainly ring true in the context of the key broad-scale environmental problems facing Australia. These problems are complex, and their impacts are felt across a wide range of sectors. Land and water degradation, for example, affects not only the natural environments within which it occurs, but a broad range of agricultural industries, town drinking water supplies, and town and rural infrastructure (such as roads). This has implications for, amongst other things, biodiversity conservation, agricultural production rates and earnings, agricultural practices, employment rates, social cohesion (particularly in an already stressed rural environment), and the opportunity costs of dealing with these problems instead of spending money on other programs.

An environment portfolio by itself cannot ensure that all (or even most) facets of such problems are dealt with successfully, or that the opportunities which arise out of attempts to address them are maximised. It needs the input and co-operation of other portfolios to do so. The arrangements and processes adopted to address the key broad-scale problems facing Australia, for example, will probably need to include not just environment and agriculture or industry portfolios (which occurs routinely now, for instance, at the Commonwealth level), but treasury, employment and other portfolios as well.⁵⁹

⁵⁷ Yencken, D., 'Sustainable Australia: Refocusing Government', a paper in the Australian Conservation Foundation's Tela series, March 2000, at p. 16 (available at www.acfonline.org.au). See also Yencken, D., and Wilkinson, D., in 'Resetting the Compass: Australia's Journey Towards Sustainability', CSIRO Publishing, Melbourne, Australia, 2000, at p.330.

⁵⁸ 'Sustainable Australia: Refocusing Government', Yencken, D., *ibid*, at p. 16.

⁵⁹ At the intergovernmental level, this concern should, to a certain extent, be addressed already by the Broad Protocols for the Operation of Ministerial Councils, which state, amongst other things, that: 'When considering intergovernmental matters which have implications beyond the areas of responsibility of a Ministerial Council, other relevant Councils should be consulted through liaison between the Chairs in the first instance. Ministerial Councils should also refer such issues to Heads of Government where they have major cross-portfolio or whole-of-government implications.' The Ministerial Compendium (see Footnote 22), p. 8.

The need for whole-of-government approaches to the critical problems facing Australia was recently the subject of a speech given by Dr. Peter Shergold, Secretary of the Department of Prime Minister and Cabinet. ('Connecting Government: Whole-of-Government Responses to Australia's Priority

Having the top decision-making level of government drive the agenda is likely to be the most effective way of achieving this whole-of-government approach. This is not only because of the priority then placed on the relevant problems across government, but because of the co-ordinating role able to be played across government by the office of the first minister in each jurisdiction.

The involvement of the first minister and other portfolios in the decision-making process may, of course, lead to a watering-down of environmental goals in some instances; some trade-offs will be inevitable. However, the experience of the last twenty years suggests that the 'mainstreaming' of environmental decisions concerning these broad-scale problems is necessary to ensure that the decisions are accepted and implemented successfully across portfolios, and that they persist.

a) The Commonwealth Government

In the Commonwealth context, having the top decision-making levels of government drive the agenda will require demonstrated leadership from the Prime Minister of the day and the key Cabinet decision-makers on each of the key broad-scale environmental problems facing Australia.

As a minimum, there should be a sustainable environment unit within the Department of Prime Minister and Cabinet, and a Cabinet sub-committee chaired by the Prime Minister, tasked with driving these issues forward.

Such bodies were in fact established by the Prime Minister, the Hon. John Howard MP, in November 2001, when he created a Sustainable Environment Committee of Cabinet, chaired by the Prime Minister.⁶⁰ The Committee secretariat is provided by the Department of Prime Minister and Cabinet. The Prime Minister said, in a press release issued on 1 November 2001, that the purpose of the Committee is to 'provide a strong whole of government framework on issues of environmental sustainability'.⁶¹ The Committee consists of a range of relevant Ministers⁶², and it is possible to co-opt other Ministers on to the Committee where appropriate.

The Prime Minister said that the matters the Committee would consider 'include greenhouse policy, the National Action Plan for Salinity and Water Quality, land

Challenges', 20 April 2004, available at www.pmc.gov.au/docs/Shergold200404.cfm, accessed 16 May 2004.)

⁶⁰ Press release issued by the Prime Minister, 13 December 2001, entitled 'Cabinet Committees'; www.pm.gov.au/news/media_releases/2001/media_release1462.htm, accessed 18 November 2002.

⁶¹ Press release issued by the Prime Minister, 1 November 2001, entitled 'Environment Policy'; www.pm.gov.au/news/media_releases/2001/media_release1358.htm, accessed 18 November 2002.

⁶² The Ministers are: the Hon. John Anderson MP, Deputy Prime Minister and Minister for Transport and Regional Services; the Hon. Dr. David Kemp MP, Minister for the Environment and Heritage; the Hon. Warren Truss MP, Minister for Agriculture, Fisheries and Forestry; the Hon Dr. Brendan Nelson MP, Minister for Education, Science and Training; the Hon Ian Macfarlane MP, Minister for Industry, Tourism and Resources; and Senator the Hon. Ian Macdonald, Minister for Forestry and Conservation. All except Senator Macdonald are Cabinet Ministers. See press release issued by the Prime Minister on 13 December 2001 (see Footnote 60).

clearing, bio-diversity and oceans policy' - very similar to the issues nominated by this paper as the key environmental problems facing Australia.⁶³

b) State and Territory governments

In the State and Territory contexts, similarly, there should be units within each Department of Premier and Cabinet or Chief Minister's Department, and Cabinet sub-committees chaired by the Premier or Chief Minister, tasked with driving these issues forward.

A number of States (Victoria, New South Wales, South Australia and Western Australia) now have environment sub-committees of Cabinet. (In some cases they deal with broader issues as well.) None of these sub-committees is chaired by the relevant Premier, although interestingly, in Victoria the Cabinet's Sustainable Development and Environment Committee has recently merged with its Economic Development Committee to form an Economic and Sustainable Development Committee (for a trial period only), chaired by the Treasurer.⁶⁴

In terms of sustainable environment units within the Department of Premier and Cabinet, there are now a number of relevant precedents in existence at the State level. The most significant of these is Western Australia, which has established a Sustainability Policy Unit within the Department of the Premier and Cabinet. This Unit is tasked with, amongst other things, overseeing the implementation of the Western Australian State Sustainability Strategy, and assisting relevant government agencies to incorporate sustainability capacity into their policy functions, enabling a network across government to achieve a whole-of-government perspective on sustainability. It also takes an active role in driving change in high priority areas of the Strategy, such as sustainability assessment.

The ACT has also established an Office of Sustainability within the Chief Minister's Department. It is tasked with:

- developing, facilitating and coordinating the implementation of guidelines, policies and procedures related to sustainability
- providing expert advice to the Chief Minister and ACT Government agencies on matters related to sustainability
- promoting sustainability across Government, business and the wider community, and

⁶³ See press release issued by the Prime Minister on 13 December 2001 (see Footnote 60).

⁶⁴ Victoria: pers. comm. with Ian Porter, Executive Director of Sustainability Strategy, Victorian Department of Sustainability and Environment, 18 May 2004, and Mark Lister, Manager, Sustainability Strategies, Victorian Department of Sustainability and Environment, 19 May 2004; New South Wales: The Cabinet Office Annual Report 2002-3, p. 62, available at www.cabinet.nsw.gov.au; South Australia: pers. comm. with Ben Wilson, Premier's Office, 18 May 2004; Western Australia: pers. comm. with Michael Rowe, Sustainability Policy Unit, Premier's Office, 18 May 2004. In South Australia, while the Premier does not chair the Natural Resources, Environment and Energy Committee, he is a member of it - as he is a member of all other Cabinet committees.

- liaising with business, industry and community organisations on sustainability issues.⁶⁵

A number of other States have established sustainability units within environmental or planning departments. For example, South Australia has established an Office of Sustainability within its Department for Environment and Heritage, and Victoria has a Sustainability Strategies Unit within the Department of Sustainability and Environment. New South Wales has established various sustainability functions, such as a Sustainability Unit within the Department of Infrastructure, Planning and Natural Resources, and Queensland has a Sustainable Industries Division within its Environment Protection Authority.⁶⁶

These units are not necessarily aimed at addressing the key broad-scale environmental issues facing Australia. Some of them have a broader remit (for example, Western Australia's Sustainability Policy Unit, which is tasked with covering a vast range of sustainability issues across government). And some of them have a much narrower remit (for example, New South Wales' Sustainability Unit, which is tasked with addressing sustainability issues within the building industry).

