

---

**Independent Review of the *National  
Environment Protection Measures  
(Implementation) Act 1998 (Cth)***

---

**BAKER & MCKENZIE**

Solicitors  
Level 27, AMP Centre  
50 Bridge Street  
SYDNEY NSW 2000  
Tel: (02) 9225-0200  
Fax: (02) 9225-1595  
Email: [martijn.wilder@bakernet.com](mailto:martijn.wilder@bakernet.com)



Ref: -v1\

## Contents

---

Section Number	Heading	Page
<b>1</b>	<b>Background to the Independent Review</b>	<b>1</b>
<b>2</b>	<b>Executive Summary</b>	<b>4</b>
<b>3</b>	<b>Background to the <i>National Environment Protection Measures (Implementation) Act</i></b>	<b>7</b>
<b>4</b>	<b>Operation of the Act</b>	<b>9</b>
4.1	How does the Act operate?	9
4.2	Legal Application of the Act	10
4.3	Features of the Act which limit the Commonwealth's ability to implement NEPMs	11
4.4	Practical Impediments to Application of the Act	
4.5	Features of the NEPMs themselves	22
4.6	Administrative Application of NEPMs to the Commonwealth	23
<b>5</b>	<b>The extent to which the policy objectives of the Act remain valid</b>	<b>26</b>
5.1	The validity of the policy objectives	26
5.2	Do the objectives meet the intention behind the application of NEPMs to the Commonwealth?	26
<b>6</b>	<b>Extent to which provisions of the Act remain appropriate for the achievement of the policy objectives of the Act</b>	<b>28</b>
6.1	"To make provision for the implementation of national environment protection measures in respect of certain activities carried on by or behalf of the Commonwealth and Commonwealth authorities"	28
6.2	"To protect, restore and enhance the quality of the environment, in order to maintain ecologically sustainable development"	32
6.3	"To ensure that the community has access to relevant and meaningful information on pollution"	33
<b>7</b>	<b>Options for future course of action</b>	<b>35</b>
7.1	Deficiencies in the operation of the Act	35
7.2	Legislative alternatives to the present Act	35
<b>8</b>	<b>Conclusion</b>	<b>40</b>

<p>The views contained in this report are entirely the views and opinions of Baker &amp; McKenzie as an independent legislative reviewer under the Act and are not in any way the views or opinions of the Department of the Environment and Heritage.</p>
--

## 1 Background to the Independent Review

This report constitutes the independent review of the *National Environmental Protection Measures (Implementation) Act 1998* (Cth) ("**the Act**") as required under section 43 of the Act. Section 43 requires the review of:

- (a) the operation of the Act; and
- (b) the extent to which the policy objectives of the Act remain valid; and
- (c) whether the provisions of this Act remain appropriate for the achievement of those policy objectives.

Section 3 of the Act states that the objectives of the Act are:

- (a) to make provision for the implementation of national environment protection measures in respect of certain activities carried on by or on behalf of the Commonwealth and Commonwealth authorities; and
- (b) to protect, restore and enhance the quality of the environment in Australia, having regard to the need to maintain ecologically sustainable development; and
- (c) to ensure that the community has access to relevant and meaningful information about pollution.

In undertaking this review, the Department of the Environment and Heritage ("**DEH**") requested the following additional matters to be considered:

- 1 The effectiveness of the operation of the Act, including:
  - (i) simplicity and workability in providing for the implementation of national environment protection measures (NEPMs) with respect to activities carried on by or on behalf of the Commonwealth and Commonwealth authorities;
  - (ii) in ensuring that the Commonwealth and Commonwealth authorities comply with NEPMs; and
  - (iii) issues arising from matters in points 2 and 3 following.
- 2 The extent to which the policy objectives of this Act remain valid.
- 3 Whether the provisions of this Act remain appropriate for the achievement of its policy objectives, including:
  - (i) comprehensiveness in enabling implementation of all NEPMs that are relevant to the Commonwealth and Commonwealth authorities in their achievement of the policy objectives of the Act, including considering whether the following matters limit the ability of the Commonwealth to implement NEPMs under the Act;
    - the definition of 'activity' in the Act;
    - other aspects of the Act; and
    - features of NEPMs themselves;

- (ii) any unanticipated ramifications of the operation of the Act, for example, when States and Territories:
- do not have legislation and regulations in place to implement a NEPM;
  - periodically amend legislation and regulations that implement NEPMs; or
  - implement a NEPM through non-legislative means such as policy measures or guidelines; and
- (iii) taking into account the national nature of the activities of the Commonwealth and Commonwealth authorities, any unanticipated ramifications of the operation of the Act arising from ‘dis-applying’ (or switching off) provisions of State and Territory law implementing a NEPM in relation to activities carried on by or on behalf of the Commonwealth or Commonwealth authorities, and then allowing the implementation of the NEPM through other provisions of the Act.
- 4 Where the review identifies any deficiency in the operation of the Act, the review will identify:
- (i) feasible alternatives to the current legislative provisions;
- (ii) the different stakeholders likely to be affected, and how they may be affected by the alternatives;
- (iii) effects of the alternatives; and
- (iv) options for a future course of action.

To address all the required issues in the scope of the review, the report is set out in the following manner:

- An executive summary of the findings of the independent review;
- Background to the Act, providing a brief overview of the NEPM regime of which the Act is part;
- An assessment of the operation of the Act and its effectiveness in ensuring that the Commonwealth and Commonwealth authorities comply with NEPMs.
- Consideration of the extent to which the policy objectives of the Act remain valid, in the light of the *National Environment Protection Council Act 1994 (Cth)* and the *Intergovernmental Agreement on the Environment 1992*.
- Consideration of the extent to which the provisions remain appropriate for the achievement of the policy objectives of the Act, relevant legal developments impacting on the operation of the Act and the extent of Commonwealth immunity from the application of State laws generally.
- A brief summary of the deficiencies of the Act, and a broad overview of feasible legislative alternatives to address such deficiencies, including the impacts of adopting such alternatives.

The review was overseen by a steering committee of senior officers from the Department of the Environment and Heritage, the Australian Government Solicitor and the Department of Transport & Regional Services.

Interviews with the following Commonwealth and State government entities and their respective representatives, staff and/or employees were undertaken in conducting this review:

- Australian Communications Authority;
- Department of the Environment and Heritage;
- Department of Defence;
- Australian Institute of Marine Sciences;
- Australian Nuclear Science and Technology Organisation;
- Australian National University;
- Department of Transport and Regional Services;
- New South Wales Environment Protection Agency;
- Queensland Environment Protection Agency; and
- Telstra.

## 2 Executive Summary

***The NEPM Regime:*** National Environment Protection Measures ("NEPMs") emerged from the *Intergovernmental Agreement on the Environment 1992* ("IGAE") to facilitate consistency in national air, water, soil and noise standards and provide all Australians with the benefit of equal environmental protection wherever they live. The Commonwealth Government has agreed under the *National Environment Protection Council Act 1994* ("the NEPC Act") to apply NEPMs to its activities and to apply State law as necessary to ensure uniformity in national pollution standards and environmental protection.

***Operation of the Act:*** The *National Environment Protection Measures (Implementation) Act 1998* (Cth) ("the Act") is the Commonwealth legislative framework by which NEPMs are to be applied to the Commonwealth. The Act operates by initially removing the application of any State or Territory laws implementing NEPMs which may otherwise apply to the Commonwealth. Several methods are then provided for the Commonwealth to apply NEPMs to Commonwealth activities, namely, by the application of State or Territory law under declaration or by regulation, or by environmental audit and management plans. In other words, the Act operates to "switch off" all State laws implementing NEPMs and provides for the qualified and selective reapplication of specific provisions of State laws implementing NEPMs to the Commonwealth as Commonwealth law.

***Application of the Act:*** Five years from the entry into force of the Act, the Act has not been used to reapply State law to the Commonwealth, and, currently, there is no legislative instrument applying NEPMs to the Commonwealth or Commonwealth activities. The principal limitations of the Act have shown themselves to be:

- the "switch off"/"switch on" mechanism for applying State laws implementing NEPMs to the Commonwealth is unduly legally complex and resource intensive;
- the narrow definition of "activity" under the Act restricts the ability of the Act to be used to implement NEPMs; and
- ambiguity as to how the Act can be used to deal with Commonwealth authorities asserting compliance difficulties with specific NEPM requirements.

Legal complexities and other practical difficulties associated with the Act have stalled the application of NEPMs to the Commonwealth, and left the policy objectives of the Act unfulfilled. In fact, the Act in its present form has:

- broadened Commonwealth immunity from State environmental laws; and
- limited Commonwealth accountability on the various types of environmental impacts which the NEPMs are designed to

address.

***Application of NEPMs to the Commonwealth:***

The application of NEPMs to the Commonwealth and Commonwealth activities remains an important part of the development of a national environmental protection regime. Increased Commonwealth compliance with the wider set of State environmental and planning laws has also been endorsed by the Commonwealth under the COAG Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment ("**Heads of Agreement**"). The movement towards increased Commonwealth compliance with State environmental law has been reinforced by the High Court decision in *Henderson*<sup>1</sup> - where it was held that State laws can bind the Commonwealth where they do not adversely affect the executive capacities of the Commonwealth.

In practice, the vast majority of Commonwealth agencies whose activities have implications under a NEPM have been administratively applying NEPMs to their operations with little difficulty since 2000 pursuant to direction from the Environment Minister under the NEPC Act. There are notable exceptions to this general rule, however generally NEPMs do not have as significant implications for Commonwealth activities as thought when the Act was drafted.

***Future Courses of Action:***

Given the unworkability of the current Act and its unfulfilled policy objectives, a future course of action available to the Commonwealth is to repeal the Act in its present form and consider other legal options for applying NEPMs to the Commonwealth. Legal alternatives to apply NEPMs to the Commonwealth include:

- allow State laws implementing NEPMs to be applied to the Commonwealth under the narrowed presumption of Commonwealth immunity as per majority decision of the High Court in *Henderson* (Commonwealth authorities would be left to determine on a case-by-case basis as to when State environmental laws do not adversely affect the executive capacities of the Commonwealth);
- introduce a new act which directly applies State law implementing NEPMs to the Commonwealth, subject to clearly defined exemptions;
- amend the NEPC Act to provide the Commonwealth with a new head of power to make regulation for applying NEPMs and State laws implementing NEPMs to the Commonwealth;
- legislate to apply all State environment and planning laws to the Commonwealth; or
- establish a Commonwealth Environment Protection Agency and pass accompanying legislation to create an exclusive Commonwealth legal regime for implementing NEPMs to the

---

<sup>1</sup> *Re The Residential Tenancies Tribunal of NSW and Henderson; Ex Parte Defence Housing Authority* (1997) 146 ALR 495.

Commonwealth and Commonwealth activities.

The implications of pursuing any one of these options are explored further in Section 7 of this report. In principle, any revision to the Act should seek to fulfil not only the policy objectives of the Act, but deliver greater administrative efficiency in the implementation of environmental policy and better definition of the roles and responsibilities of governments in environmental protection.

### 3 Background to the National Environment Protection Measures (Implementation) Act

NEPMs are national policy setting framework instruments which Commonwealth, State and Territory Governments have agreed under the IGAE as necessary to ensure harmonized environmental protection regimes in respect of air, water or soil and noise pollution for all Australians. The IGAE recognised that environmental concerns and impacts respect neither physical nor political boundaries and are increasingly taking on inter-jurisdictional significance in a way not contemplated by those who framed the Australian Constitution. Indeed, as protection of the environment was not a subject matter which the framers of the Constitution expressly contemplated, the Federal division of legislative responsibility between the Commonwealth and States has created considerable difficulty in securing effective or uniform national environmental protection outcomes. Protection and management of environmental issues within the Federal system necessitates the co-operation of all Australian governments to ensure all Australians have the benefit of equivalent environmental protection. Governments were also concerned that investment and business decision making was not distorted by variations between State and Territory jurisdictions in relation to the adoption of major environment protection measures.

