High court challenge to Walker inquiry threatens federation

A Commonwealth challenge to South Australia's Murray– Darling royal commission has become a state rights battleground with implications for the Constitution. Karen Middleton reports.

- The Saturday Paper
- 4 Aug 2018
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KAREN MIDDLETON is The Saturday Paper's chief political correspondent.

As he opened the first hearing of South Australia's inquiry into the management of the Murray–Darling river system, royal commissioner Bret Walker, SC, was not hiding his annoyance with the federal government.

Trying to establish whether laws have been broken, Walker issued a series of summonses for current and former Commonwealth officials to appear, and for documents to be presented.

The Turnbull government has not only refused to comply, it has started proceedings in the High Court to challenge Walker's legal authority to do so, naming the South Australian government as second defendant and Bret Walker first.

"We live in a federation," Walker declared from the commissioner's chair on June 18, five days after the Commonwealth launched its action.

"... We are not foreign country – the states to each other, let alone to the Commonwealth – and we are certainly not mutually hostile."

But with the federal government's court action, which advanced this week, hostility is creeping in, setting states against each other and against the Commonwealth with potentially wideranging implications for cooperative agreements in future.

Walker's Murray–Darling Basin

Royal Commission is established under SA legislation that includes the power to compel witnesses and punish recalcitrants, laying out penalty options including a $1000 fine and three months' jail.

These are the particular powers the federal government is challenging.

On his first hearing day, the royal commissioner arranged his words to avoid accusations that he was telling the High Court what to do.

A highly regarded constitutional lawyer who served the Gillard and Abbott governments for three years as the country's independent national security legislation monitor, Walker guided those at his hearing through the relevant sections of Australia's founding document, pondering what the court might find.

Walker observed that, even considering section 109 of the Constitution, which says Commonwealth laws prevail wherever they clash with state laws, it "may well be" that there is "nothing in the Constitution permitting the Commonwealth to ignore the continuation or creation of powers at the level of the states – the former colonies".

He pointed to the two sections – 106 and 107 – that protect the states' ongoing existence and added: "I repeat, it is a federation."

Walker suggested the case could form a precedent on the distribution of powers and answer questions the High Court had not ever resolved.

"It may well be that the nature of our federation is, in a sense, infirm," he said. "And I don't mean by that to raise a straw man argument. It may well be that it is infirm in this regard."

The implications in the case of the Commonwealth v Walker – the potential that our federation may well be "infirm" – are not lost on the other states, either.

If the main Murray–Darling Basin states were exercised earliest, interest spread quickly across the country.

At the court's first hearing in June, Queensland joined the case in support of SA, accompanied by Western Australia and Tasmania – neither of which has the Murray River system anywhere near it.

But they are wading in because broader principles are at stake.

A spokeswoman for WA AttorneyGeneral John Quigley told The Saturday Paper that the state had joined because the case would traverse "constitutional law issues involving the executive and legislative powers of the states and the Commonwealth".

"It is not unusual for states to intervene in such matters," the spokeswoman said.

"WA will be intervening in support of the respondents and their arguments that the states have constitutional powers to enact legislation like the South Australian law. States other than South Australia also have royal commission legislation and therefore it is important that WA makes submissions to the High Court on these important issues."

Only Victoria has chosen not to join the case, considering it not necessary because no Victorians have been summonsed. The territories are not included because they don't have the constitutional status of a state.

New South Wales has joined the case partly in support of the Commonwealth and partly against. The state is supporting the Commonwealth's broad arguments about the legal roles and jurisdictions of the High Court and the federal parliament and also those arguments that insist the court should rule invalid the sections of the SA Royal Commissions Act that confer powers to compel witnesses and dish out penalties.

The Commonwealth appears to be arguing that these are powers only rightly conferred on a court. But NSW has indicated it expects to oppose the Commonwealth's other arguments – essentially those drawing on previous cases to insist it has the power to ignore state law.

NSW's divided position may result from the fact that, as the High Court heard, one former Commonwealth employee summonsed to appear before the royal commission now works for the NSW government.

Also possibly relevant to the NSW position – though not featuring in the High Court case – is the pressure its government has been under over its handling of Murray–Darling water issues since ABC TV's Four Corners aired secret recordings a year ago of a state water bureaucrat offering to share confidential internal documents on the Murray– Darling Basin plan with irrigators.