It seems fair to comment, however, that units tasked with addressing the broader (and more complex) end of the spectrum of environmental sustainability issues are more likely to achieve a truly effective whole-of-government approach if they are placed within the relevant Premier's or Chief Minister's office. This is particularly so because of the role of Premiers' and Chief Ministers' offices in directing and co-ordinating the activities of government.

c) The intergovernmental context

Within the intergovernmental context, the major institutional arrangements adopted to address the key broad-scale environmental problems facing Australia should be

⁶⁵ Western Australia: 'Hope for the Future: The Western Australian State Sustainability Strategy' (see Footnote 52), pp.44-5, and pers. comm. with Andrew Higham, Sustainability Policy Unit, 17 May, 2004. The ACT: pers. comm. with Marissa Cahill, Office of Sustainability, 17 May 2004. See also www.sustainability.act.gov.au.

⁶⁶ South Australia: see <http://www.environment.sa.gov.au/sustainability/about.html>, accessed 9 February 2003; Victoria: pers. comm with Mark Lister, Manager, Sustainability Strategies, Victorian Department of Sustainability and Environment, 19 May 2004; NSW: pers.comm. with Rachel O'Leary, Sustainability Unit, Department of Infrastructure, Planning and Natural Resources, 20 May 2004; Queensland: pers. comm. with Nicole Buchanski, Director, Sustainable Industries Division of the Environment Protection Authority, 17 May 2004.

Some States also have independent sustainability round tables, or commissioners. Most of these bodies play either an advisory role, or a role co-ordinating sustainability reporting. These are undoubtedly useful roles. However, these institutions are no substitute, in the present context, for a sustainable environment sub-committee of Cabinet and a sustainable environment unit within the Department of Premier and Cabinet, because they are not likely to be able to drive a whole-of-government approach to environmental sustainability as successfully as the latter. [Declaration: the author is a member of the South Australian Premier's Round Table on Sustainability.] And some States deal with environmental sustainability by addressing relevant issues at regular meetings of relevant heads of agencies, or inter-departmental committees. While this provides useful cross-departmental capacity, again, it is likely that a unit within the Department of Premier and Cabinet, with the Premier's specific backing, will be more effective in achieving outcomes.

adopted through and driven by COAG, rather than by Councils made up of relevant Commonwealth, State and Territory Ministers.

To an extent, this happens already. As noted above, a number of the broad-scale issues facing Australia have been considered by COAG over the past ten years. This is not surprising when one considers the informal rules about what matters can be taken to COAG. Matters must be of national significance. They should not put on COAG's agenda if they can be adequately considered by Ministerial Councils. And typically, an issue would be either of momentous importance, vast in scope or complexity, or would involve conflicts between jurisdictions in order for it to be put on COAG's agenda.⁶⁷

Arguably, all the broad-scale problems nominated above fall into one or more of these categories.

As also noted above, however, although COAG has considered a number of major environmental problems, it has by no means been systematic in its examination of the broad-scale problems facing Australia. One way of addressing this would be to have an independent body make recommendations to COAG on a more comprehensive environmental reform agenda. This is discussed further below.

Recommendation 3:

Ensure that the major institutional arrangements adopted to address the key broad-scale environmental problems facing Australia are adopted and driven by the top decision-making level of each of the Commonwealth, State and Territory governments. This is likely to be the most effective way to ensure that the political will exists to address these problems, and that these institutional arrangements are adopted and implemented through whole-of-government processes.

In order to assist this to occur, establish or continue the following bodies, tasked with driving these problems forward:

- an environmental sustainability unit within the Department of Prime Minister and Cabinet, and a Cabinet sub-committee chaired by the Prime Minister, and
- environmental sustainability units within each Department of Premier and Cabinet or Chief Minister's Department, and Cabinet sub-committees chaired by the relevant Premier or Chief Minister.

Within the intergovernmental context, ensure that the major institutional arrangements adopted to address the key broad-scale environmental problems facing Australia are adopted through and driven by COAG, rather than by Councils made up of relevant Commonwealth, State and Territory Ministers.

⁶⁷ Pers. comm. with Ron Perry, Department of Prime Minister and Cabinet, 2002.

4.5 Ensure strong national leadership by the Commonwealth

One of the key practical requirements articulated by Stephen Dovers is that institutional arrangements suitable for handling environmental issues need to be aware of and capable of handling issues and processes that cut across political and administrative boundaries.

What becomes clear in attempting to deal with this requirement is that the key broad-scale environmental problems facing Australia today can only be dealt with effectively if the Commonwealth government takes a strong national leadership role in relation to them. This is not to downgrade the contribution which will also be necessary from other levels of government and administration (State, regional and local). However, the geographic reach of these problems, and the lengthy time-frames required to address them, make it impossible for other levels of government to address these problems effectively without strong co-ordinating leadership from the Commonwealth government.

The House of Representatives Standing Committee on Environment and Heritage looked at this issue within the context of catchment management - one of the key broad-scale environmental problems facing Australia - and came to the same conclusion.

The Standing Committee's December 2000 report, entitled 'Co-ordinating Catchment Management', noted first of all that since catchments spread over local government, regional and state boundaries, co-ordination is necessary between the competent authorities to ensure a consistent approach. It said, however, that at present, catchment management is largely regulated by individual States, and that the practical effect is that catchment management has become subordinated to State interests.⁶⁸ It also noted that:

'... a major failing in the present system [of catchment management] is that the different jurisdictions and different levels of government often do not share common goals and, where they do, there is poor co-ordination between them in terms of policies, targets and programs.'⁶⁹ The result is a fragmented, piecemeal system that fails to deliver consistent and co-ordinated programs and which is subject to the uncertainties of the political cycle and the actions of pressure groups.

These considerations demonstrate clearly that the Commonwealth not only has the primary leadership role, given our federal system - a view shared by the community and revealed in other inquiries - but that successful co-ordinated

⁶⁸ 'Co-ordinating Catchment Management', House of Representatives Standing Committee on Environment and Heritage, December 2000, p. 68, paras 3.93, 3.94.

⁶⁹ The 2001 SOE Report makes a similar point in a broader context, noting that planning and management of the environment is often highly uncoordinated between the Commonwealth, the States and Territories and local government. 2001 SOE Report, Institutional Arrangements and Limitations, at <http://www.ea.gov.au/soe/2001/context-4.html>, accessed 12 November 2002.

national programs will occur only through Commonwealth legislation and facilitation.⁷⁰

The Standing Committee's report concluded that:

'...the Committee believes that the Commonwealth has a duty to take a leadership role. There are several reasons for this.

- First, only the Commonwealth has the capacity to collect, collate and make available, in a co-ordinated manner and on a national basis, information on the ecologically sustainable use of Australia's catchment systems.
- Second, the Commonwealth has the capacity to raise a significant proportion of the public funding necessary and disburse it on an equitable basis.
- Third, only the Commonwealth has the capacity to provide the impartial, national infrastructure to solve what is a national problem. This includes legislation and a legal system and public service to administer it.
- Finally, the Commonwealth was created by the consent of the people of six self-governing colonies to administer those matters that it was impractical, difficult, or unfeasible, for individual colonies to undertake themselves. It was also recognised that there were some activities that, while they could be administered on a regional level, were of such common concern that it was prudent for them to be administered at a national level. Defence, postal and telegraphic services and foreign relations are clear examples. Such matter transcend the borders of any single jurisdiction. The Committee believes that the ecologically sustainable use of Australia's catchment systems is a similar issue.'⁷¹

These considerations apply, arguably, not only to catchment management, but to the other key broad-scale environmental problems nominated above.

It is clear from a number of other recent significant reports that many Australians expect the Commonwealth to take a lead role in tackling the environmental problems facing the nation.⁷² One of these, a recent Senate Committee report into the Commonwealth's environmental powers, noted that '(t)here was overwhelming support in submissions for the Commonwealth to take a leadership role in environmental matters'.⁷³

The Prime Minister, John Howard, also recognised the importance of national environmental leadership when he launched the National Action Plan in October 2000. He stated that unless the Commonwealth took the lead role in addressing the

⁷⁰ 'Co-ordinating Catchment Management', House of Representatives Standing Committee on Environment and Heritage (see Footnote 68), p. 87, paras 3.163. 3.164.

⁷¹ 'Co-ordinating Catchment Management', House of Representatives Standing Committee on Environment and Heritage (see Footnote 68), p. 88, para 3.165.

⁷² See, for example, the Steering Committee report to Australian governments on the public response to 'Managing Natural Resources in Rural Australia for a Sustainable Future', July 2000, p. 10. <http://www.napswg.gov.au/downloads/pdf/cttereport.pdf>, accessed 16 February 2003.