To achieve these objectives, the National Environment Protection Council was established under the NEPC Act and charged with the function of making NEPMs. NEPMs can only be made to address the following seven environmental issues:

- ambient air quality;
- ambient marine, estuarine and fresh water quality;
- noise standards;
- site contamination assessment guidelines;
- hazardous waste impacts;
- re-use and recycling of used material; and
- motor vehicle noise and emissions.

Under the NEPC Act, the Commonwealth has agreed to apply any adopted NEPM to its activities as part of the fulfilment of its obligations under the IGAE. Section 7 of the NEPC Act provides as follows:

- (1) It is the intention of the Parliament that the Commonwealth will, in compliance with its obligations under the Agreement, implement, by such laws and other arrangements as are necessary, each national environment protection measure in respect of activities that are subject to Commonwealth law, including activities of the Commonwealth (and its instrumentalities) in a participating jurisdiction.*
- (2) Without limiting the generality of subsection (1), the Commonwealth will apply, as Commonwealth law, designated laws used to implement each such measure in a participating jurisdiction, to the extent necessary to achieve the effect referred to in subsection (1).*

At the time this review was undertaken, the following NEPMs have been made by the NEPC:

- Ambient Air Quality NEPM;

- National Pollutant Inventory NEPM ("**NPI NEPM**");
- Movement of Controlled Waste between States and Territories NEPM ("**Controlled Waste NEPM**");
- Used Packaging Materials NEPM;
- Assessment of Site Contamination NEPM ("**Contaminated Sites NEPM**");
- Air Toxics NEPM;
- Diesel Vehicle Emissions NEPM ("**Diesel NEPM**").

The Ambient Air Quality NEPM, the Used Packaging Material NEPM and the Air Toxics NEPM, for various reasons specific to the scope of each named NEPM, do not apply to Commonwealth activities.

For NEPMs to achieve their desired outcome, Commonwealth, State and Territory governments recognised several fundamental principles inherent in the delivery of a national, standardised environmental protection regime:

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

In 1997, the IGAE and its key principles were extended upon with the signing of the Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment ("**Heads of Agreement**"). Among the many commitments made by Commonwealth and State Governments was the agreement by the Commonwealth to increase compliance by Commonwealth departments, statutory authorities, agencies, business enterprises and tenants with relevant State environmental and planning laws.

## 4 Operation of the Act

### 4.1 How does the Act operate?

#### 4.1.1 General Scheme of the Act

The *National Environment Protection Measures (Implementation) Act 1998* (Cth) ("**the Act**") was created in accordance with the scope of section 7 of the *National Environmental Protection Council Act 1994* (Cth) ("**the NEPC Act**") to provide a statutory framework for the implementation of NEPMs by the Commonwealth in relation to certain activities carried out by or on behalf of the Commonwealth.

The starting principle of the Act is that State laws which implement NEPMs no longer apply to the Commonwealth or Commonwealth authorities to the extent that they otherwise would by reason of the operation of the *Commonwealth Places (Application of Laws) Act 1970* (Cth), or by their own force, as a matter of statutory interpretation. State laws implementing NEPMs are only to apply to the Commonwealth to the extent permitted by the operation of the Act. The Act therefore effectively "switches off" any provision of any State or Territory law which implements a NEPM.

Under the Act the Commonwealth Environment Minister may, subject to considerations of "national interest" or "administrative efficiency":

- (a) apply State laws implementing NEPMs to Commonwealth activities in Commonwealth places by declaration (Part 2);
- (b) apply State laws implementing NEPMs to Commonwealth activities in other places by declaration (Part 3);
- (c) implement NEPMs by regulations under this Act (Part 4); or
- (d) implement NEPMs through environmental audits and environment management plans (Part 5).

The general scheme of the Act is therefore to remove or "switch off" the application of State laws implementing NEPMs from the Commonwealth and then selectively reapply such laws in a qualified and limited fashion.

#### 4.1.2 Exemptions to application of the Act

The operation of both Part 2 and Part 3 of the Act can be excluded if there is in force a declaration from the Minister stating that an "alternative Commonwealth regime" exists in relation to the specified activity which will achieve the environmental outcomes specified in the NEPM, and that the application of the NEPM by such an alternative regime is more appropriate than by means of State or Territory law because "the activity involves a specified matter of national interest", or "for reasons of administrative efficiency".

A "matter of national interest" is defined in section 5 as:

- (a) a matter concerning Australia's relations with another country or Australia's international obligations;
- (b) national security;
- (c) national defence;
- (d) a national emergency;

- (e) a matter relating to prescribed telecommunications activities or the management of aviation air space<sup>2</sup>; or
- (f) any other matter agreed between the Commonwealth, States and Territories.

Neither "alternative Commonwealth regime" nor "administrative efficiency" is defined under the Act.

#### 4.1.3 Enforcement

In the event of a contravention of State law applied under the Act, an administrative enforcement mechanism is available under the Act, which essentially provides for a series of reporting procedures and recommendations to be made. If a State or Territory officer believes that the Commonwealth, Commonwealth authority, or an officer or employee of the Commonwealth has contravened a provision of State or Territory law implementing a NEPM, the following administrative procedure is available:

- a State or Territory officer may serve a contravention report on the Secretary or CEO of the Commonwealth authority and, if appropriate action is not taken, may report in writing to the Environment Secretary;
- the Environment Secretary is then required to investigate and provide a written report to the Environment Minister;
- the Environment Minister must then make recommendations to the relevant Minister; and
- the relevant Minister must give to the Environment Minister his or her comments on the recommendations, and report on any action taken.

The Act provides that the Crown in right of the Commonwealth is bound, however nothing in the Act renders the Crown in right of the Commonwealth liable for the prosecution of an offence. Therefore authorities that have the shield of the Crown have no criminal liability. Those parts of the Commonwealth which do not have the shield of the Crown will be liable to prosecution for breaches of applied State laws, but this will be done under Commonwealth procedures and initiated by the Commonwealth Director of Public Prosecutions.<sup>3</sup> Any application for review of administrative decisions, including decisions made under applied State laws, will be made in the Commonwealth system (Administrative Appeals Tribunal and Federal Court).

#### 4.2 Legal Application of the Act

To date, the Act is yet to be used by the Environment Minister to apply NEPMs to the Commonwealth or its instrumentalities. It has never been used to re-apply State or Territory law implementing NEPMs to the activities of the Commonwealth.

The Department of the Environment and Heritage ("DEH") has consulted extensively with relevant Commonwealth Departments in relation to establishing legislative mechanisms for the implementation of NEPMs, and has worked closely with the Office of Legislative Drafting to commence the process of drafting instruments under the Act. However, the development of these instruments has been subject to a series of complications and none have progressed beyond draft form.

---

<sup>2</sup> See also *National Environment Protection Measures (Implementation) Regulations 1999*

<sup>3</sup> Explanatory memorandum. p.7

Attempts to use the Act to apply recent NEPMs to the Commonwealth, such as the Contaminated Sites NEPM and the Diesel NEPM, have met with further difficulties, principally as a result of confusion as to whether the Act can in fact be used to apply these particular NEPMs to the Commonwealth.

At present NEPMs are being applied to Commonwealth activities on an administrative basis pursuant to a direction of the Environment Minister under the NEPC Act. Despite the absence of any legal mechanism to apply State and Territory laws implementing NEPMs to the Commonwealth, the majority of Commonwealth authorities have been able to apply NEPMs to their activities without great difficulty, and have generally achieved a high degree of compliance.

The Department of Defence and the Australian Antarctic Division of the Department of the Environment and Heritage are the only Commonwealth instrumentalities that have expressed concerns with regard to administratively, and potentially legally, implementing NEPMs. These agencies provide interesting test cases, as both operate under special circumstances that make the application of certain aspects of certain NEPMs very problematic. These issues are discussed in more detail in paragraphs 4.4.1 and 4.4.2 below.

### **4.3 Features of the Act which limit the Commonwealth's ability to implement NEPMs**

While section 43 of the Act requires review of the operation of the Act, the fact is that five years on from the Act's commencement, the Act is yet to be used to apply NEPMs to the Commonwealth and therefore the key parts of the Act are not effectively in practical operation. Questions directed to the effectiveness of the Act in ensuring that the Commonwealth complies with NEPMs can only be answered in the negative: the Act has been ineffective in ensuring Commonwealth compliance with the requirements of NEPMs.

As a result, this review will commence by examining the legal and practical issues which have acted to impede the Act's implementation.

#### **4.3.1 Legal Barriers and Impediments to the Application of the Act**

Efforts to apply NEPMs to the Commonwealth under the Act have raised a number of complex legal issues. These can be summarised briefly as follows:

- the structure employed under the Act to selectively apply NEPMs to the activities of the Commonwealth is legally complex;
- the legal definitions under the Act restrict the application of the Act; and
- the interaction of the Act with other Commonwealth laws, in particular laws of the non-self governing territories give rise to complex legal issues.

The legal complexity of the Act is a principal reason for the non-implementation of the Act. Attempts to put the Act to its intended use have given rise to a plethora of issues, and in many cases DEH has received conflicting legal advice as to the outcome of legal issues arising from the application of the Act. This review's purpose is not to conclusively resolve any of the legal controversies or debates that have arisen in the attempted implementation of the Act. However, uncertainty and ambiguity as to the precise legal operation of the Act has, in itself, impeded the Act's intended use.

#### **4.3.2 "Switching Off" State and Territory laws implementing NEPMs**

As previously mentioned, the starting point of the Act under section 9 is the removal of any State and Territory laws implementing NEPMs which might otherwise apply to the Commonwealth.

The starting point of "dis-application" has two initial consequences for the operation of the Act:

**(a) There is no legal obligation under the Act for the Commonwealth or Commonwealth authorities to implement or comply with NEPMs**

Section 9 means that the only automatic effect of the Act coming into force is to make the Commonwealth and Commonwealth authorities “immune” from any State or Territory law implementing a NEPM. Legal obligations to implement or comply with a NEPM will only arise with the positive declaration of the Minister, or by the making of appropriate regulations, or by the undertaking of environmental audits and management plans, under Parts 2, 3, 4 and 5 of the Act respectively. Section 9 of the Act effectively grants a wider immunity than the Commonwealth and Commonwealth authorities would ordinarily have with respect to State environmental laws, particularly in light of the decision of the High Court in *Henderson*.

**(b) The Act only "dis-applies" the particular provisions of State and Territory laws implementing NEPMs**

The initial immunity granted to the Commonwealth by way of section 9 extends only to those provisions of State and Territory laws purporting to implement NEPMs, and does not grant the Commonwealth immunity to the entire act or environmental regulation where provisions implementing NEPMs are found.

This effectively means, before the Minister can act to use a mechanism under the Act to apply NEPMs to Commonwealth activities, the preliminary assessment is required to be carried out to determine which legal obligations section 9 has effectively "switched off". In other words, to bring the Act into operation requires a determination of what has in fact been “dis-applied” before it can be “re-applied”.

Determinations as to exactly which provisions of State and Territory laws have been "switched off" have been the source of considerable difficulty. Such a determination is made difficult for two principal reasons:

- (i) Environmental regulatory regimes at the State and Territory level generally consist of complex layers of legislation, regulation, policy, guidelines and protocols. As each State has been historically responsible for environmental regulation, there is also considerable disparity between State and Territory jurisdictions in the regulatory approach and legislative instruments employed to meet similar environmental goals; and
- (ii) NEPMs themselves consist of a combination of goals, standards or guidelines. As NEPMs are broad policy-setting framework instruments, they do not prescribe or specify a mode of implementation and it is left to each participating government to make an assessment as to how a particular NEPM will best be implemented within the jurisdiction's pre-existing environmental framework. Generally, a NEPM will require a combination of legislation and policy development for its implementation. Exactly what combination will be required of course depends on how it fits with that jurisdiction's existing environmental regulatory and policy framework.