The program's revelations prompted the state government to initiate an independent investigation. A week after the investigation's findings were published, the senior officer in question, Gavin Hanlon, resigned. The NSW

Labor Opposition had earlier referred Hanlon and former state water minister Kevin Humphries to the Independent Commission Against Corruption.

The ABC program also prompted the federal auditor-general to extend an existing audit of the system of national partnership agreements to look specifically at water.

The South Australian royal commission is proceeding separate from all of this.

Even without the Commonwealth witnesses and documents it seeks, the royal commission is asking uncomfortable questions about the amount of water successive governments have allowed to be released for farm use and the amount they kept back for the environment.

This line of inquiry prompts more questions: why is the federal government going to so much trouble – and risking having the High Court rule once and for all that the states can compel the Commonwealth all they like – to stop a handful of officials appearing and some documents being handed over?

Although the High Court action was initiated through the portfolio of the federal agriculture minister,

David Littleproud, who refused to let officials from the Murray–Darling Basin commission – and the secretary of his department – comply with the summons, The Saturday Paper understands it was at the insistence of Attorney-General Christian Porter.

Officially, the federal government's position is that the issue has less to do with water than with the principle that the Commonwealth will not accede to a state seeking to use coercive powers.

But evidence already presented to the royal commission suggests it may also be concerned about the potential consequences of cooperating with an inquiry that is considering whether unlawful decisions were made.

The royal commission continues to take that evidence while awaiting the High Court's verdict.

On Monday, the court held its second hearing before a single judge, Justice Patrick Keane. Justice Keane has now referred the case to the full bench for a two-day hearing in October.

It will be the first case in 21 years to tackle the issue of states' rights in the High Court. The previous case, in 1997, involved a landlord, Dr Henderson, who had leased a property to the Defence Housing Authority to accommodate defence personnel.

The case arose after Dr Henderson sought an order from a NSW tribunal to be able to both inspect his property and compel the DHA to give him a key. The DHA refused, arguing that as a Commonwealth agency it was not bound to obey state law.

Now known as Henderson's case, the dispute ended up before the High Court. The court confirmed that the states did have the power to require the Commonwealth to do certain things – under certain circumstances. But the six-judges-to-one ruling – with Justice Michael McHugh dissenting – did not clarify fully the extent of those powers.

As legal analyst Mark Gladman wrote in the Federal Law Review following the case: "The High Court's decision in Henderson appears to expand the states' power to bind the Commonwealth, however, the precise scope of the power remains uncertain."

This new case may clear up some of that uncertainty.

No judge on the current court was serving on it when Henderson's case was decided, so it's not clear which way it might rule.

Two constitutional experts, Sydney University's professor of constitutional law Anne Twomey and the dean of the law faculty at the University of New South Wales, Professor George Williams, both say it's an important and complex case.

Twomey says that while the states need to be able to require the Commonwealth to answer questions, those powers must also be protected from political misuse.

"There has always been reluctance within the federation to allow the executive of one jurisdiction to compel the production of government information from another jurisdiction or to compel oral evidence from the public servants or politicians of another jurisdiction," Twomey says.

"This is for the obvious reason that, otherwise, a government of one political persuasion in a state could use a royal commission to compel the production of sensitive information from a government of another political persuasion in another state – or the Commonwealth – in order to embarrass it or obtain some kind of politically partisan advantage."

Twomey notes a series of cases before lower courts have examined the extent to which one jurisdiction can forcibly extract information from another.

She says the case in the Commonwealth v Walker will likely canvass some issues that arose in those cases but also the question of whether a state's jurisdiction extends beyond its own boundaries and whether parliamentary privilege protects a member of parliament from subpoena.

On the Murray–Darling and other agreements between the Commonwealth and the states, she can see both sides.

"In short, it's a very complicated constitutional issue that has never been addressed head-on by the High Court," Twomey says.

"It does raise important issues of federalism – but not just about the need for the states to be able to obtain access to information. It also raises the issue of a state or the Commonwealth being able to protect itself from interference by another jurisdiction where that other jurisdiction may be seeking to obtain confidential information for partisan purposes, rather than policy purposes. There is a difficult balance that needs to be struck and there are certainly two legitimate sides to the argument."

Williams says the case represents "actually a very significant question that does go to the heart of our federation and the way in which our

governments interact".

"This will be a major test case," he says.

Williams suggests there may be a range of reasons that a federal government seeks to avoid acquiescing to a state request. "It may wish to hide information, it may wish not to be embarrassed, or it may just wish to make life harder for a state," he says. "This case is very significant because it's a question of whether it can be compelled to do so."