⁷³ 'Commonwealth Environment Powers', Senate Environment, Communications, Information Technology and the Arts References Committee, May 1999, Chap 3, para 3.1, available at http://www.aph.gov.au/senate/committee/ecita_ctte/enviropowers/report/c03.htm, accessed 10 February 2003.

problems of salinity and water quality, the problems 'will never be fixed because there are competing and colliding state interests that only the facilitating, co-ordinating leadership role of the Federal Government can overcome.'⁷⁴

However, strong national environmental leadership by the Commonwealth, within the context of the current federation of States, is not an easy task. Nor is it easy to detail, across such diverse issues as the broad-scale problems facing Australia, precisely what form such leadership should take. Government action can range across a broad field of possibilities, from measures which provide information and education, to measures which set an example, to regulatory or incentive-based measures, to what might be termed 'direct action'.

Nevertheless, a number of general principles can be identified.

Firstly, it makes sense for the Commonwealth to play to its natural strengths. As the national government within a federation of States, these are, amongst other things, that it can provide broad strategic direction, national legislation and national institutions, research and information brokering, and a very substantial part of the funding required to address the broad-scale environmental issues.

Secondly, it also makes sense for the Commonwealth to continue to attempt to address these issues, where it can, within the context of a co-operative relationship with the States. Quite apart from 'States' rights' sensitivities over any unilateral Commonwealth action, there is the very practical consideration that because of the way environmental issues were initially dealt with (or not dealt with) in the Constitution, the States have developed large administrative structures to tackle environmental issues. The Commonwealth has, comparatively, far less administrative capacity 'on the ground', and while it has the Constitutional capacity to act unilaterally in many areas, it would take considerable time, effort and resources for it to gear up to the point where it could administer national programs on the ground across Australia.

However, there are various versions of what a co-operative Commonwealth/State relationship could look like, and not all of them are likely to achieve effective results. It may be useful to think of the possibilities on a spectrum of weak to strong co-operation. For example, a weak co-operative relationship might be one in which the Commonwealth merely facilitates combined Commonwealth/State action. A strong co-operative relationship, on the other hand, might be one in which the Commonwealth drives the agenda and provides substantial funding to the States in order to leverage greater co-operation from them.⁷⁵

⁷⁴ Press conference transcript on the launch of 'Our Vital Resources: National Action Plan for Salinity and Water Quality in Australia', Parliament House, Canberra, 10 October 2000; see www.pm.gov.au/news/interviews/2000/interview475.htm, accessed 10 February 2003.

⁷⁵ Note that there have already been two intergovernmental agreements which have, to one degree or another, dealt with the respective roles of the Commonwealth and State governments on environmental issues; the IGAE, referred to in Footnote 28, and the 1997 COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment, referred to in the text associated with Footnote 42. The discussion below canvasses arrangements which move on from, and in some cases would supercede, these agreements.

With this in mind, it is suggested that there are three keys to strong national environmental leadership by the Commonwealth.

The first is that the Commonwealth needs to ensure that there is a process in place to develop a comprehensive and robust environmental reform agenda at the national level in relation to the key broad-scale problems facing Australia.

Secondly, the Commonwealth should use the provision of billions of dollars of funding to the States to obtain their agreement to that agenda. The Commonwealth would be able to exert far greater leverage over State efforts to deal with the key broad-scale environmental problems than it currently does if it made very substantial amounts of funding available to the States on the condition that they comply with the national environmental reform agenda on those issues.

Thirdly, however, the Commonwealth needs to be prepared to make far more extensive use of its Constitutional powers than it currently does to achieve environmental goals if Commonwealth/State negotiations on this co-operative approach fail to deliver adequate national outcomes.

Each of these points is discussed in more detail below.

Recommendation 4:

Ensure that the Commonwealth takes a strong national leadership role on the key broad-scale environmental problems facing Australia today. This should involve the following three features:

- ensuring that there is a process in place to develop a comprehensive and robust environmental reform agenda at the national level in relation to the key broad-scale problems facing Australia
- the provision of billions of dollars of Commonwealth funding to the States in return for the States' implementation of that reform agenda, and
- a greater use of the Commonwealth's Constitutional powers where this co-operative approach fails.

Each of these points is discussed in more detail below.

4.6 Establish an independent, statutory National Environmental Sustainability Council

In seeking a model for processes to develop an environmental reform agenda at the national level, it is particularly instructive to look at the National Competition Policy.

In 1995, after some years of negotiations, the Commonwealth and all States signed three intergovernmental agreements aimed at implementing competition reforms.⁷⁶

⁷⁶ The Competition Principles Agreement; The Conduct Code Agreement, and The Agreement to Implement the National Competition Policy and Related Reforms, available in the Compendium of National Competition Policy Agreements (Second Edition 1998), at www.ncc.gov.au.

In return for the States making satisfactory progress on a specified program of reforms, the Commonwealth agreed to make payments of some \$4.8 billion to the States over the period 1997-8 to 2005-6. The payments were to take two forms; a guarantee to maintain the real per capita value of the Commonwealth's Financial Assistance Grants (now replaced by the GST), and specific, indexed competition payments. They were to be made available in three tranches some years apart, following assessments of progress as to whether each State had met the relevant conditions. The assessments of progress were to be made by the National Competition Council, an independent statutory body set up under the *Trade Practices Act 1974* (*C'th*). These assessments were to be followed by National Competition Council recommendations to the Federal Treasurer concerning the payment (or non-payment) of Commonwealth funds to individual States, with the final decision concerning payment to be made by the Federal Treasurer.

The reforms agreed upon included:

- the extension of prices surveillance to governmental businesses
- the application of competitive neutrality principles so that government businesses do not enjoy a competitive advantage simply as a result of public sector ownership
- the restructuring of public sector monopoly businesses
- the review and reform of all legislation which restricts competition; and
- the provision of third party access to services provided by means of significant infrastructure facilities.

Related reforms in the electricity, gas, water and road transport industries also formed part of the package.⁷⁷ For example, the national water reform program adopted by COAG in 1994 was taken up by the National Competition Council. This program included:

- water pricing based on full cost recovery and the amount of water used
- the establishment of clearly specified water entitlements and the arrangements to enable trade in those entitlements
- the allocation of water to the environment
- the establishment of regulatory and water service institutions that have clear roles and responsibilities, and
- public education and consultation.⁷⁸

As can be seen, these reforms were significant and extensive, requiring considerable and detailed effort on the part of States to address them. Interestingly, so far (with some exceptions and some delays), the competition reform agenda has largely been met despite these difficulties.⁷⁹ Likely reasons for this are discussed at 4.8, below.

⁷⁷ Details of these reforms can also be found in the Compendium of National Competition Policy Agreements (Second Edition 1998) (ibid).

⁷⁸ See <http://www.ncc.gov.au/sector.asp?sectorID=8&page=>, accessed 31 January 2003.

⁷⁹ See the National Competition Council's Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms: 2003 - Volume One: Overview of the National Competition Policy and Related Reforms, August 2003, and its 2002 Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms - Volume One: Assessment, August 2002, available at www.ncc.gov.au, accessed 16 April 2004 and 3 February 2003,

The National Competition Policy model is a useful one in a number of ways. Amongst other things, it provides, in the National Competition Council, a credible example of an independent, statutory body reporting, under COAG's auspices, on complex national reform issues.

Significantly, the National Competition Council's role is not to implement the reforms, but to assess State progress in doing so. (There are competition policy units in each State, and at the Commonwealth level, whose task it is to co-ordinate the implementation of the reforms within each jurisdiction. These units are placed either within the relevant Department of Treasury, or the Department of Premier and Cabinet.⁸⁰)

It is suggested that a National Environmental Sustainability Council be established, the purpose of which would be to:

- develop and make recommendations to COAG on a robust national environmental reform agenda aimed at addressing the key broad-scale problems facing Australia (this would be different to the National Competition Policy, where the recommendations were made by the Hilmer Committee, but similar in the sense that COAG would make the final decisions about the agenda)
- once an agenda is agreed by COAG (in the form of one or more intergovernmental agreements), assess, at regular intervals, State progress in meeting the reform targets, and
- based on those assessments, make recommendations to the Federal Treasurer on whether or not Commonwealth funds should be made available to individual States. The final funding decisions would be made by the Federal Treasurer.

Key features of the proposed reform agenda are discussed at 4.7, below, and the provision of Commonwealth funding is discussed at 4.8.

respectively. While the States have not met the deadline for removing uncompetitive laws, they have completed a substantial amount of work in that area, and are nearing completion of much of the rest of the original 10-year program. For example, as noted in an article on the National Competition Council's 2002 Assessment, 'Most government authorities have been corporatised and exposed to the full force of private sector competition, national markets have been created in electricity and gas and most industries and professions have been deregulated.' (O'Loughlin, J., 'NCC Approves States' Payment', *The Weekend Australian Financial Review*, 7-8 December 2002, p. 5.)