As a result, it is far from obvious as to which State and Territory laws are in fact implementing NEPMs, and consequently not binding on the Commonwealth under the initial operation of section 9 of the Act. When considering that, as a precursor to its implementation, any application of State laws under the Act requires this kind of provision-by-provision assessment in the eight participating jurisdictions, it becomes readily apparent why there has been serious delay in bringing the Act into operation.

### 4.3.3 “Re-application” of State and Territory law implementing NEPMs

In order for the Act to be brought into its intended operation, the Act relies primarily on the re-application of State and Territory law implementing NEPMs. This also has resulted in a series of perhaps unanticipated practical difficulties in attempts to use the Act to apply NEPMs to the Commonwealth and Commonwealth authorities.

#### (a) States and Territories without legislation and/or regulations to implement a NEPM

Where a State has not yet implemented a given NEPM into law there is no State law which can be "switched off" under section 9 and consequentially no State law for the Minister to reapply under Parts 2 and 3 of the Act. Where there is no State or Territory law implementing the NEPM, it is possible to implement the NEPM by regulation under Part 4 of the Act or by environmental audit and management plans under Part 5. However, where some States have implemented the NEPM into law and others have not, the Minister is placed in a difficult position as to how to use the Act to implement a single NEPM for Commonwealth agencies with activities across all Australia jurisdictions. The Act would seem to present two possible approaches to address this situation:

- (i) The Minister could make a declaration under Parts 2 and 3 to apply provisions of State and Territory laws implementing NEPMs for Commonwealth authorities, and use Parts 4 and/or 5 to apply NEPMs to the Commonwealth in States which have not implemented NEPMs. However this would result in a series of different legislative instruments for the application of a single NEPM. Additionally as States and Territories did take legislative action to implement a NEPM, any legislative instrument made under the Act may require on-going revision and amendment to reflect and apply State law implementing the NEPM as it came into force.

This is a convoluted way of achieving a fairly simple objective. The development of numerous statutory instruments at the Commonwealth level to apply NEPMs to the Commonwealth places considerable strain on resources allocated to implement the Act, not to mention the resources required to monitor, revise and amend instruments as States and Territories act to implement NEPMs into law. Commonwealth instrumentalities operating in several jurisdictions would also face a complex task in determining their legal obligations, as they would be required to review a series of different Commonwealth statutory instruments to determine which State or Territory laws to apply to the regulated activity at the State level.

- (ii) A second approach would be to wait until all participating jurisdictions have implemented a relevant NEPM into law before proceeding to make a declaration under Part 2. However, the operation of section 9 in “switching off” all State and Territory laws implementing a NEPM means that, while waiting for other jurisdictions to implement relevant NEPM standards, all Commonwealth authorities are immune from the operation of provisions of State laws that are in force. This is not consistent with the policy objectives of the Act and section 7 of the NEPC Act which would see the application of State laws implementing NEPMs applied to the Commonwealth. Additionally, it is difficult to justify not applying any State law implementing NEPMs to the Commonwealth simply because one participating jurisdiction had failed to take the requisite steps to implement NEPMs in their own jurisdiction.

The already complex mechanism for application of State laws implementing NEPMs to the Commonwealth becomes almost unmanageable where gaps appear in State implementation:

the current structure of the Act is simply not designed to be able to accommodate where “gaps” exist in legislative implementation at State level.

**(b) States and Territories implementing NEPMs through non-legislative measures**

Another ramification of section 9 prescribing that the provisions of a State *law* implementing a NEPM do not apply to activities of the Commonwealth, is that it only “switches off” State “law” and is silent as to the status of State *policy* implementing NEPMs. “Law” is defined in section 5 of the Act to include "an instrument made or having effect under a law in force in the State or Territory".

As it would appear the term "instrument" does not cover non-legislative policies or guidelines, these measures would not have any application to Commonwealth activities, effectively making section 9 unable to be applied in this respect. If non-legislative measures are not captured by the definition of "instrument", such policies could not be made binding on the Commonwealth under the Act. This issue takes on heightened significance as a considerable proportion of NEPMs are implemented at the State and Territory level through environmental policy and guidelines. The situation becomes more complicated by the fact that some guidelines and policy instruments have legislative force, by virtue of direction under relevant legislation, but this may not be easily apparent on the face of any given guideline or policy instrument.

Moreover, there is also an issue as to whether non-legislative State measures would meet the "necessary" test under Parts 2 and 3 of the Act for the reapplication of State or Territory “law to the Commonwealth”. Sections 12 and 17 provide that a particular provision of State law will only be applied to the carrying out of an activity by the Commonwealth under circumstances where the Environment Minister declares that the provision is, inter alia, "necessary" for the implementation of a NEPM. This issue was raised during the 1998 Senate Inquiry on the *National Environmental Protection Measures (Implementation) Bill* ("**Senate Inquiry**"), where the Government of Victoria argued that "the requirement that a provision of State law must be necessary for the implementation of a NEPM shows a lack of understanding of the integrated nature of State environmental laws. In Victoria, NEPMs will be implemented through judicious application of the range of environment protection tools available...It is possible that none of these tools, on their own, would be considered 'necessary' for the implementation of the standard, but together they provide a comprehensive program...".

**(c) States and Territories amending legislation and/or regulations that implement NEPMs**

Further uncertainty has arisen under the Act in understanding the legal consequences when a State law implementing a NEPM (where applied to the Commonwealth under a declaration) is subsequently amended. With no provision in the Act to provide that the declaration applies to law as amended, there are two legal views as to the effect of the declaration under the Act:

- (i) a declaration may only be effective with regards to the law in force when the declaration was made (and an amendment to the Act would be required to alter this); or
- (ii) Section 10A of the *Acts Interpretation Act 1901* applies to provide that where an Act contains a reference to a State or Territory law then, except so far as the contrary

intention appears, the reference shall be construed as a reference to that law as originally enacted or made and as amended from time to time<sup>4</sup>.

The critical point here is that the Act is silent on an important issue regarding how State law is to be applied to the Commonwealth. At the very least, this goes towards demonstrating the range of legal uncertainties which have arisen in attempts to understand how the Act is to be used to apply NEPMs to the Commonwealth.

**(d) Content and Form of Declarations under Parts 2 and 3**

Another debate arising in the context of drafting declarations under Parts 2 and 3 is whether, in reapplying the provisions of State law implementing NEPMs to the Commonwealth's activities, the Minister must list all relevant State and Territory provisions, or whether reference to the relevant act as a whole would be sufficient. The Office of the Australian Government Solicitor has advised that on the basis of paragraph 23(b) of the *Acts Interpretation Act 1901*, a declaration referring to an act or regulation as a whole would be sufficient to apply the relevant NEPM-implementing provision to the Commonwealth.

However this approach has been objected to on a practical level by some Commonwealth agencies on the basis that referring to an act or regulation as a whole creates uncertainty for Commonwealth instrumentalities in determining which legal obligations the Commonwealth body is bound to apply. For instance, the view of one Commonwealth authority was that, from a policy and regulatory perspective, it is inappropriate to transfer the uncertainty and the burden of determining whether a particular provision in a law listed in the declaration may or may not 'implement the NEPM' to individual agencies or officers, who face possible sanctions if they make the wrong choice.

The response to such concerns is that often the specific provisions which clearly implement the NEPM requirements are supported by definitional provisions and are attached to various enforcement provisions and penalties for breach. Section 36 of the Act would support the inclusion of such other provisions as they operated to apply to the Commonwealth. The specification of particular provisions in isolation from the broader regulatory framework is somewhat difficult and problematic. Additionally, in many cases the provisions implementing NEPMs in States and Territories also carry out other functions. For instance, many States and Territories (including NSW and South Australia) implement NEPMs through licence conditions. In these jurisdictions, there is a provision that breach of a condition of a licence can render the operator guilty of an offence. This type of provision is fundamental to the implementation of the NEPM requirement, but equally applies to other activities which are not related to the NEPM. Any reference to a particular provision of a State law must always be subject to the qualification "to the extent to which the provisions implement the [relevant] NEPM".

This debate is indicative of the difficulties that have arisen in the implementation of the Act, and the difficulties arising from the Act's mechanism of "reapplying" State laws implementing NEPMs by Ministerial declaration.

#### 4.3.4 Definition of "activity"

The definition of "activity" in Section 5 of the Act has caused significant difficulties in connection with the implementation of the Act. Parts 2, 3, 4 and 5 of the Act are premised on the basis that the

---

<sup>4</sup> A potential difficulty with applying section 10A of the *Acts Interpretation Act* in this context is that section 9 of the *NEPM (Implementation) Act* does not contain a reference to a specific State or Territory law. Perhaps more conclusively, a declaration under the Act is not a Commonwealth act in itself.

action for the implementation of a NEPM will be directed to the carrying on of an “activity” by the Commonwealth and Commonwealth authorities<sup>5</sup>.

“Activity” is defined in section 5 of the Act as:

*“a physical activity that has a direct effect on, or represents a substantial risk of damage to, an aspect of the environment to which a NEPM applies but, to avoid doubt, does not include:*

*(a) the formulation of a policy; or*

*(b) the making of a decision by a Minister or a person to whom the Minister has, under an Act or an instrument made or having effect under an Act, delegated power to make a decision”.*

This definition effectively restricts the application of the Act to implementing NEPMs in respect of actual physical activities of the Commonwealth and Commonwealth authorities which have a direct effect on or represent a substantial risk to the environment.

The difficulty has therefore arisen when NEPMs themselves are directed toward activities which do not in themselves have a direct effect on or represent a risk to the environment. For instance the Contaminated Sites NEPM relates to the assessment of contaminated sites, and an assessment of environmental impact would not ordinarily of itself have any direct effect on the environment. Additionally the Contaminated Sites NEPM does not relate to the carrying on of antecedent activities; it does not, for example, require a person carrying out a particular type of activity or operating a particular type of facility to conduct an assessment of site contamination. The problem therefore is that the Contaminated Sites NEPM does not appear to relate to an “activity” in respect of which an implementation action may be taken under any of Parts 2, 3, 4 or 5 of the Act. Therefore the Act cannot in effect be used to implement the NEPM with respect to Commonwealth contaminated site assessment “activities” as these are not activities within the meaning of the Act.

This difficulty has also arisen in the context of the Diesel NEPM. There has been considerable debate and uncertainty as to whether the Diesel NEPM seeks to regulate an “activity” within the definitions under the Act and therefore whether the Act can be used to apply the Diesel NEPM to Commonwealth activities. For instance, the Diesel NEPM requires the assessment of diesel vehicle emissions by managers of in-service diesel fleets. If the ‘activity’ which the Diesel NEPM is seeking to regulate is the operation of a diesel vehicle, then this would be a physical activity that has a direct effect on the environment and the Act could be used to regulate this ‘activity’. If however the ‘activity’ is the *management* of a diesel vehicles fleet, it is more questionable as to whether that is a physical activity with a direct effect on, or which represents a substantial risk of damage to, the environment. From these ambiguities uncertainty has arisen as to in which circumstances the Act may be used to apply certain provisions.

#### **4.3.5 External Territories**

Section 6 of the Act provides that the Act extends to “the external Territories other than Norfolk Island”.

The application of the Act to the “external” Territories raises particularly complex legal issues due to the interaction between Commonwealth, State and Territory legal regimes in these jurisdictions.

---

<sup>5</sup> For example, Part 4 authorises the making of regulations “for or in relation to the implementation of a NEPM in respect of the carrying on of an activity by the Commonwealth or a Commonwealth authority”, section 21(5). See also Part 3, section 17(1)(c).