Water reform is not complete, and will be extended by the National Water Initiative agreed to by COAG in August 2003 (See www.coag.gov.au/meetings/290803/index.html and www.pmc.gov.au/docs/national_water_initiative_progress.cfm, accessed 14 May 2004). However, even in this area, progress has been made. According to the National Competition Council's website, its achievements to date in the area of water reform include:

- recognition that water is a scarce resource, with prices providing an incentive to conserve water
- recognition of the environment's need for and right to water
- substantial improvements in natural resource planning
- recognition that greater knowledge of the environmental effects of water use is required and, as a result, that water allocations must continue to be conservative.
- an overall real reduction in residential water bills, and
- improved drinking water quality and effluent treatment as a result of reform of water management businesses. (See <http://www.ncc.gov.au/sector.asp?sectorID=9>, accessed 3 February 2003.)

⁸⁰ Pers. comm. with Dionne Lew, National Competition Council Secretariat, 10 July 2003.

The National Environmental Sustainability Council should be an independent, statutory, expertise-based body to provide a degree of independence from short term political pressures, and to provide greater permanency.

It should be funded by the Commonwealth, and required to report annually to the Commonwealth Parliament, as is the National Competition Council.

An expertise-based Scientific Advisory Committee should be established to inform its deliberations, particularly the development of national targets. This would enable the provision of rigorous scientific advice in a transparent manner.⁸¹ In addition, the Council should provide opportunities for public input into the development of the reform agenda, in the form of regular consultation with the community (including business, academia, professional bodies and civil society organisations), and through a Community Advisory Committee established for that purpose. The Scientific Advisory Committee, the Community Advisory Committee and the requirement for community consultation should all have a statutory basis to provide greater permanency and certainty.

The National Environmental Sustainability Council's role should not extend to *implementing* the reform agenda; that should be the responsibility of the various governments party to the intergovernmental agreements (Commonwealth and State). The environmental sustainability units discussed in Recommendation Four (within the Departments of Prime Minister and Cabinet, and Premier and Cabinet) should co-ordinate the implementation of the reforms within each jurisdiction.

As with the National Competition Council, the National Environmental Sustainability Council should be supported by a Secretariat, the main functions of which should be:

- providing advice and analysis at the Council's direction on matters related to the implementation of the reform agenda, and
- representing the Council in dealings with Commonwealth and State government officials and other parties with interests in the reform agenda.⁸²

The need for and the operation of the National Environmental Sustainability Council should be reviewed periodically to ensure its continued relevance and effectiveness, and to allow flexibility in the reform arrangements if necessary.

Recommendation 5:

In order to ensure that there is a process in place to develop a comprehensive and robust environmental reform agenda at the national level, have the Commonwealth take the lead role in establishing an independent, statutory, expertise-based National Environmental Sustainability Council, the purpose of which is to:

⁸¹ One possibility here might be to expand the functions and membership of the Prime Minister's Science, Engineering and Innovation Council, which is the Commonwealth Government's principal source of independent advice on issues in science, engineering and innovation and relevant aspects of education and training. See <http://www.detya.gov.au/science/pmseic/#role>, accessed 31 July 2003.

⁸² The National Competition Council has a Secretariat with the same roles; see www.ncc.gov.au, accessed 10 July 2003.

- develop and make recommendations to COAG on a robust national environmental reform agenda aimed at addressing the key broad-scale problems facing Australia
- once an agenda is agreed by COAG (in the form of one or more intergovernmental agreements), assess, at regular intervals, State progress in meeting the reform targets, and
- based on those assessments, make recommendations to the Federal Treasurer on whether or not Commonwealth funds should be made available to individual States. The final funding decisions would be made by the Federal Treasurer.

The National Environmental Sustainability Council should be funded by the Commonwealth, and required to report annually to the Commonwealth Parliament.

A Scientific Advisory Committee should be established to inform the National Environmental Sustainability Council's deliberations, particularly the development of national targets. In addition, the Council should provide opportunities for public input into the development of the reform agenda, both in the form of regular consultation with the community (including business, academia, professional bodies and civil society organisations), and through a Community Advisory Committee established for that purpose. The Scientific Advisory Committee, the Community Advisory Committee and the requirement for community consultation should all have a statutory basis.

The National Environmental Sustainability Council's role should not extend to *implementing* the reform agenda; that should be the responsibility of the various governments party to the intergovernmental agreements (Commonwealth and State). The environmental sustainability units discussed in Recommendation Four (within the Departments of Prime Minister and Cabinet, and Premier and Cabinet) should co-ordinate the implementation of the reforms within each jurisdiction.

The National Environmental Sustainability Council should be supported by a Secretariat, the main functions of which should be:

- providing advice and analysis at the Council's direction on matters related to the implementation of the reform agenda, and
- representing the Council in dealings with Commonwealth and State government officials and other parties with interests in the reform agenda.

The need for and the operation of the National Environmental Sustainability Council should be reviewed periodically.

4.7 Develop a robust national reform agenda

It is not appropriate to specify in this paper what the content of the national environmental reform agenda should be; that should be one of the National Environmental Sustainability Council's key tasks, and will require time, a great deal of consideration, and comprehensive public consultation. Some of the agenda will need to cover new ground; some will be able to build on existing initiatives (such as the National Action Plan). However, it is possible to set out some of the main features which the reform agenda should include.

a) Develop national principles and targets for each of the key broad-scale problems

The National Environmental Sustainability Council should develop national principles and targets for each area of the reform agenda (that is, for each of the key broad-scale problems facing Australia).

As mentioned above, an important requirement for institutions for sustainability is that institutional arrangements should have a vision and a set of goals.

Part of the way to address this requirement would be to develop a reform agenda that includes robust national principles aimed at addressing climate change, land and water repair, biodiversity loss and the management of Australia's oceans. (Various attempts have already been made to develop such principles.) Such principles should be spelt out in legislation for greater permanency, and should be based on ESD principles in order to ensure adequate levels of environmental protection, and that environmental, social and economic concerns are integrated.

National principles by themselves, however, will not be sufficient to ensure progress. As has been increasingly noted over the last few years, *targets* are needed to ensure that progress can be monitored and measured.

The House of Representatives Standing Committee on Environment and Heritage, in discussing the need for nationally agreed targets for the development of policies and programs for the ecologically sustainable use of Australia's catchment systems, said:

'National targets provide a benchmark by which the community can assess the development and implementation of catchment management policies and programs. Targets provide criteria for accountability of government, organisations and communities. If the targets are met, new ones can be set; if they are missed, then the community is entitled to know why and to seek remedies.'⁸³

The Committee recommended that the Commonwealth Government work at national ministerial level to set legislated, mandatory national targets for the ecologically sustainable use of Australia's catchment systems, and that these targets be reviewable and disallowable.⁸⁴

The Prime Minister, John Howard, also recognised the importance of target-setting when he launched the National Action Plan:

⁸³ 'Co-ordinating Catchment Management', House of Representatives Standing Committee on Environment and Heritage (see Footnote 68), p. 99, para 3.204.

⁸⁴ 'Co-ordinating Catchment Management', House of Representatives Standing Committee on Environment and Heritage (see Footnote 68), p. 101, para 3.212. The need for targets may seem self-evident. However, the Standing Committee, in reviewing catchment systems programs in Australia, made it clear that it considered that there had been a lack of clear targets and specified outcomes up to that point, and said: '... it is astonishing that such indicators have not been developed hitherto and that policy makers are still at the stage of testifying to the need for indicators.' (p. 78, para 3.132).

'Good progress on addressing water quality, salinity and natural resource management issues has been made with Landcare and the Natural Heritage Trust. However, the lack of agreed specific on-the-ground outcomes and targets for water quality, salinity and other natural resource management attributes has been a major barrier to guaranteeing a return on the Commonwealth's investment.

Agreed targets and standards will need to be set between the Commonwealth and the States and Territories, either bilaterally or multilaterally, as appropriate, in consultation with the relevant community to ensure effective use of funding.'⁸⁵

This view is highly relevant to the current context. It will be crucial, if the National Environmental Sustainability Council is to be able to accurately assess State progress in meeting the national reform agenda, that national targets are developed to provide the 'criteria for accountability' mentioned above by the House of Representatives Standing Committee on Environment and Heritage.

Consequently, as with national principles, the National Environmental Sustainability Council should develop robust national targets aimed at addressing climate change, land and water repair, biodiversity loss and the management of Australia's oceans. (Again, various attempts have already been made to develop such targets.) Such targets should be spelt out in legislation for greater permanency.