Further, the different roles the Commonwealth plays in each Territory creates additional complexity for regulation of the Commonwealth in these jurisdictions.

For clarification, there are principally two types of Territories in the Australian legal framework. Firstly, self-governing Territories which have their own legislative assemblies to pass their own laws, such as the Australian Capital Territory, Northern Territory and Norfolk Island. Secondly there are non-self governing Territories, which do not have their own legislative assemblies and have the laws of another jurisdiction applied by virtue of a Commonwealth Act. These jurisdictions constitute principally of the Australian Antarctic Territory, Heard Island and McDonald Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Ashmore and Cartier Islands and the Jervis Bay Territory.

Jurisdictions are applied to these non-self-governing territories as follows:

<b>Territory</b>	<b>Applied law</b>	<b>Commonwealth Act</b>
<b><i>Australian Antarctic Territory</i></b>	ACT	<i>Australian Antarctic Territory Act 1954</i>
<b><i>Heard Island and McDonald Islands</i></b>	ACT	<i>Heard Island and McDonald Islands Act 1953</i>
<b><i>Jervis Bay Territory</i></b>	ACT	<i>Jervis Bay Territory Acceptance Act 1915</i>
<b><i>Coral Sea Islands</i></b>	ACT	<i>Coral Sea Islands Act 1969</i>
<b><i>Christmas Island</i></b>	Western Australia	<i>Christmas Island Act 1958</i>
<b><i>Cocos (Keeling) Islands</i></b>	Western Australia	<i>Cocos (Keeling) Islands Act 1955</i>
<b><i>Ashmore and Cartier Islands</i></b>	Northern Territory	<i>Ashmore and Cartier Islands Acceptance Act 1933</i>

The effect of applying State and Territory law to these Territories by virtue of Commonwealth legislation, means that State and Territory laws are applied as Federal law, and do not have the force of State or Territory law in the relevant Territory. For instance, a breach of Western Australian law as applied in the Christmas Island Territory would be prosecuted, in the first instance, before the Supreme Court of Christmas Island: the aggrieved person would not have automatic rights to a Western Australian court.

As Commonwealth legislation applies State or Territory laws to the non-self governing Territories, the critical question is what is the relationship between the Act, as a Commonwealth Act, and the Commonwealth legislation applying State or Territory law to the non-self governing territories. Under general principles of statutory interpretation, Commonwealth legislation which is later in time will override earlier Commonwealth legislation to the extent of the inconsistency. In practical terms this means that the Act will override any earlier Territories-related Act which provides that State or Territory law applies in the Territories, meaning that the Act will "switch-off" any Territory law applying NEPMs to the Commonwealth. In effect this means that the Act has the same operative effect in relation to Commonwealth activities in the Territories as it does on mainland Australia. Additionally, Territory legislation provides the Commonwealth with the ability to pass ordinances which would provide that the Commonwealth could repeal or amend the application of any State law to the Territories. Therefore if any State or Territory law implementing a NEPM did create

operational difficulties for Commonwealth activities in the Territories, the Commonwealth would have the power to create its own exception by means of an ordinance.

Further issues arise with respect to the respective roles of State and Commonwealth officials. External Territories legislation generally provides that the laws of the State apply to the respective Territory, however the power and functions conferred on State officials are exercisable by the Commonwealth Territories Minister or his delegate. The Commonwealth in the Territories therefore may already be bound to apply the State law and section 9 may "switch off" certain of those laws already applying. However, to add to the administrative complexity, there are Intergovernmental Service Delivery Arrangements, such as those in the Christmas and Cocos (Keeling) Islands, between the Commonwealth and Western Australian governments under which many of the applied laws are administered by Western Australian officials. The complex web of administrative responsibility would be further complicated by a declaration under the Act that "switched off" State laws applying to the Commonwealth and then making a further determination as to how they are switched on.

#### **4.4 Practical Impediments to Application of the Act**

In addition to the legal complexities raised by the Act's structure, the implementation of the Act has also given rise to a number of practical and institutional difficulties in relation to the application of NEPMs and State law to particular Commonwealth operations.

One of the key difficulties encountered in the attempts to employ mechanisms under the Act to apply NEPMs to the Commonwealth has been in the negotiations surrounding exemptions from the re-application of State and Territory laws implementing NEPMs. The fact is that particular activities of Commonwealth agencies do, in some cases, require special arrangements or even dispensation from the application of NEPMs in light of the particular objective of such activities. The Department of Defence and the Australia Antarctic Division are two Commonwealth agencies that have reported difficulties in applying NEPMs to their activities and for this reason they present good case studies for practical impediments to applying the Act.

##### **4.4.1 Applying NEPMs to Department of Defence**

The Department of Defence (Defence) is by far the biggest landowner in the Commonwealth and has geographically widespread and diverse facilities and functions. Defence holds large tracts of land, many of which have some degree of historic soil and water contamination issues. Defence operations are also responsible for the majority of the Commonwealth's energy and fuel use. Defence has reported the following obstacles to the application of relevant NEPMs to its activities:

###### **(a) Administrative Obstacles to the Implementation of NEPMs**

Defence has indicated that one of the principal difficulties for the application of NEPMs to Defence activities is the absence of an appropriate administrative infrastructure to meet the particular requirements of NEPMs.

Given the dispersed nature of the Department, and the diversity and range of operations with which Defence is charged, collecting and consolidating the required data to meet basic reporting requirements under NEPMs presents a considerable administrative undertaking.

For instance, for the purpose of the National Pollutant Inventory (NPI) NEPM, a Defence "facility" may have multiple users, operating independently on a long term, temporary or intermittent basis. This makes reporting requirements under the NPI NEPM administratively difficult and resource intensive.

The administrative challenges posed by the application of NEPMs to multiple Defence activities and uncertainty surrounding the legal mechanism by which NEPMs will be applied to Defence has stalled attempts to draft declarations under the Act.

**(b) National Security Interests**

Specific reporting requirements under various NEPMs are viewed by Defence as potentially posing a threat to national security interests. One such example is the emission reporting requirements under the NPI NEPM. Defence suggests that this requirement may reveal information about sensitive Defence activities and capabilities. Defence would have no difficulty reporting some aggregated NEPM information up to the level at which security issues would arise.

**(c) Unique organisational function**

Another issue for Defence regarding the application of NEPMs to its operations is the degree to which NEPMs address, or moreover do not address, the unique character of Defence's activities in relation to defending and protecting Australia's national security. For instance, many Defence operations are temporary in nature or not site specific, making compliance technically difficult for Defence to achieve. Defence has stated that, where its functions correspond with those of other Commonwealth departments it is not difficult to ensure compliance, but in many cases the operations of Defence are simply outside the boundaries of the intended regulatory scope of the NEPM regime.

**(d) Financial implications**

Given the complexity of some of Defence's operations, the cost of NEPM compliance is likely to be significantly greater for Defence than for other Commonwealth authorities and this would need to be taken into account in designing regimes for the application of NEPMs to Defence.

**4.4.2 Applying NEPMs to the Australian Antarctic Division**

The Australian Antarctic Division ("AAD"), a Division of DEH, administers the Australian Antarctic Territory ("AAT") and Heard Island and McDonald Islands ("HIMI"). The AAT and HIMI are subject to a unique regulatory framework:

- (i) Antarctic Treaty System: The Australian Government as a party to the Antarctic Treaty System is bound by its international obligations in any dealings with the AAT and all Australian activities in the AAT. These international obligations are implemented in the AAT under a series of Commonwealth Acts: the *Antarctic Treaty Act 1960*, the *Antarctic Treaty (Environmental Protection) Act 1980*, the *Antarctic Marine Living Resources Conservation Act 1981*, and the *Environment Protection and Biodiversity Conservation Act 1999*;
- (ii) Federal laws: The AAT and HIMI are deemed to be "outside Australia" and equated as 'foreign country' for the purposes of Federal quarantine, customs and immigration (and some, but not all, other) laws and are also subject to these Federal regimes;
- (iii) ACT law: The AAT and HIMI are applied law jurisdictions, and both are subject to ACT law by virtue of the *Australian Antarctic Territory Act 1954* (Cth) and the *Heard Island and McDonald Islands Act 1953* (Cth).

A declaration under the Act simply applying State law implementing NEPMs to Commonwealth activities would result in any ACT law implementing a NEPM being applied to the AAT and HIMI. The following difficulties reported by AAD illustrate the range of considerations that need to be taken into account in applying NEPMs within the existing legal framework.

**(a) Duplication of legal obligations and administrative requirements**

If ACT law was applied, any movement of waste from the AAT to the Australian mainland would be subject to the requirements of the Controlled Waste NEPM, on the same basis as if it were a movement of waste between the ACT and (for instance) Tasmania. The same shipment would also be subject to Federal shipping laws on the basis that the AAT is "outside Australia" and subsequently liable to all imposed environment assessments, authorisations and permitting requirements. The AAD would therefore be subject to two sets of laws with competing and potentially conflicting procedures applying to the same activities. Duplication or conflict may also occur in respect of general environmental obligations, as the AAD is already subject to a range of stringent environmental obligations in carrying out all of its activities in the AAT and HIMI, due to the application of international obligations under the Antarctic Treaty System to the Territory. The AAD has unique legal environmental obligations in this respect, distinguishing it from other Commonwealth authorities. Further, the application of NEPMs to the AAD may not necessarily constitute a significant contribution to the achievement of the policy objectives of the NEPM regime – namely the equivalent protection of all Australians and the prevention of market distortions – as there are no industry operations in the AAT and a population of only 100 (give or take, depending on expeditions).

**(b) Antarctica's unique physical environment**

Antarctica's unique physical environment poses significant issues for the application of NEPMs to the AAT: sea-ice that bars ship access for much of the year, hurricane force winds that restrict the ability to store waste and work in Antarctica, freezing temperatures and summer thaws are just some of the climatic constraints that pose unique logistical challenges for carrying out even the most basic activities. Compliance by the AAD with all aspects of NEPMs may have greater resource implications than for Commonwealth agencies operating on mainland Australia where NEPMs were probably envisioned to apply and the level of resources to achieve compliance may better serve the policy goal of the NEPM by being used in other ways.

**Antarctic Waste Removal Program under the Protocol on Environmental Protection to the Antarctic Treaty and the Movement of Controlled Waste NEPM**

Under the Protocol on Environmental Protection to the Antarctic Treaty, members of the Antarctic Treaty System are required to remove historical waste from past activities in the Antarctic Territory and cleanup abandoned work sites. In order to fulfil this commitment under the Protocol, the AAD has embarked upon an ongoing waste removal program which involves cleaning up former waste sites (including tips) from the 1950s and 1960s and shipping significant quantities of controlled wastes to Western Australia and Tasmania for appropriate disposal. Nearly all of this waste originated in Australia.

The practice to date has largely proceeded on a set of informal arrangements whereby Tasmanian officials have granted the AAD authorisation to unload at designated wharf quarantine areas on the basis of estimates derived from the volumes, weights and types of waste shipped in previous seasons. The waste is then sorted and/or processed at that site, before being transported to Federal and State approved disposal or reprocessing sites.

There are potential tensions between the Commonwealth responsibility under the Protocol and the application of the Controlled Waste NEPM to the shipping of controlled waste. The Controlled Waste NEPM requires all waste to be analysed and fully sorted, categorised, documented and assigned a consignment number prior to shipment. The AAD cannot complete, or readily complete, many of these requirements in Antarctica due to the unique logistical difficulties and inherent difficulties in undertaking analytical and other work in situ prior to shipping. For instance, there are no weighbridges on the ice and no infrastructure to

deliver original paper work in advance of the ship carrying the waste. Some limited sampling and analysis of the relevant waste site is possible, but due to the potential considerable variability of the contents of waste at each site, there are concerns as to what exactly would constitute a representative sampling of the waste.

Another issue which arises for the application of the Controlled Waste NEPM to the waste removal program from Antarctica is the logistics and cost of compliance. For instance, some waste sites are only accessible at particular months of the year and sometimes require waiting for several years before the right "thaw" permits access; it is not possible to reliably predict when cleanup work can be conducted at such sites. Additionally, sending a ship to Antarctica to collect waste requires a minimum of an 18-day voyage, at a cost of close to \$1 million, and between \$30,000 and \$60,000 a day in charter fees alone in the case of delay. Clearly this involves different considerations to those faced when transporting waste interstate across mainland Australia. In particular, it has considerable ramifications if Commonwealth or State officials decided to refuse the waste for any reason.

#### 4.4.3 NEPM implementation issues at the State and Territory level

NEPM implementation activities at the State and Territory level have had two impacts on attempts to bring the Act into operation:

- (i) *Delays at State level in implementing NEPMs into law:* Delays at State levels, as discussed earlier, create severe difficulties for employing the Act's mechanisms to apply State law to the Commonwealth. The Minister effectively faces a choice between using a combination of declarations under Parts 2 and 3 and regulations under Part 4 to apply a single NEPM to the Commonwealth's activities or not applying the NEPM until all participating jurisdictions come into force.
- (ii) *Inconsistent opinions on NEPM implementation:* Legal ambiguities in determining which provisions of State law implement NEPMs has been exacerbated by the uncertainty of State officials themselves in identifying the exact provisions implementing NEPMs in their relevant jurisdictions. The most accurate record of implementation at State level can be found in the annual State reports under the NEPC Act, but these reports rarely specify the exact provisions purporting to implement NEPMs. Uncertainty surrounding NEPM implementation is heightened by inconsistency between States as to what constitutes NEPM implementation. For instance, States with identical legal provisions have evidenced a difference of opinion as to whether that provision constitutes NEPM implementation.

#### 4.4.4 Resource intensive implementation

The complexity of the model employed by the Act to apply NEPMs to the Commonwealth and Commonwealth authorities means that in practice the Act requires considerable resources to be put into operation. A history of attempts to draft declarations under the Act shows that the current mechanisms necessitate identification of whether the activity to which the relevant NEPM is directed comes within the scope of the Act, whether the activity is an activity in which the Commonwealth is engaged (and to what extent it is engaged), what State and Territory law has implemented the relevant NEPM, and whether there are any gaps in its implementation at State level. The time and resources this process absorbs to apply State law to the Commonwealth is disproportionate to the objective seeking to be achieved. Additionally, any action under Parts 2, 3, 4 and 5 must be directed toward accommodating all affected departments and considering any exemption that may need to apply to any particular State or Territory law and/or any particular requirement of the NEPM itself which requires further co-ordination and negotiation with all affected Departments.

## 4.5 Features of the NEPMs themselves

While section 43 of the Act does not mandate a review of NEPMs themselves and associated implementation difficulties, certain aspects of the NEPMs have raised particular issues with regard to the operation of the Act.

### 4.5.1 Uncertainty as to how NEPMs are to implemented

As highlighted previously, NEPMs are not prescriptive as to their mode of implementation: how the goal is achieved is left to the discretion of the participating jurisdiction. The lack of clear guidance from the NEPM as to their required implementation makes it difficult for Commonwealth authorities to identify where NEPM requirements exist under State law. Even States have reported experiencing some difficulty in isolating the exact provisions through which NEPM requirements have been implemented. This potentially raises serious issues for any legal regime which applies State law implementing NEPMs to the Commonwealth, as it creates uncertainty regarding the exact legal obligations of the Commonwealth authorities.

#### **Case Study: How is the Diesel NEPM implemented?**

Clause 13 of the Diesel NEPM states that the NEPM "requires participating jurisdictions to assess the need to manage emissions from in-service diesel vehicles", taking into consideration specified criteria. Where this assessment demonstrates a need to manage in-service diesel emissions "participating jurisdictions may use the Guidelines in Schedule A to develop compliance programs that are appropriate for their particular circumstances".

Clause 8 discusses the nature of a compliance program and states that a program may include a number of components. These components include elements that would not require any legislative action (eg information collection, monitoring systems). However they also include other elements that may require legislative support such as compulsory maintenance programs and random roadside inspections. In short the Diesel NEPM does not require legislation to be implemented, but it certainly allows jurisdictions the option of legislative action for its implementation.

In determining whether a particular NEPM has been implemented into State law, the first point of reference is State and Territory reports on programs taken to implement the NEPM prepared in accordance with clause 15 of the Diesel NEPM. These reports are generally contained in the NEPC Annual Report. The NSW 2002 – 2003 Report to the NEPC indicates the level of detail provided:

*The Protection of the Environment Operations Act 1997 (NSW) and, under the Act, the Protection of the Environment Operations (Clean Air) Regulations 2002 (NSW) provide the regulatory basis for action to address emissions from the in-service diesel fleet. The Regulation underpins the NSW Diesel NEPM Implementation. Specifically the Regulation prohibits excessive visible smoke emissions from vehicles and tampering with filter control equipment".*

Most other States and Territories have generally reported a consistent position: the Northern Territory however says that it has taken no specific action to implement the NEPM (although it does have a smoky vehicle program as part of its vehicle registration and roadworthiness testing).

### 4.5.2 Differences between NEPMs

Each NEPM adopted to date has adopted different structures and forms for the achievement of its stated goals. For instance, the Contaminated Sites NEPM contains a series of principles and guidelines to govern an assessment process; the Diesel NEPM requires emissions assessment and offers a range of compliance programs; the Controlled Waste NEPM has a mandatory series of

administrative and reporting requirements. While this may reflect the different environmental objectives each NEPM is crafted to achieve, it has also increased the difficulty in making a determination as to what may be required to meet the NEPM standard, and how it may be implemented into State law. Additionally, differences between various NEPMs have revealed the limitation of the Act to meet the implementation requirements of each NEPM. The variations between individual NEPMs necessitate a simple legislative structure to apply NEPMs to the Commonwealth – it is suggested that the design of the current structure of the Act does not meet this criteria.

### **Small Amounts of Waste and the Movement of Controlled Waste NEPM**

The Controlled Waste NEPM does not contain a general exemption for the interstate movement of small amounts of waste. The policy justification for this approach is that even a very small amount of waste could pose a high risk to the environment (such an approach has been endorsed at the international level under the *Basel Convention on the Transboundary Movement of Hazardous Wastes*).

State laws generally do incorporate an exemption for movements of small amounts of waste, or movement of waste that is not for fee or reward, to varying degrees. For instance:

- NSW exempts movement of waste under 200kg;
- Victoria exempts movement for no fee or reward but the vehicle must have gross loading capacity of less than 1000kg;
- Queensland exempts movement of waste under 250kg;
- Northern Territory and South Australia exempt movement for no fee or reward;
- ACT has no exemption; and
- Western Australia exempts both movement of waste under 200kg and movement for no fee or reward.

Victoria, Tasmania, South Australia and the ACT also impose a general requirement that all interstate movement of waste must comply with Controlled Waste NEPM requirements. This would appear to create an inconsistency as the Controlled Waste NEPM does not permit any such exemption.

## **4.6 Administrative Application of NEPMs to the Commonwealth**

The fact that the Act has not been used to apply NEPMs to the Commonwealth does not mean that NEPMs have not been applied to the Commonwealth. Section 7 of the NEPC Act provides the Commonwealth with the ability to implement NEPMs by “law and other arrangements”.

In February 2000, the Acting Secretary of the Department of the Environment and Heritage sent a letter to all Commonwealth agencies requesting that NEPMs be implemented administratively pursuant to section 7 of the NEPC Act. Since this time, Commonwealth authorities whose activities have implications under NEPMs have generally been applying NEPMs to their activities under the NEPC Act. Commonwealth reporting under this current arrangement generally indicates that Commonwealth authorities are by and large implementing and complying with NEPMs as required.

The Contaminated Sites NEPM provides an interesting case study of how, even in the absence of a working legal framework, a high degree of compliance with NEPMs is being achieved by administrative means. The Contaminated Sites NEPM is only a guideline and does not impose compulsory requirements on its users. Yet there is a strong incentive for compliance because any resale of land will require a high degree of assessment and documentation of any contamination. Even

where there is not necessarily any legal requirement to apply the NEPM requirements (as is the case of this NEPM), the market has usually been a sufficient driver to ensure Commonwealth compliance.

In consultations with Government agencies reporting significantly on two or more NEPMs, almost every Commonwealth agency stated that compliance with various NEPM standards posed few problems for their operations and most of the requirements were in fact already covered by their internal environmental management standards. In fact, several of the stakeholders consulted stated that it is in their best interests, both from an administrative efficiency and a public perception viewpoint, to adopt higher environmental standards than those contained in the NEPMs.

- Telstra, the Australian Nuclear Science and Technology Organisation (ANSTO), the Australian Communications Authority (ACA), the Australian National University (ANU) and others noted that despite the law providing Commonwealth immunity from the application of State laws, the reality was that when operating within a State context there was simply a practical need to abide by and comply with State law.
- The Australian Institute of Marine Sciences (AIMS), operating in Queensland, Western Australia and the Northern Territory reported that it is more administratively efficient for the Institute to incorporate higher environmental management standards than required by State environmental laws, so as to ensure they could easily meet any environmental criteria imposed by any of the various jurisdictions in which they operated. As the requirements imposed by State environmental laws generally go further than the requirements of the NEPMs, there was no perceived difficulty in applying NEPMs to the Institute's operation. Furthermore, the Institute stressed that being a scientific research institute meant that it was critical to be viewed as an environmentally responsible "citizen" by the general public.
- The ACA also stated that with less stringent environmental standards at the Commonwealth level, there was a need to provide a stronger and clearer signal as to when the Commonwealth is subject to State laws. Additionally, the reporting guidelines under the NEPC Act were very broad and did not capture the level of detailed environmental reporting which the ACA was capable of providing.

The compulsory reporting requirements under the NEPC Act are of a general nature and do not require the detailed level of reporting provided for under some of the NEPMs. The lack of a legally enforceable requirement for Commonwealth agencies to report under the NEPMs has, in some cases, resulted in an ad hoc approach to the reporting requirements under the NEPMs, thereby failing to achieve the environmental goals contained within these NEPMs.

**Case Study: DOTARS and the Application of State Laws Implementing NEPMs**

As the Act has not been used to apply NEPMs to the Commonwealth, there is no legal requirement for the Department of Transport and Regional Services (DOTARS) to apply State and Territory laws implementing NEPMs to its activities in the Territories for which it is responsible, namely the Christmas Island and the Cocos (Keeling) Islands ("the Indian Ocean Territories"), the Coral Sea Islands, Ashmore and Cartier Islands and the Jervis Bay Territory.

However, DOTARS does in fact apply State and Territory law implementing NEPMs to its activities in all Territories for which it has responsibility as a result of Government policy. Commonwealth policy stipulates that the Commonwealth will apply State or Territory law in force in the Territories to all its activities as far as practicable, on the basis that the Commonwealth intends to be perceived as bound by the very laws which the Commonwealth is seeking to apply in the Territories. DOTARS also suggested that it was aware of the unanticipated complexities that can be created where various exceptions to general legislative regimes are implemented and on this basis preferred to comply with NEPMs rather than seek out additional legal exemptions.

In practice, the Commonwealth activities triggering NEPM requirements for DOTARS are few and far between. Regarding operations in the Indian Ocean Territories, the NPI NEPM and the Controlled Waste NEPM are being implemented without difficulty, and the Contaminated Sites NEPM is in the process of being implemented (as the Western Australian law implementing the Contaminated Sites NEPM has yet to come into force).