The targets should be drafted specifically enough to have measurable, time-bound outcomes (that is, they should specify a quantifiable result within a given timeframe), and they should be achievable within the timeframe specified. They should tackle the most important issues first, focussing attention on what most needs to occur to address the problems at hand, and they should be focussed on outcomes, rather than processes (recognising that there may well be more than one way of achieving something). They should be reviewed every five years, in order to provide some flexibility in the system. Lastly, Commonwealth funding should be tied to compliance with the targets (this is discussed further at 4.8, below).

⁸⁵ Press conference transcript on the launch of 'Our Vital Resources: National Action Plan for Salinity and Water Quality in Australia', the Prime Minister, John Howard (see Footnote 74), at p. 2. See also the National Action Plan, p. 6, available at <http://www.napswq.gov.au/>. The National Framework for Natural Resource Management Standards and Targets has subsequently been developed under the auspices of the NRMCC. Its purpose is to provide a structure to guide regions in setting targets within their integrated regional plans, and for focusing action and investment under those plans. It is also intended as an important tool for the measurement of the impacts of programs such as the National Action Plan and the Natural Heritage Trust on natural resource conditions and management. (Natural Resource Management Ministerial Council, Communique, 'Responding to Land and Water Challenges', May 2002, <http://ea.gov.au/nrm/nrmcc/communique/index.html>, accessed 15 February 2003.) The National Framework for Natural Resource Management Standards and Targets is available at <http://www.deh.gov.au/nrm/monitoring/index.html>. Note, however, that the National Framework for Natural Resource Management Standards and Targets does not actually set national targets; rather, it nominates aspirational national outcomes, and then establishes 'matters for targets' which are designed to help focus efforts to achieve the national outcomes. Regional bodies preparing regional natural resource management plans will need to set regional targets for all 'matters for targets' within the Framework.

Recommendation 6:

Include in the reform agenda developed by the National Environmental Sustainability Council robust national principles and targets aimed at addressing climate change, land and water repair, biodiversity loss and the management of Australia's oceans. These principles and targets should be included in legislation. The targets should be measurable, time-bound and achievable, and focussed on outcomes rather than processes. They should be reviewed every five years. Commonwealth funding should be dependent on the targets being met (see below).

b) Review all Commonwealth and State laws for inconsistency with the national principles and targets

As was clearly recognised in the competition reforms, inconsistent laws can greatly undermine the effectiveness of any reforms.

In the competition reforms, each government party to the Competition Agreements was required to review all existing legislation (including acts, regulations and ordinances), and, where appropriate, to reform legislation which restricted competition, by the year 2000. (This time-frame has since been extended by several years.)

The guiding principle of the review was that legislation should not restrict competition unless it can be demonstrated that:

- a) the benefits of the restriction to the community as a whole outweigh the costs, and
- b) the objectives of the legislation can only be achieved by restricting competition.

Each government also undertook to require proposals for new legislation which restricts competition to be accompanied by evidence that the legislation is consistent with the guiding principle of the review, and to review all legislation which restricts competition every ten years.⁸⁶

Similarly, the reform agenda developed by the National Environmental Sustainability Council should require all Commonwealth and State laws to be reviewed for inconsistency with the national principles and targets developed under that agenda. This review should, amongst other things, check for subsidies which are inconsistent with the national principles and targets, and laws which incorrectly value (or which fail to value) environmental assets.

Laws which are inconsistent with the national principles and targets should, where appropriate, be reformed within a specified period of years. A 'guiding principle' similar to that used in the competition review should be formulated to assist in determining when reform is appropriate. In addition, all proposed new laws should be

⁸⁶ Competition Principles Agreement, Clause 5 - Legislation Review. See Footnote 76.

reviewed for inconsistency with the national principles and targets, and a review of all inconsistent laws undertaken periodically.

Recommendation 7:

Include in the reform agenda developed by the National Environmental Sustainability Council a requirement that all Commonwealth and State laws be reviewed for inconsistency with the national principles and targets developed under that agenda. This review should, amongst other things, check for subsidies which are inconsistent with the national principles and targets, and laws which incorrectly value (or which fail to value) environmental assets.

Laws which are inconsistent with the national principles and targets should, where appropriate, be reformed within a specified period of years. A 'guiding principle' similar to that used in the competition review should be formulated to assist in determining when reform is appropriate. In addition, all proposed new laws should be reviewed for inconsistency with the national principles and targets, and a review of all inconsistent laws undertaken periodically.

c) Introduce national laws for each of the key broad-scale problems

Another important requirement for institutions for sustainability is that institutional arrangements have a statutory basis in order to ensure stability and longevity.

The House of Representatives Standing Committee on Environment and Heritage's report into catchment management recommended that if the Australian Law Reform Commission reported that it was possible to enact a single piece of Commonwealth legislation, and if agreement could be reached through COAG, there should be national catchment management legislation. It suggested that such legislation should provide for principles, targets and outcomes, funding arrangements, accreditation of program delivery agencies, program delivery infrastructure, and accountability structures.⁸⁷

The clearest way of giving the arrangements proposed in this paper a statutory basis would be to introduce comprehensive national laws aimed at addressing land and water repair, climate change, biodiversity loss and the management of Australia's oceans. As discussed above, while there is Commonwealth legislation in a number of these areas, it is ad hoc, and not comprehensive.

National laws for each of these areas should, as a minimum, set out the national principles and targets developed by the National Environmental Sustainability Council for the area. Other matters to be covered by the laws would depend on the reforms developed by the National Environmental Sustainability Council for the particular area.

⁸⁷ 'Co-ordinating Catchment Management', House of Representatives Standing Committee on Environment and Heritage (see Footnote 68), pp. 95-6, paras 3.188 - 3.195.

The laws, once approved by COAG, could probably be enacted either as complementary Commonwealth/State legislation, or as Commonwealth legislation. Careful consideration would of course need to be given to ensuring the Constitutional validity of any laws enacted by the Commonwealth.

Recommendation 8:

Include in the reform agenda developed by the National Environmental Sustainability Council the introduction of national laws for each of the key broad-scale problems facing Australia. These laws should, as a minimum, set out the national principles and targets developed by the National Environmental Sustainability Council for each area. Other matters to be covered by the laws would depend on the reforms developed by the National Environmental Sustainability Council for the particular area.

d) Provide opportunities to review the reform agenda

As is apparent from the discussion in 4.3 and 4.6, above, while 'environmental sustainability' obviously encompasses a large range of environmental issues, this paper proposes that the reform agenda developed by the National Environmental Sustainability Council be limited in context to the key broad-scale problems facing Australia, in line with Recommendation Two. However, emphases may change over the years - as indeed may the key broad-scale problems. Consequently, there should be periodic opportunities to review the reform agenda (say, every five to ten years), to ensure its continued relevancy and provide flexibility in the reform arrangements if necessary.

Recommendation 9:

Provide periodic opportunities to review the reform agenda (say, every five to ten years), to ensure its continued relevance and provide flexibility in the reform arrangements if necessary.

4.8 Provide substantial Commonwealth funding to the States in return for satisfactory implementation of the reform agenda

The Commonwealth needs to accept that progress in this area will require the expenditure of very substantial amounts of money. It should use the provision of billions of dollars of funding to the States to obtain the States' agreement to the reform agenda developed by the National Environmental Sustainability Council (and approved by COAG). Such an approach would have the benefit that - because it would occur within a co-operative context - it would be less likely to trigger States' rights sensitivities or a constitutional challenge to the Commonwealth's environmental powers. It would also make it more likely that the Commonwealth could restrict its activities to the functions it is best suited to, with the States stepping in to administer much of the reform agenda on the ground.

The history of the Australian federation, including recent history, suggests that when sufficiently large amounts of money are made available by the Commonwealth to the

States, the States are prepared to comply with conditions attached to that funding in order to obtain it, even at the price of some inconvenience or cost to their own policy agendas.

It is useful to look briefly at how Commonwealth funding is made available to the States at present. Broadly speaking, there are a number of different ways this can occur:

- In the form of untied general purpose revenue which can be used for any purpose the States choose. (Prior to the GST, the Commonwealth provided a substantial amount of money each year to the States in the form of Financial Assistance Grants, or FAG's, which were in this form. As mentioned above, FAG's have now been replaced by the GST revenue collected by the Commonwealth and distributed to the States, which is also passed on to the States in an untied form. GST revenue is estimated at some \$34.5 billion in the 2004-5 Commonwealth budget.)
- In the form of tied specific purpose payments which are only able to be spent by the States for the purposes specified by the Commonwealth. (Specific purpose payments, including specific purpose payments made through the States to others, and specific purpose payments made direct to local government, are estimated at some \$24.6 billion in the 2004-5 Commonwealth budget.)
- In the form of general purpose payments which can be used for any purpose the States choose, but provision of which is conditional upon the States complying with a national policy agenda. (Payments made by the Commonwealth to the States under the National Competition Policy fall into this category. They are estimated at some \$800 million in the 2004-5 Commonwealth budget.)⁸⁸

Again, it is particularly instructive to look at the National Competition Policy in more detail.