However, the application of the Controlled Waste NEPM in the Jervis Bay Territory has created a somewhat anomalous situation. The Jervis Bay Territory is home to a small sewerage treatment plant and a medical health clinic. Any disposal of waste from these two facilities is caught by the Controlled Waste NEPM on the basis that it constitutes an interstate transfer of waste (effectively from the ACT legal regime to NSW), even though it is a very insignificant amount of waste moving only a short distance (a total of 5km). DOTARS has continued to comply with the Controlled Waste NEPM, which creates significant administrative requirements on the transfer of the waste, including ticketing and tracking of the waste. It has not sought to pass an ordinance as a means of side stepping these requirements, on the basis that amending legislation could have unanticipated ramifications for the operation of other types of legislation. The ACT Environment Department is seeking an exemption for the Controlled Waste NEPM for the Jervis Bay Territory from the NSW Department of Environment and Conservation, given that NSW is where the waste is being transported for disposal. However, as NSW must table new legislation to deal with this aspect of the NEPM, it will take some time before the Jervis Bay Territory is likely to receive a geographic exemption.

## 5 The extent to which the policy objectives of the Act remain valid

### 5.1 The validity of the policy objectives

While the validity of the policy objectives ultimately is a matter for the Commonwealth to determine, the continued existence of the legislative and policy framework in which the Act was introduced, namely the IGAE and the NEPC Act, would indicate that the policy objectives do indeed remain valid.

The first stated objective of the Act - "to make provision for the implementation of national environment protection measures in respect of certain activities carried on by or on behalf of the Commonwealth and Commonwealth authorities" – is a direct fulfilment of the Commonwealth's existing commitment under section 7 of the NEPC Act. The application of NEPMs to Commonwealth activities, and the application of State law to achieve this objective where necessary, is part of the broader agreement between Commonwealth, State and Territory governments to create uniform environmental standards. In a scheme aimed at national consistency of environmental standards, the exemption of Commonwealth activities would be difficult to justify. NEPMs are intended to fulfil a vision of equivalent and harmonized national environmental standards. To exempt the activities of the Commonwealth from the application of NEPMs would contradict this broader goal of regulatory consistency and environmental quality.

The second stated objective of the Act – "to protect, restore and enhance the quality of the environment in Australia, having regard to the need to maintain ecologically sustainable development" – is also indisputably a part of the NEPM regime and a driving factor behind the Commonwealth's participation in it. The signing of the IGAE in 1992 formally recognised the importance of the protection and enhancement of the environment as well as acknowledging the important role ecologically sustainable development plays in integrating environmental and economic considerations. The subsequent signing of the Heads of Agreement has only reinforced the importance of environmental protection and intergovernmental regulatory efforts to achieve this outcome.

The validity of the third and final objective of the Act – "to ensure that the community has access to relevant and meaningful information on pollution" – would also be difficult to dispute. One of the founding principles of the NEPM regime is to ensure that all Australians have equivalent environmental protection wherever they live throughout Australia. Public access to information on pollution and transparency surrounding activities with environmental impacts is a critical means by which the community is assured environmental protection. All seven identified areas for which NEPMs can be made seek to protect the community from the effects of pollution in some way or another – whether that be air pollution under the Ambient Air Quality NEPM or soil pollution under the Contaminated Sites NEPM. Additionally, many of the NEPMs employ transparency and accountability mechanisms as a means of achieving environmental goals and standards.

### 5.2 Do the objectives meet the intention behind the application of NEPMs to the Commonwealth?

It would seem that all policy objectives of the Act – the application of NEPMs to Commonwealth activities, better environmental protection and community access to information on pollution – remain valid. However, the objectives of the Act, as stated under section 3, do not seem to fully reflect the broader objective behind the application of NEPMs to the Commonwealth or indicate the role of the Act in the wider NEPM regime.

The Act is ultimately only one part of the broader NEPM regime, the objectives of which are to ensure that:

- the national community has equivalent environmental protection, throughout Australia; and

- industry cannot escape basic environmental obligations by seeking out the jurisdiction with the lowest environmental standards, in order to minimize the cost associated with higher standards in other prevailing jurisdictions, otherwise known as "forum shopping".

The present objectives of the Act do not reflect these broader objectives of the NEPM regime, as outlined under the NEPC Act, and the Commonwealth's participation and endorsement of its outcomes. The current objective of the Act, to "make provision" for the implementation of NEPMs in respect of certain activities of the Commonwealth, while valid, speaks only to the creation of legal mechanisms for the application of the NEPM, rather than why there is a need to apply NEPMs to the Commonwealth.

Including the broader objective of NEPMs as provided under the NEPC Act would focus the application of the Act toward achieving the fundamental goals of the NEPM regime, which are ultimately broader than the application of State law implementing NEPMs to the Commonwealth. The ease by which most Commonwealth agencies have administratively complied with NEPM requirements and applied associated State laws indicates that an over emphasis on the legal technicalities of the application of State law to the Commonwealth may detract from the broader NEPM objectives which the regime endeavours to achieve. Equally, the inclusion of the broader objectives of NEPMs could guide the creation of any exemption to the application of State law implementing NEPMs to the Commonwealth. Where Commonwealth authorities sought exemptions from NEPM requirements in specific circumstances, the broader goals of public accountability and environmental consistency would be required to be taken into account.

## 6 Extent to which provisions of the Act remain appropriate for the achievement of the policy objectives of the Act

### 6.1 “To make provision for the implementation of national environment protection measures in respect of certain activities carried on by or on behalf of the Commonwealth and Commonwealth authorities”

Despite being in force for five years, the Act has not been implemented due to the various legal and practical difficulties encountered in attempts to put the Act to its intended operation. On this basis, it may be concluded that the provisions of the Act do not remain appropriate for the achievement of the policy objectives of the Act.

#### 6.1.1 Commonwealth immunity from State law

By removing the application of State law implementing NEPMs to the Commonwealth, the operation of section 9 effectively broadens the Commonwealth immunity from State environmental laws. As the Minister has not made a declaration under the Act to reapply State and Territory laws to the Commonwealth – nor have any regulations been made or environmental audits undertaken – the current application of the Act is that no State or Territory law implementing a NEPM mandatorily applies to the Commonwealth. The Act has consequently operated contrary to the intention for which it was designed.

This situation is now compounded by the fact that the High Court's 1997 decision in *Henderson* has narrowed the broad presumption of Commonwealth immunity from the application of State law. The majority of the Court held that while the Commonwealth is immune from State law which purports to modify the nature of the executive power vested in the Crown ('its capacities'), it was not immune from State legislation which assumes the existence of those capacities and regulates activities in which the Crown may choose to engage in the exercise of those capacities. In *Henderson*, this meant that State law affecting the responsibilities of a landlord and tenant were applicable to the Defence Housing Authority, on the facts of that case.

While the distinction between the capacities of the Commonwealth and the exercise of those capacities may not always be a distinction easily determined, the outcome of the *Henderson* case certainly means it is more likely that a court would find that State environmental legislation is capable of binding the Commonwealth than in the past. At its most basic, a 6:1 majority of the High Court has now rejected the broad proposition that the Commonwealth cannot be bound by State legislation.

The current state of the law is that the Commonwealth can no longer assume to be beyond the reach of the application of State law. Not only, then, is section 9 inconsistent with legal developments in this field, but the current state of the law could result in the anomalous situation where, under the Act, the Commonwealth was not legally bound by State environmental law implementing NEPMs but was nonetheless bound to implement other State environmental law under the High Court's approach in *Henderson*. For instance, under the present operation of the Act, a Commonwealth authority would not be required to assess contaminated sites according to standards contained in the Contaminated Sites NEPM but may be required to take measures to clean up the site under State environmental laws on the basis that such laws do not adversely affect the Commonwealth's executive capacities.

The signing of the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment has further reinforced the progression towards Commonwealth compliance with State environment and planning laws. However, section 9 of the Act would seem no longer appropriate for the achievement of these policy objectives.

**6.1.2 Commonwealth activities a minor part of the NEPM "compliance picture"**

When the Act was first drafted, it was widely thought that NEPMs, and the implementation of NEPMs by State law, would have much wider implications for, and potential impact on, Commonwealth activities. In practice, only some NEPMs have proved to be relevant to Commonwealth activities. Where Commonwealth activities do have implications under NEPMs, the application of NEPM requirements do not generally present a major compliance threshold or administrative difficulty. Consequently, Commonwealth activities are a fairly minor part of the broader behaviour and environmental impacts which the NEPMs are seeking to address.

From the States' perspective, the Commonwealth does not play a significant role in the NEPM compliance picture and, for the most part, where it does enter the picture, there is already a high degree of compliance. The head of one State environmental protection agency commented that non-compliance by Commonwealth authorities tends to arise only where there are significant costs or resource allocation issues associated with NEPM implementation.

Considering the limited degree of application of NEPMs to Commonwealth activities and the general administrative compliance which the vast majority of Commonwealth Departments have achieved in relation to NEPM requirements, it would appear that the complex operation of the Act does not correlate with the application of NEPMs to the Commonwealth in practice. In effect, the complexity of the Act structure, starting from section 9, is geared towards only applying State laws to the Commonwealth where they are appropriate, "necessary" and "desirable" – when in the vast majority of cases the application of State law would cause little problem. The special case scenario is Defence, and perhaps the Australian Antarctic Division, and it seems it would be more appropriate to create particular legislative provisions to accommodate the operational peculiarities of these organisations than to structure the whole Act around exemptions to a set of rules generally acceptable to all other Commonwealth entities.

<b>NEPM</b>	<b>Commonwealth Authority Reporting on NEPM</b>
<i>National Pollutant Inventory NEPM</i>	ABC, AAD, Defence, ANU, CSIRO, Parliamentary Services, Air Services Australia, Aviation Regulations, Territories Branch (Transport and Regional Services), Royal Australian Mint
<i>Movement of Controlled Waste NEPM</i>	ABC, AAD, ANSTO, ANU, Health & Ageing, Geoscience Australia, Air Services Australia, Aviation Regulations, Territories Branch, Telstra
<i>Assessment of Contaminated Sites NEPM</i>	ABC, ACA, AAD, Parks, Defence, AIMS, ANSTO, ANU, Health & Ageing, Industry Tourism and Resources, National Measurement Institute, Finance and Administration, Air Services Australia, Aviation Regulations, Territories Branch, Telstra, Royal Australian Mint
<i>Diesel Vehicle Emissions NEPM</i>	Australian Customs Service, Agriculture Fisheries & Forestry, ABC, ACA, Australian Film, Television and Radio School, Australian Sports Commission, Australia Post, SBS, AAD, Bureau of Meteorology, Parks, Defence, Education, Science and Training, AIMS, ANSTO, ANU, CSIRO, Employee and Workplace Relations, Family and Community Services, Health and Ageing, Immigration, Geoscience Australia, Parliamentary Services, Finance and Administration, Veterans Affairs, Territories Branch

### 6.1.3 National interest exemption

The Act to date has not been used to apply State law implementing NEPMs to the Commonwealth and consequentially the national interest exception has never been exercised under the Act. On this basis, it is not possible to evaluate how the current definition of "national interest" has operated in relation to achieving the Act's stated objectives.

There are, however, several points worth making here. A national interest exemption is a standard part of most Commonwealth laws, and, in the context of NEPM requirements, there are clearly security circumstances which necessitate exemptions from general public reporting and transparency requirements. The definition of national interest under the Act at present is in line with the definition of national interest under the Heads of Agreement. The heightened security situation since 2001 would only reinforce the inclusion of a national interest exemption in this context.

There is a possibility that the 'matters of national interest' criterion could be used to avoid implementing NEPMs via regulation. For this reason, it is important to ensure that a national interest exemption is sufficiently specific and tailored so it cannot be abused. Ultimately, the scope of any such exemption is a policy issue for the Commonwealth to determine.