As mentioned above, in return for the States making satisfactory progress on a specified program of reforms, the Commonwealth agreed to make payments of some \$4.8 billion to the States over the period 1997-8 to 2005-6. These reforms required considerable and detailed effort on the part of States to address them - but so far (with some exceptions and some delays), the competition reform agenda has largely been met despite these difficulties.⁸⁹

⁸⁸ The Budget estimates are drawn from the Commonwealth Budget 2004-5, Budget Paper No. 3, Federal Financial Relations; see http://www.budget.gov.au/2004-05/bp3/html/bp3_main.htm, and http://www.budget.gov.au/2004-05/bp3/html/bp3_main-01.htm, accessed 19 May 2004. Specifically, GST revenue to the States is estimated at \$34,460.1 billion; specific purpose payments to and through the States and direct to local government are estimated at \$24,592.4 billion, and National Competition Policy Payments at \$777.7 million. The 2004-5 Budget also estimates that \$330 million will be paid to the States as compensation for the deferral of certain GST revenue until the financial year 2005-6. While this amount is a payment, and not GST revenue, it is similar to GST revenue in that it will be able to be used by the States as untied general purpose revenue. Pers. comm. with Troy Sloan, Federal Department of Treasury, 20 May 2004.

⁸⁹ When addressing whether or not the States have made satisfactory progress, the National Competition Council has recommended on a number of occasions that funding be withheld for non-compliance with aspects of the reforms, and the Commonwealth Treasurer has accepted those recommendations. For example, in its 2002 assessment report, the National Competition Council recommended that Queensland lose \$270,000 for the second year in a row because of Townsville City

It seems reasonable to speculate that this has been partly because competition reform fits the prevailing economic orthodoxy (and therefore is supported by the powerful finance-related ministries within each government), and partly because of the substantial general purpose funding provided by the Commonwealth government in return for undertaking these reforms. It seems likely that this general purpose funding, while presumably used at least in part to compensate for the expenditure necessary to comply with the reforms, has been particularly useful to State governments because it is not tied to any particular measure.

It is suggested that a similar approach be taken in the current context, and that billions of dollars of funding be made available to the States by the Commonwealth in general purpose grants, the provision of which is conditional upon the States meeting the targets set out in the reform agenda developed by the National Environmental Sustainability Council. (As mentioned above, the States' progress would be assessed at regular intervals by the National Environmental Sustainability Council, which would then make recommendations to the Federal Treasurer on whether individual States should receive the relevant grants. The final funding decisions would be made by the Federal Treasurer.)

This funding should be made available over, say, a twenty-year period; the magnitude of the key broad-scale environmental issues facing Australia is such that shorter time-frames are unlikely to be adequate.

Of course, this begs the question of where to source the money to address these problems.

It is not suggested that all the funds needed to tackle these problems will need to, or should, come from the Commonwealth. It is critical that State governments and the private sector also contribute, and that private sector investment is leveraged off long-

Council's refusal to overhaul the way it prices water. In general, the National Competition Council's focus has been on 'encouraging implementation of beneficial change, rather than on recommending reductions in competition payments'. (2002 Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms - Volume One: Assessment, National Competition Council (see Footnote 79), at pp. 37 and 22.) However, the National Competition Council's 2003 assessment report contained recommendations for substantial reductions and suspensions in payments, in line with warnings issued in its 2002 assessment report. For example, in relation to NSW (which it considered, notwithstanding these recommendations, to have made very significant progress in implementing competition policy), it recommended that NSW's payments be reduced permanently by \$12.86M for non-compliance in the regulation of liquor sales, and by \$12.86M for non-compliance in relation to chicken meat industry legislation. It also recommended that \$25.72M of NSW's payments be suspended for outstanding legislative review items (a total of \$51.44M). In relation to Queensland the National Competition Council recommended reductions and suspensions totalling an even larger amount - \$58.48M. (Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms: 2003 - Volume One: Overview of the National Competition Policy and Related Reforms (see Footnote 79), at pp 29 and 38.) These recommendations were accepted by the Commonwealth Treasurer (see the Treasurer's press release: 'National Competition Policy payments to States and Territories for 2003-4', 8 December 2003, www.ncc.gov.au/pdf/AST5PR_001.pdf, accessed 17 May 2004).

term, well-targeted public investment, and encouraged with a range of appropriate taxation incentives⁹⁰.

However, the sort of money needed to address these problems is an order of magnitude greater than the funds found to date by either the Commonwealth or State governments.

For example, as mentioned above, the National Action Plan allocates \$1.4 billion over seven years to the problem of land and water repair, with \$700 million coming from the Commonwealth, and the remainder from the States. However, a report prepared in 2000 for the National Farmers' Federation and the Australian Conservation Foundation with assistance from the Land and Water Resources Research and Development Corporation estimated that the amount needed to address land and water repair was some \$6.5 billion per year for ten years. The report estimated that of this annual amount, \$3.7 billion would need to come from public funds, and the rest from targeted private sector investment. Other recent reports have also estimated that many billions of dollars will be needed over the next ten to twenty years to address land and water repair.⁹¹

Arguably, only the Commonwealth has a deep enough pocket to kick-start the levels of investment necessary. Finding funding of this magnitude will not be easy, of course, even given an annual Commonwealth budget of some \$190 billion (excluding GST).⁹² However, there are a number of possible sources.

One could look, for example, at using some of the billions of dollars per annum currently directed towards government programs and subsidies to industry that are either directly or indirectly damaging the environment.⁹³ One could look to new

⁹⁰ See, for example, 'Repairing the Country: Leveraging Private Investment', prepared for the Business Leaders Roundtable by the Allen Consulting Group, August 2001, available at http://www.allenconsult.com.au/resources/BLR_Summary.pdf, accessed 15 February 2003.

⁹¹ 'National Investment in Rural Landscapes: An Investment Scenario for NFF and ACF with the assistance of LWRRDC', The Virtual Consulting Group and Griffin nrm Pty Ltd, April 2000, at p. 3. The report was commissioned to quantify the scale of investment needed to halt the decline in rural environments and natural resources. It is available at <http://www.nff.org.au/pages/pub/nirl.pdf>, accessed 15 Feb 2003. See also 'Repairing the Country: Leveraging Private Investment', the Allen Consulting Group (ibid), and 'Blueprint for a Living Continent: A Way Forward from the Wentworth Group of Concerned Scientists' (see Footnote 29). For example, the Wentworth Group report calls for expenditure of \$20 billion over 10 years.

⁹² The Commonwealth Budget 2004-5, Budget Paper No.1, Statement 5: Revenue, and Statement 6: Expenses and Net Capital Investment, www.budget.gov.au/2004-05/bp1/download/bst5.pdf and <http://www.budget.gov.au/2004-05/bp1/html/bst6.htm>, accessed 20 May 2004. Specifically, revenue for 2004-5 is estimated to total \$193.2 billion, and expenses are estimated to total \$192.3 billion. These figures exclude GST.

⁹³ For example, tax incentives and rebates are one part of a broader range of government incentives that encourage unsustainable resource use and pollution. A 1998 preliminary assessment undertaken for the Australian Conservation Foundation suggested that direct subsidies related to taxation policy could be \$2 billion per annum or higher. More work has been done on this issue overseas. For example, for a number of years now in the United States, a diverse alliance of environmental, taxpayer, budget watchdog and other groups, coordinated by Friends of the Earth USA, has submitted a report to the US Congress. The report highlights the use of taxpayer funds to support environmentally and socially damaging spending. For instance, in 2003 the report identified US\$58 billion to be spent in taxpayer subsidised projects which were environmentally or socially harmful. The 2004 report concentrates on five programs which represent more than US\$4 billion of the previously-identified US\$58 billion. The

revenue sources such as 'green taxes' (taxes that discourage unsustainable resource use and environmentally damaging production and consumption, such as energy and carbon taxes, landfill taxes and air and water pollution taxes and charges).⁹⁴ One could also look to a national environment repair levy on taxable income.⁹⁵ One might even, opportunistically, look to such one-off sources as budget surpluses, the sale of government assets, or the revenue from income tax 'bracket creep'.

The measures chosen should be structured to provide maximum stability of funding over at least twenty years (which, as noted above, is the sort of time-frame needed to address these environmental problems). In addition, they should be structured so as not to be socially regressive.

Recommendation 10:

Make billions of dollars of Commonwealth funding available over a twenty-year period to the States in the form of general purpose grants. The provision of this funding should be conditional upon the States satisfactorily implementing the reform agenda (and specifically, meeting the national targets) developed by the National Environmental Sustainability Council.

This funding could be raised in a number of ways, including, for example, measures such as:

- re-directing some of the billions of dollars currently spent each year on

alliance claims that this program - the Green Scissors program - has helped eliminate more than US\$26 billion in wasteful and environmentally harmful spending programs since 1995. Globally, the United Nations Environment Program (UNEP) has identified at least US\$700 billion of environmentally-unsound subsidies per annum. See Krockenberger, M., 'Natural Advantage: A Blueprint for a Sustainable Australia', Australian Conservation Foundation, October 2000, Module 2, 'Green Shears (Cutting Environmentally Damaging Subsidies)', and Module 3, 'Taxing Waste, Not Work (Environmental Tax Reform)', available at <http://www.acfonline.org.au/na/asp/pages/default.asp>, accessed 28 July 2003. See also <http://www.foe.org/camps/eco/gs/scissors.html>, accessed 28 July 2003 and 17 May 2004, and <http://www.grid.unep.ch/geo2000/english/0138.htm>, accessed 28 July 2003.

⁹⁴ For example, there is already a range of such taxes in European countries. See 'Natural Advantage: A Blueprint for a Sustainable Australia', Krockenberger, M., Module 3, 'Taxing Waste, Not Work (Environmental Tax Reform)', *ibid*.

⁹⁵ A number of stakeholders have made this suggestion over the last few years, particularly within the context of land and water repair. See, for example, the House of Representatives Standing Committee on Environment and Heritage's report on catchment management ('Co-ordinating Catchment Management' - see Footnote 68), at p. 140, para 4.53, and the 2003 Australia Day address delivered by Rick Farley, former Executive Director of the National Farmers' Federation, reported in 'Some birthday thoughts for a modern identity', Farley, R., *The Australian*, 23 January 2003, p. 9. The 'Wentworth Group' of scientists also canvassed the idea in their report 'Blueprint for a Living Continent: A Way Forward from the Wentworth Group of Concerned Scientists' (see Footnote 29), pp. 14, 19.) There are a number of precedents for such a levy. The Medicare levy of (currently) one and a half percent of taxable income has been in place for almost two decades. Specific levies have also been imposed or proposed by the Commonwealth government in relation to other issues, such as the 'Guns Buyback' scheme, early in the first term of the current Commonwealth government, and more recently, Australia's involvement in East Timor. (In 1996-7 the Medicare levy was temporarily increased to 1.7% of taxable income to fund the Guns Buyback scheme. (Pers. comm. with K. Tark, Commonwealth Department of Treasury, 13 February 2003.) The East Timor levy was proposed by the current Commonwealth government, but in the end was not necessary (see the Budget Speech given by the Treasurer, The Hon. Peter Costello MP, for the 2000-1 Commonwealth Budget, http://www.budget.gov.au/2000-01/speech/html/speech.htm#P23_2880, accessed 7 July 2003.)

government subsidies to industry that either directly or indirectly damage the environment

- new revenue sources such as 'green taxes' (taxes that discourage unsustainable resource use and environmentally damaging production and consumption, such as energy and carbon taxes, landfill taxes and air and water pollution taxes and charges), or
- a national environment repair levy on taxable income.

The measures chosen should be structured so as not to be socially regressive, and to provide maximum stability of funding over the twenty-year period.

4.9 Make more extensive use of the Commonwealth's Constitutional powers if this co-operative approach fails

As noted above, there is no specific environment power in the Australian Constitution. Ideally, a specific, new environment power would be included in the Constitution in order to make the scope of the Commonwealth's environmental powers quite clear.⁹⁶

Regardless of whether or not this occurs, however, it is clear that the Commonwealth Government currently possesses the Constitutional ability to take extensive unilateral action (legislative and otherwise) in relation to the environment.

Given the critical state of much of the nation's environment, and for the other reasons listed above (such as the spatial and temporal scales of many environmental problems), it is crucial that where genuine attempts to take the co-operative approach described above fail, the Commonwealth use its Constitutional powers to a far greater degree than it currently does to ensure appropriate national outcomes.

Recommendation 11:

Where genuine attempts to take the co-operative approach described above fail, ensure that the Commonwealth makes more extensive use of its Constitutional powers to achieve appropriate national outcomes in relation to the broad-scale environmental issues facing Australia.

⁹⁶ The Senate report entitled 'Commonwealth Environment Powers' made a similar recommendation. It commented that: 'It is appropriate for the Commonwealth Parliament to have a general express Constitutional environment power, instead of having to rely on the current expansive, but formally incomplete method of Commonwealth involvement in environmental matters. Many modern Constitutions from republics around the world contain such provisions.' ('Commonwealth Environment Powers', Senate Environment, Communications, Information Technology and the Arts References Committee (see Footnote 73), Chap 6, para 6.64, available at http://www.aph.gov.au/senate/committee/ecita_ctte/enviropowers/report/c06.htm), accessed 10 February 2003.

Recommendation 12:

If the opportunity arises, include a specific environment power in the Constitution in order to make the broad scope of the Commonwealth's environmental powers quite clear.

4.10 Ensure that environmental considerations are taken into account in national economic processes

A number of other broad institutional measures would ideally be taken at the national level if attempts to address the key broad-scale environmental issues facing Australia are to be successful.

One of these is to reform major national economic processes to ensure that environmental considerations are taken into account. At present they typically are not - and so we have, for example, a federal budget that predicts economic growth, but does not take account of environmental degradation (such as land and water degradation) or of resource depletion (such as biodiversity loss). As with inconsistent laws, any reforms aimed at resolving the broad-scale environmental issues facing Australia will be greatly undermined while this situation continues.

One way of assisting this to occur would be to establish, at the national level, the institutional capacity to undertake strategic environmental economics policy research. Such research could include, for example:

- research on accounting systems which take environmental factors into consideration (such as that begun by the Australian Bureau of Statistics)
- research into a new 'indicator of genuine progress' which more accurately reflects the economic, social and environmental well-being of Australia than the current measures of economic growth
- research on how to cut environmentally-damaging subsidies
- research into environmental tax reform opportunities
- research on leveraging private investment in sustainability initiatives and outcomes, and
- research into and assessment of different economic instruments for achieving environmental goals.⁹⁷

While some of this research is taking place now, it is not occurring in a comprehensive manner.

Such research could be undertaken by a newly-established institution, such as a Bureau of Ecological Economics, as David Yencken and Stephen Dovers have

⁹⁷ See 'Natural Advantage: A Blueprint for a Sustainable Australia', Krockenberger, M. (see Footnote 93), Module 2, 'Green Shears (Cutting Environmentally Damaging Subsidies)', and Module 5, 'Measuring Real Progress (Green and Social Accounting)'; 'Sustainable Australia: Refocusing Government', Yencken, D. (see Footnote 57), at pp. 19-22, 25; and 'Institutions for Sustainability', Dovers, S. (see Footnote 45), at p. 30.

suggested, or it could be undertaken by existing bodies such as the Commonwealth Treasury, the Australian Bureau of Statistics, or the Productivity Commission⁹⁸. Wherever the function is placed, it should have a statutory basis to provide greater permanence, and should be adequately funded by the Commonwealth.

Recommendation 13:

Reform national economic institutions to ensure that environmental considerations are taken into account in national economic processes.

Assist this process by establishing a Bureau of Ecological Economics to undertake strategic environmental economics policy research, or alternatively, ensure that such research is undertaken by existing agencies such as the Commonwealth Treasury, the Australian Bureau of Statistics, or the Productivity Commission. Wherever the function is placed, it should have a statutory basis to provide greater permanence, and should be adequately funded by the Commonwealth.

4.11 Ensure adequate environmental data collection, analysis, monitoring and dissemination

In addition, it is most important that decisions concerning the key broad-scale environmental issues facing Australia are made on the basis of accurate and comprehensive environmental information - not least because such decisions are often highly controversial.

State of the Environment (SOE) reporting goes some way towards providing such information, and there is now a legislatively-based SOE process at the Commonwealth level.⁹⁹ This should be continued, and refined, and co-ordinated with State-based SOE processes.