### 6.1.4 A question of enforcement

Again, as the Act has not been used to apply NEPMs to the Commonwealth, the enforcement provisions of the Act have not yet come into play. A review of whether the provisions remain appropriate for the achievement of the policy objectives of the Act would, however, seem to necessitate consideration of how any legal obligations under the Act would be enforced.

As summarised previously, section 10 provides that the Act binds the Commonwealth in right of the Crown, but authorities that have the shield of the Crown in right of the Commonwealth are immune from criminal prosecution. An administrative reporting procedure is the principal means by which any alleged breach of the Act and any applied NEPM requirement will be addressed.

The administrative procedure as it stands presently under the Act would not be characterised as a rigorous enforcement regime. For instance:

- there is no requirement to make reporting actions public;
- there are no defined sanctions against Commonwealth authorities who are found breaching any given NEPM requirements; and
- there is no role for the State and Territory officials reporting the breach in any subsequent enforcement procedure.

The exclusion of the Crown in right of the Commonwealth from criminal liability can also result in a degree of legal uncertainty as it is frequently a matter of debate whether or not a particular authority has the 'shield of the Crown'. It would be accurate to say such provision would grant the scope for a significant number of Commonwealth authorities to be protected from criminal liability under the Act.

In the Senate Inquiry on the *National Environment Protection Measures (Implementation) Bill*, State Governments expressed objection to particular provisions of the enforcement regime:

- Clauses 35 and 36 of the Bill (sections 36 and 37 of the Act), which create offences by State officials for divulging certain information obtained on Commonwealth property, were highly criticised: 'It is an inadequate proposition that the Commonwealth can provide for criminal

liability to officers of this State, without assuming a similar responsibility in respect to its agents.<sup>6</sup>

- The States and Territories have no real enforcement power under this regime: prosecution of criminal offences under the Act is the responsibility of the Commonwealth Director for Public Prosecutions.

Victoria made the point in their submission to the Senate Inquiry that, in Victoria, the Crown and its departments have been subject to criminal liability for the commission of environmental offences since the commencement of the *Environment Protection Act 1970* (Vic). The position of Crown immunity would mean that the Commonwealth and its instrumentalities would continue to operate "above the law" which applies to all other public and private entities in Victoria, which is inconsistent with general developments in the environmental law field.

However, the enforcement regime under the Act is consistent with the current Commonwealth position relating to criminal liability of Commonwealth public servants. There is a distinction between imposing liability on the Crown as a body politic and imposing criminal liability specifically on servants of the Crown. Crown servants may be criminally liable under other legislation that binds the Crown but does not render the Crown liable to prosecution, as long as the terms of the offence do not make the servant's guilt dependant on the commission of an offence by the Crown itself. Criminal liability may be imposed on servants of the Crown to ensure that they act according to the law in the performance of their duties.

#### 6.1.5 Commonwealth authorities

The first stated objective of the Act is directed towards the application of NEPMs to activities carried on by or on behalf of the Commonwealth and "Commonwealth authorities". The ability to achieve this objective of the Act will depend on the scope and definition of Commonwealth authorities. Under section 5 of the Act, "Commonwealth authority" is defined as:

- (a) *a body, whether incorporated or not, that is established for a public purpose by or under an Act; or*
- (b) *a body, whether incorporated or not, that is established by the Governor-General or by a Minister; or*
- (c) *a body that is:*
  - (i) *an incorporated company over which the Commonwealth or a body referred to in paragraph (a) or (b) is in a position to exercise control; or*
  - (ii) *a subsidiary (within the meaning of the Corporations Act 2001) of an incorporated company referred to in subparagraph (i).*

Whether a particular government body is to be considered part of the Commonwealth is therefore to be assessed on a case-by-case basis.

#### (a) Government business enterprises

The question of whether Commonwealth government business enterprises ("GBEs") are considered an agent of the Crown in right of the Commonwealth is a crucial one. To determine if a GBE is an agent or emanation of the Commonwealth, it is necessary to examine the Act constituting it. An examination of this nature reveals that, while Australia Post and Telstra (at

<sup>6</sup> Government of South Australia, submission 9 p. 8. Similarly Government of Victoria, submission 11 p. 4, Government of the Northern Territory, submission 8 p. 2

least while the government remains majority shareholder) will be considered Commonwealth authorities under the definition in section 5, the position may be less clear in relation to Commonwealth companies under Corporations Law (eg Australian Rail Track Corporation Ltd, Australian Submarine Corporation Pty Ltd, Australian Technology Group Ltd, Employment National Limited, Health Services Australia Ltd, Medibank Private Ltd). Thus it could not be said with certainty that all GBEs are covered by the definition in section 5 of the Act. The definition of "Commonwealth authority" under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) may provide greater clarity in this area.

**(b) Contractors**

Section 7 of the Act provides that the Act extends to Commonwealth contractors:

*A reference in this Act to the carrying on of an activity by the Commonwealth or a Commonwealth authority includes a reference to the engaging in of any conduct by another person under a contract entered into by the person with the Commonwealth or the authority in connection with the carrying on of such an activity for or on behalf of the Commonwealth or the authority.*

The inclusion of Commonwealth contractors would seem to ensure that activities carried out on behalf of the Commonwealth, even if not carried out by the Commonwealth itself, are covered by the operation of the Act, and therefore covered by NEPMs. However, due to the non-application of NEPMs under the Act, section 7 of the Act has effectively excluded the activities of contractors from the application of NEPMs where otherwise their activities would remain covered by State law. For instance, both Defence and the AAD commonly hire contractors to transport relevant waste, and it is these contractors that take responsibility for complying with relevant State laws, including the Controlled Waste NEPM requirements for the interstate movement of controlled waste. Such arrangements effectively mean that Defence and the AAD have been complying with State law implementing NEPMs. Ironically, the Act in its present operation would actually exempt these contractors from complying with State law implementing NEPMs where they are carrying out the activities on behalf of the Commonwealth. This is yet another way in which the operation of section 9 has effectively broadened the scope of Commonwealth immunity from State law rather than increasing Commonwealth compliance.

**6.2 "To protect, restore and enhance the quality of the environment, in order to maintain ecologically sustainable development"**

Again, with the Act not being utilised to apply NEPMs to activities of the Commonwealth as intended, it would be difficult to conclude that the provisions of the Act remain appropriate to achieve the Act's objective of environmental protection.

Moreover, a review of the Act reveals that the provisions of the Act do not seem directed toward protection of the environment as such. In fact, the provisions of the Act would appear to be almost entirely directed towards the legal mechanisms and exceptions to the application of State law implementing NEPMs to the Commonwealth. A relevant quote on this issue was made by the ACT to the Senate Inquiry:

'The Bill seems more directed to ensuring the Commonwealth agencies are not bound by State and Territory laws to implement NEPMs than it is to giving effect to the environmental objectives...'<sup>7</sup>

---

<sup>7</sup> Government of the ACT, submission 6 p. 1

Even when State laws apply, sections 13 and 18 provide that the application of State laws does not have the effect of requiring a licence, permit or other authorisation for the construction, alteration or demolition of a building (except where the requirement is made for the purpose of implementing a NEPM or requiring preparation of an environmental impact statement). This exclusion would be likely to exclude related environment protection tools, such as works approvals and licensing, from applying to the Commonwealth. From an environmental protection perspective, this exemption would seem difficult to justify. The limited definition of activities also seems to preclude a range of Commonwealth behaviours from being subject to environmental regulation requirements under the Act and NEPMs.

In short, the provisions of the Act are not appropriate to achieve the objectives of protection, restoration and enhancement of the environment, or even to achieve the more limited objective of applying NEPMs to Commonwealth activities.

### **6.3 "To ensure that the community has access to relevant and meaningful information on pollution"**

In relation to whether the provisions of the Act remain "appropriate" for the achievement of this policy objective, two points should be made:

- The only provision of the Act which is directed towards the provision of public information on pollution is section 40, which directs Commonwealth departments and authorities responsible for carrying out an activity to which a NEPM applies to report to the Environment Minister on the application of NEPMs by virtue of the Act (the details for the reporting requirements are contained in the *National Environmental Protection Measures (Implementation) Regulations 1999*). As the Act has not been used to apply any State law to the Commonwealth, nor to make regulations or undertake environmental audits, no legal reporting requirement for Commonwealth bodies has been triggered under the Act. No other provision under the Act is directed towards the provision of information on pollution to the public in the absence of the Minister taking any action under Parts 2, 3, 4 and 5.
- The key public reporting requirements are found within the NEPMs themselves, and it is by reporting under the NEPMs which provides the community access to information on pollution. The most obvious example of this is the NPI NEPM – and for the most part, Commonwealth agencies have been consistently reporting under the NPI NEPM on an administrative basis under the NEPC Act (with a few exceptions). Additionally, Commonwealth Departments have been reporting on NEPM implementation under the annual reporting requirements under the NEPC Act, but these reports are not made under any provision of this Act.

In other words, there are very few provisions in the Act directed explicitly towards the realisation of this objective. The Act's mechanisms are designed principally to create a legal obligation for Commonwealth authorities to report under the NEPMs where required. However, again the failure of the Act to be employed to achieve its intended effect means that reporting requirements under the regulation have not been triggered and this would not seem to satisfy this particular policy objective of the Act.

The enforcement procedure, while it has not come into play due to the inoperative status of the Act, would not appear to be sufficiently transparent so as to ensure the public is informed about pollution. For instance:

- The administrative procedure for reporting Commonwealth breaches of applied State laws under section 10 contains no requirement to make reports public and therefore the public would have no way of knowing that a report alleging a breach had been filed; and

- Section 36(3) seeks to limit the circumstances in which evidence could be brought before a court.

While these sections do have some exceptions, it would appear these measures are not in the spirit of full and true disclosure in environmental performance matters of the Commonwealth.

## 7 Options for future course of action

### 7.1 Deficiencies in the operation of the Act

In summary, the review has revealed a series of deficiencies in the operation of the Act, principally:

- the "switch-off"/"switch on" mechanism for applying State law implementing NEPMs to the Commonwealth is legally complex, resource intensive and has stalled the legal application of NEPMs to the Commonwealth;
- the narrow definition of "activity" under the Act limits the ability of the Act to be used to implement NEPMs;
- uncertainty as to how the Act can be used to accommodate Commonwealth authorities with unique operational issues for particular NEPM implementation requirements;
- the policy objectives which do not reflect the Act's role in the NEPM regime, namely equal environmental protection for all Australians and prevention of "forum shopping" for lax environmental regulations; and
- limitations on public accountability mechanisms to ensure all Australians are informed as to the Commonwealth application of NEPMs to the Commonwealth and public access to information on pollution.

### 7.2 Legal alternatives to the present Act

The Act in its present form has proved to be unworkable: the complex structure of the Act has only added to existing uncertainty regarding both the implementation of the NEPM regime and the application of State law to the Commonwealth. As a result the policy objectives of the Act remain unfulfilled and there is no legal instrument present in force which applies NEPMs to the Commonwealth. To rectify this situation, the Commonwealth could consider repealing the Act in its present form and assessing the legal alternatives for applying NEPMs to the Commonwealth. If the Commonwealth should choose to repeal the Act, there are five broad legal options open to the Commonwealth to implement NEPMs in respect of its activities.

#### 7.2.1 No Act or legislative instrument to apply NEPMs to the Commonwealth

The first option is simply to repeal the Act and allow State laws implementing NEPMs to be applied to the Commonwealth on the same basis as any other State environment laws. The High Court's decision in *Henderson* means that State laws implementing NEPMs would, in all likelihood, apply to the Commonwealth on the grounds that such laws regulate the exercise of the capacities of the Commonwealth, as opposed to the capacities of the Commonwealth itself. This distinction made by the majority in *Henderson*, between the executive capacity of the Commonwealth and its exercise, may also be sufficient to ensure that Defence would not be subject to NEPM requirements where they purported to regulate the executive power of defence as vested in the Commonwealth.