However, SOE reporting typically 'collates existing information - a communication mechanism limited by available data'. Long-term ecological research and monitoring is not currently carried out in a systematic way in Australia.¹⁰⁰

There is consequently a need for the Commonwealth's SOE process to be complemented by a body which co-ordinates long-term ecological research, analysis and monitoring at the national level, and disseminates the resulting data.¹⁰¹ Such a role could be undertaken by a newly-established institution, such as a National Environmental Sustainability Research Institute, or it could be undertaken by existing agencies such as the National Land and Water Resources Audit or the Commonwealth

⁹⁸ See 'Sustainable Australia: Refocusing Government', Yencken, D. (see Footnote 57), at p. 25, and 'Institutions for Sustainability', Dovers, S. (see Footnote 45), at p. 30. The Federal Department of Treasury, for example, has established an Environment and Agriculture Unit within the Fiscal Group, and a Resource and Environment Taxation Unit within the Revenue Group. Pers. comm. with Simon Nash, Federal Department of Treasury, 19 May 2004.

⁹⁹ Section 516B, *Environment Protection and Biodiversity Conservation Act 1999* (C'th).

¹⁰⁰ 'Institutions for Sustainability', Dovers, S. (see Footnote 45), at p. 16.

¹⁰¹ Relevant precedents might include, for example, the Wuppertal Institute for Climate, Environment and Energy in Germany.

Scientific and Industrial Research Organisation (**CSIRO**). Wherever the functions are placed, they should be statutorily-based, to provide greater permanence and independence, and should be adequately funded by the Commonwealth.

Recommendation 14:

Ensure that there is adequate collection and dissemination of environmental data at the national level by continuing and refining the existing Commonwealth State of the Environment reporting process, and co-ordinating it with State-based SOE processes.

Complement this with a National Environmental Sustainability Research Institute, the purpose of which is to co-ordinate long-term ecological research, analysis and monitoring at the national level, and disseminate the resulting data. Alternatively, ensure that these functions are undertaken by existing agencies such as the National Land and Water Resources Audit, or the CSIRO. Wherever the functions are placed, they should be statutorily-based, to provide greater permanence and independence, and should be adequately funded by the Commonwealth.

4.12 Ensure independent auditing of governmental environmental performance

Lastly, an important institutional aspect of addressing the key broad-scale environmental problems facing Australia is ensuring that the performance of both the Commonwealth and State governments in this area is independently audited, and the results made public.¹⁰²

Greg Rose has said: 'Governmental auditing needs to be seen in the broader framework of tools for good public sector governance. It promotes public sector accountability to stakeholders for the proper performance of its responsibilities, including the integrity, efficiency and effectiveness of its performance.'¹⁰³

Such accountability is particularly necessary, given the plethora of governmental policies in the environmental area. A tremendous number of commitments are made in the course of formulating such policies. Follow-up in the form of performance auditing provides greater incentive for governments to take such commitments seriously.

In terms of who should perform this auditing function, at the Commonwealth level it is probably most effectively placed within the Australian National Audit Office (**the**

¹⁰² It is not possible, in a paper of this size, to cover every aspect of this very large topic. However, in addition to independent auditing of Government performance, it is also important to ensure that the public has:

- adequate access to information, through appropriate Freedom of Information legislation
- access to an Ombudsman with adequate investigatory powers, and
- open standing to bring actions to remedy or restrain breaches of legislation aimed at addressing the key broad-scale environmental issues facing Australia, and to apply for judicial review in relation to decisions made under that legislation.

¹⁰³ Rose, G., 'Environmental Performance Auditing of Government - the Role for an Australian Commissioner for the Environment', 18 EPLJ 293, at 296.

ANAO), which operates under the *Auditor-General Act 1997 (C'th)*. The Auditor-General already has the power to audit the environmental performance of Commonwealth bodies¹⁰⁴, but he or she is not actually required to do so. This should be changed by statute amendment, so that the Auditor-General has an explicit statutory mandate (perhaps delegated to an Office of the Environmental Auditor), and is required to conduct systematic Commonwealth agency environmental performance audits in relation to the key broad-scale environmental problems facing Australia.

As Greg Rose has commented, while the ANAO is not currently well-resourced to conduct such a program, and may need to refine its expertise and methodologies, '[i]f located outside the ANAO, [an Environmental Auditor] would be more vulnerable to budget cuts and political hostility than if located within the Auditor-General's office, which is an institution of respectable assurance of governmental responsibility and accountability.'¹⁰⁵

There are Auditor-General's offices (or the equivalent) within all States and Territories. For the same reasons as those expressed in the Commonwealth context, similar institutional arrangements should be made at the State level.

A problem to date with such auditing in the environmental field has been the lack of specific performance commitments against which performance can be measured.¹⁰⁶ Attempts to audit against generalised ESD principles, for example, are largely meaningless in the absence of specific agency or sector targets.

Consequently, in addition to ensuring that a body with appropriate auditing powers exists, it will be necessary to ensure that an appropriately specific set of performance targets is developed for each agency to be audited. In the context of the key broad-scale problems facing Australia, this could be done by developing agency performance targets aimed at addressing the goals and targets established in each of the relevant areas, including those established by way of bilateral or multilateral agreement between the Commonwealth and the States.

Recommendation 15:

Strengthen the Commonwealth Auditor-General's powers to audit the environmental performance of Commonwealth Government bodies in relation to the key broad-scale environmental problems facing Australia, by giving an explicit statutory mandate to a new Office of the Environmental Auditor within the ANAO, requiring it to conduct a systematic program of Commonwealth agency environmental performance audits in relation to these problems. Ensure that the office is adequately resourced by the Commonwealth.

¹⁰⁴ Sections 11 - 13, *Auditor-General Act 1997 (C'th)*.

¹⁰⁵ 'Environmental Performance Auditing of Government - the Role for an Australian Commissioner for the Environment', Rose, G. (see Footnote 103), at p. 313.

¹⁰⁶ 'Environmental Performance Auditing of Government - the Role for an Australian Commissioner for the Environment', Rose, G. (see Footnote 103), at p. 314. Rose notes similar comments in two reports which he cites in his article; the ANAO's report on Commonwealth Natural Resource Management and Environment Programs (Audit Report No. 36, 1996-7), and the Productivity Commission's report on Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies (Productivity Commission Inquiry Report No. 5, 25 May 1999).

Establish similar arrangements at the State level within State Auditor-General's offices.

Ensure that specific agency performance targets are developed for each relevant governmental agency, against which its performance can be audited. These performance targets should aim to address the principles and targets established for each of the key broad-scale environmental problems facing Australia.

5. Conclusion

The purpose of this paper has been to examine ways in which Australia's national institutional arrangements can be improved in order to deliver a greater level of environmental sustainability, particularly in relation to the key broad-scale environmental problems facing Australia.

It has set out a proposal for national institutional reform to promote environmental sustainability across Australia. Key elements of the reform proposal are based on the experience of the institutional arrangements developed over the 1990's around the National Competition Policy..

This proposal is intended to provide an effective way forward, within a co-operative Commonwealth/State framework, for a rigorous program of environmental reform at the national level. The institutional arrangements it proposes are based, in particular, on:

- the need to address geographic scales with institutions which can cross political and administrative boundaries
- the need to address time scales with institutions which can provide certainty and longevity
- the need for political acceptance of the proposal within government, and
- the need for sufficient resources.

As the evidence demonstrates, new arrangements need to be tried if we are to avoid further severe degradation of Australia's environment, and the social, economic and environmental costs consequent on that degradation.¹⁰⁷ The key institutional arrangements proposed in this paper would take some time and effort to establish. However, they are worth trying. As the National Competition Policy shows, similar arrangements have been put in place at the national level in another highly complex policy context - and significant change has been achieved as a consequence.

¹⁰⁷ For example, the National Action Plan has estimated the cost of land and water degradation, excluding weeds and pests, at \$3.5 billion per year. (The National Action Plan (see Footnote 85), p. 5.)

APPENDIX ONE

Abbreviations

ANAO	Australian National Audit Office
ANZECC	Australian and New Zealand Environment and Conservation Council
ARMCANZ	Agriculture and Resource Management Council of Australia and New Zealand
COAG	Council of Australian Governments
CSIRO	Commonwealth Scientific and Industrial Research Organisation
ESD	Ecologically sustainable development
IGAE	1992 Inter-Governmental Agreement on the Environment
Ministerial Compendium	'Commonwealth-State Ministerial Councils: A Compendium', Department of Prime Minister and Cabinet, June 2002
MDBMC	Murray-Darling Basin Ministerial Council
National Action Plan	National Action Plan for Salinity and Water Quality
NEPC	National Environment Protection Council
NEPM's	National Environment Protection Measures
SOE reporting	State of the Environment reporting
2001 SOE Report	2001 Australian State of the Environment Report