By removing a specific legislative scheme for the application of State laws implementing NEPMs to the Commonwealth, the difficulties associated with treating State laws implementing NEPMs separately from the holistic environmental law regimes in which they exist would be eliminated. The existence of two legal regimes for the application of State environmental laws to the Commonwealth is legally convoluted and difficult to justify as delivering enhanced environmental protection. Section 7 of the NEPC Act does provide for the application of State law implementing NEPMs as Commonwealth law, but now, post-*Henderson*, it may be possible that the Commonwealth obligations under the IGAE would be fulfilled by the narrowed presumption of Commonwealth immunity from the application of State law as decided by the majority of the High Court in that case.

The problems arising with this option are principally:

- (a) The application of *Henderson* to State environmental laws is far from clear and certain in its outcome<sup>8</sup>. Leaving Commonwealth instrumentalities to make judgement calls on a case-by-case basis as to whether a particular requirement of State environmental law regulates the capacities of the Commonwealth or the exercise of such capacities, may only increase the existing complexity of determining the extent of Commonwealth immunity from the application of State law<sup>9</sup>. Given that the uncertainty surrounding the implementation of NEPMs themselves has been a significant impediment in their application to the Commonwealth, the Commonwealth would be advised to seek the option which minimizes the degree of uncertainty endemic to this area of the law.
- (b) There would be no clear legal grounds for Commonwealth instrumentalities to make out exceptions to the application of NEPMs where needed. As the Office of the Australian Government Solicitor stated: "The decision in *Henderson* emphasises the importance of section 109 of the Constitution ... If it is intended that the Commonwealth carry out activities or enter into transactions without having to comply with State laws of general application, Commonwealth legislation will be necessary to ensure the Commonwealth is unaffected by such laws"<sup>10</sup>.
- (c) Enforcement may also be another grey area in the absence of a legislative framework to address the application of NEPMs to the Commonwealth. There is a very strong presumption that a statute does not impose criminal liability on the Crown<sup>11</sup>. In the absence of an Act providing clear enforcement procedures, the ability of State Environmental Protection Authorities ("EPAs") to enforce State law implementing NEPMs against the Commonwealth could be unclear and potentially give rise to further dispute as to the implementation of NEPMs by the Commonwealth.

## 7.2.2 Legislation or legislative instrument applying State law implementing NEPMs to the Commonwealth

The second option is to repeal the Act and in its place introduce an act (or possibly regulation<sup>12</sup>) which provides for the direct application of State laws implementing NEPMs to the Commonwealth, subject to clearly defined exemptions.

The direct application of State laws implementing NEPMs to the Commonwealth under Commonwealth legislation would ensure greater legal certainty in two important respects. Firstly, it would circumvent any ambiguity stemming from the application of the majority decision in *Henderson* to determine when the Commonwealth is bound by State environmental laws. Secondly,

<sup>8</sup> While state environmental legislation which restricts the use by the Commonwealth of its own property could be argued to be an interference with the executive capacities of the Commonwealth (and therefore result in invalidity), State environmental legislation may equally be characterised as merely regulating an activity which the Commonwealth has entered into in the exercise of those capacities. The difficulty of applying what appears to be an elusive distinction is the reason why it was rejected by two of the judges in *Henderson*.

<sup>9</sup> For example, if a State law prevents the Commonwealth from discharging a pollutant into the atmosphere without a licence, is the State law fettering the Commonwealth's capacity or only the exercise of it?

<sup>10</sup> Australian Government Solicitor (1997), 'The Commonwealth's Implied Constitutional Immunity from State Law', Legal Briefing No.36, 30 August 1997, p.5.

<sup>11</sup> *Cain v Doyle* (1946) 72 CLR 409 at 417-8.

<sup>12</sup> A regulation under the NEPC Act may be another means of achieving this ends. However, it is unlikely that the regulation making power under section 63 of the NEPC Act would currently be broad enough to make regulations on the application of State laws to the Commonwealth.

the current legal difficulties associated with attempts to use the Act's various mechanisms to apply State law to the Commonwealth would be eliminated. The greater legal certainty secured by the direct application of State laws implementing NEPMs not only has benefits in terms of clarifying the legal obligations of Commonwealth authorities in respect of NEPMs but can also deliver greater administrative efficiency in the implementation of NEPMs to the Commonwealth. Direct application dispenses with the need to expend additional departmental resources to create the legislative instruments to apply State law implementing NEPMs to the Commonwealth. Further, and perhaps more critically, legally reinforcing the role of State EPAs in administering NEPMs constitutes an effective utilisation of existing institutional resources and more efficient division of responsibility between the Commonwealth and State governments.

A legislative framework to apply NEPMs to the Commonwealth could also ensure legal certainty in other critical areas for the Commonwealth implementation of NEPMs including:

- clearly defined exemptions, such as a specific national interest exemption or exemption for shipping activities;
- reporting on NEPM implementation by Commonwealth authorities; and
- transparent enforcement procedures to ensure Commonwealth authorities are publicly accountable for breaches of NEPM requirements.

The difficulty with this approach remains in determining which provisions of relevant State and Territory laws purport to implement NEPMs and the associated difficulties of how such provisions relate to the broader environmental regulatory framework. However, any legislative option for applying State environment laws to the Commonwealth will encounter legal complexities. The key is to create a legislative framework which minimizes the inherent complexities of this legal area and provide appropriate and practical mechanisms by which to manage any associated difficulties.

There are any number of mechanisms which a legislative scheme could adopt to manage anticipated complexities arising with the direct application of State law implementing NEPMs to the Commonwealth, including:

- alternative Commonwealth compliance regime where the application of State law implementing NEPMs proves administratively inefficient<sup>13</sup>;
- bilateral agreements between relevant Commonwealth and State authorities to enhance co-operation on the implementation of NEPMs<sup>14</sup>; or
- strategic assessment reports on the delivery of the goals and standards of NEPMs by Commonwealth authorities.

Instituting effective and transparent processes for the implementation of NEPMs will be essential for delivering environmental protection to the Australian public and harmonising environmental standards.

---

<sup>13</sup> Such as an alternative compliance regime similar to that developed under the National Road and Transport Commission, or the accredited licensee system under the *Environment Protection Act 1970* (Vic).

<sup>14</sup> Bilateral agreements between State and Territory authorities and a Commonwealth Minister as part of a legislative scheme has been employed with some success under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

### **7.2.3 Amend the *National Environmental Protection Council Act 1994 (Cth)* to provide a regulation making power for applying State law implementing NEPMs to the Commonwealth**

Another option is to amend the NEPC Act to provide for a new head of power for the Commonwealth to make regulations for applying NEPMs and State law implementing NEPMs to the Commonwealth. This option would not in and of itself establish a legal regime for the application of NEPMs to the Commonwealth: it would allow *Henderson* to apply to any State law implementing a NEPM to the Commonwealth until a regulation was made to provide otherwise.

The benefit of pursuing this option would depend largely on the content and structure of any regulations made under the new head of power under the NEPC Act. A regulation which directly applied State law implementing NEPMs to the Commonwealth subject to defined exemptions would have all the advantages of an act directed at achieving the same end, with the added benefit of being able to amend any such regulation without needing to secure parliamentary approval. This may provide more flexibility to develop an implementation regime which is tailored to the specific issues which the application of NEPMs to particular activities of the Commonwealth raises.

A potential disadvantage of this option is the possibility for further delay and uncertainty at the Commonwealth and State level as to the legal regime for the application of NEPMs to the activities of the Commonwealth. It would mean that firstly, Commonwealth authorities would be required to determine their obligations under *Henderson* and then engage in a revision of their legal obligations with respect to NEPMs when any regulation was passed, and further revision when it was amended. There is potential as a result for further confusion in this area and it is questionable whether this constitutes the most efficient means of proceeding in light of the difficulties identified with the present Act.

### **7.2.4 Legislation applying general State environmental and planning law to the Commonwealth**

A fourth option is legislating to apply State environment and planning laws generally to the Commonwealth. Adopting a broader and more comprehensive approach would avoid the current uncertainty surrounding applying the majority decision in *Henderson* to determine which State environmental laws are capable of binding the Commonwealth and circumvent the difficulties of separating State law implementing NEPMs from other State environment and planning laws created by the present Act. Any legislation to increase the Commonwealth's broader compliance with State environment and planning laws would also be a direct fulfilment of the Commonwealth commitment under the Heads of Agreement, in particular Attachment 3.

The principal objection to this approach would be that it is disproportionate to the initial objectives sought to be achieved under the Act, namely the application of NEPMs to the Commonwealth and the realisation of nationally harmonised standards on air, water, soil and noise pollution. Legislating for the application of State environment and planning laws may be viewed as opening the "flood gates", giving rise to a much broader and more complex legal debate. Determining what is a State environmental law and what exemptions may be needed for Commonwealth activities from the application of State environmental regimes would show the application of NEPMs to the Commonwealth to be a relatively simple exercise by comparison.

### **7.2.5 Exclusive Commonwealth legislative regime for the application of NEPMs**

A final option is the development of a Commonwealth legislative scheme to provide for the comprehensive application of NEPMs to Commonwealth activities and Commonwealth places. Again a more comprehensive legislative approach would avoid the ambiguities in applying *Henderson* and the separation of State laws implementing NEPMs from their broader regime. From the Commonwealth's perspective this approach would have the added benefit of ensuring the

Commonwealth retained total discretion as to how NEPMs are legally applied to, and enforced against, the Commonwealth in respect of its activities - in particular carving out any specific exemption arising from the application of NEPMs to some of the unique activities of the Commonwealth.

The obstacles to implementing this option are considerable. Perhaps first and foremost, the Commonwealth at present does not have an equivalent of a State EPA with the capacity to report on and monitor compliance with an environmental compliance scheme. Establishing a Commonwealth body capable of implementing, and administering, all NEPMs in relation to Commonwealth activities would require significant resources, and would be difficult to justify on the basis of a cost-benefit analysis, in light of the outcomes sought to be achieved. From an efficiency perspective, the duplication of government administrative functions which already exist at the State level would seem both unnecessary and unjustified.

A comprehensive Commonwealth scheme for the implementation of NEPMs which totally bypassed State law implementing NEPMs in participating jurisdictions would also appear to be contrary to the intention and operation of section 7 of the NEPC Act, the IGAE and the Heads of Agreement. The IGAE recognised that the protection of the environment required the co-operation of Commonwealth and State governments and a better definition of their respective roles: the creation of an exclusive Commonwealth environment regime would seem to directly counter attempts at greater integration and harmonisation in the delivery of environmental protection outcomes.

---

## 8 Conclusion

The deficiencies of the Act must not only be viewed in light of the Act's failure to be put into its intended operative effect but in the broader landscape of the IGAE and NEPM regime from which the Act emerged. The Commonwealth, State and Territory governments have agreed that intergovernmental co-operation, a better definition of the roles of the respective governments, and greater certainty in Government decision making are necessary to deliver environmental protection to all Australians. The Act in its current form would seem to actually exacerbate many of the environmental regulatory problems which the IGAE and NEPMs were seeking to address.

The application of NEPMs to the Commonwealth is an integral part of a nationally harmonized environmental protection regime, as envisioned under the IGAE, where all private and public activities are managed in a holistic manner so as to minimize impacts on the environment and achieve and maintain a level of environmental quality desired by the community. Any revision of the Act should be directed towards realising the Commonwealth's commitment to apply NEPMs to its activities and fulfilling the vision under the IGAE and Heads of Agreement. At minimum it should seek to ensure better environmental protection and greater effectiveness in the application of environmental policy in the Australian Federal system.