Williams points to the inquest into the 2014 Sydney Lindt cafe siege as an example of a state-based inquiry that sought to draw on federal information and showed the importance of it being shared.

He agrees with Walker's proposition that in this new High Court case, the federation could be found "infirm".

"I think it is infirm anyway," Williams says. "This will raise further questions about that. What the community might see as the ability to ask reasonable questions could be stymied."

The full details of the arguments to be put will be clear when submissions are lodged with the court later this month.

Commissioner Walker is among those likely to be poring over them with more than a passing interest. His relationship to the federal–state issue extends beyond his current South Australian circumstances. In a strange constitutional twist, when the High Court heard Henderson's case back in 1997, the counsel representing Dr Henderson was one Bret Walker, SC.

Because of his position as royal commissioner as well as defendant in this new case, Walker has entered what's known as a "submitting appearance" before the court, which means he's standing back and allowing the SA government to run the case on behalf of them both.

That, in turn, means for all his involvement in the earlier chapter in the fate of federalism – and despite his own name being attached to the new one – he can do little but watch and wait.

And aside from his carefully crafted royal commission opening statement about what the court might decide, the sometimes outspoken barrister can't say

• a word about it.

AustLII

High Court of Australia

Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority [1997] HCA 36; (1997) 190 CLR 410; (1997) 146 ALR 495; (1997) 71 ALJR 1254 (12 August 1997)

HIGH COURT OF AUSTRALIA

BRENNAN CJ,

DAWSON, TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

RE THE RESIDENTIAL TENANCIES

TRIBUNAL OF NEW SOUTH WALES FIRST RESPONDENT

AND

HENDERSON & ANOR SECOND RESPONDENTS

EX PARTE THE DEFENCE HOUSING

AUTHORITY PROSECUTOR

ORDER

1. Order nisi for a writ of prohibition discharged.

2. The prosecutor pay the respondents' costs.

12 August 1997

FC 97/033

S 75/1996

Representation:

R J Ellicott QC with S J Gageler for the prosecutor (instructed by Bruce & Stewart)

K Mason QC with L S Katz SC for the first respondent (instructed by Crown Solicitor for New South Wales)

B W Walker SC with M J Leeming for the second respondents (instructed by Public Interest Advocacy Centre)

Interveners:

G Griffith QC with M A Perry intervening on behalf of the Attorney-General for the Commonwealth (instructed by the Australian Government Solicitor)

W C R Bale QC with T J Bullard intervening on behalf of the Attorney-General for Tasmania (instructed by the Crown Solicitor for Tasmania)

P A Keane QC with R W Campbell intervening on behalf of the Attorney-General for the State of Queensland (instructed by the Crown Solicitor for Queensland)

D Graham QC with C M Caleo intervening on behalf of the Attorney-General for the State of Victoria (instructed by the Victorian Government Solicitor)

ARTICLES

Improving the Commonwealth's Environmental Performance? The NEPM Implementation Bill

James Prest

BA(Hons)(Adel), LLB(Hons)(ANU), GDLP (ANU). Candidate - Master Nat Res Law, U Wollongong. Barrister and Solicitor, Supreme Court of the ACT.[7]

In the midst of what is likely to be a rush of environmental law making in 1998, the Commonwealth Parliament will soon debate the *National Environment Protection Measures (Implementation) Bill (NEPMI Bill)*. Despite its not exactly scintillating title, the Bill has many important implications for a much neglected environmental problem, the environmental impact of Commonwealth activities and places.

The problem

The activities of Commonwealth can have, and have had, a significant impact on Australia's environment. The Commonwealth owns, leases or occupies a small but significant proportion of Australia's total land mass.[8] It operates a wide range of facilities, such as:

> airports; defence works; docks; explosives industries; landfill sites; munitions testing and production sites; oil production, treatment and storage; properties containing underground storage tanks; radioactive materials, use or disposal; railway yards, research laboratories; transport/storage depots, waste treatment plants.[9]

The main environmental issues arising on Commonwealth lands include major land contamination (including unexploded ordnance), storage of toxic and hazardous wastes, and air, noise, and water pollution. For example:

* Commonwealth airports, according to the Victorian EPA, have polluted local creeks in that State by oil, kerosene, metal particles, surfactants, detergents, and stormwater run-off.[10]
* Between 10,000–60,000 Commonwealth contaminated sites exist, according to the Australian National Audit Office. [11] Two former ADI sites in Victoria were found to be heavily contaminated with 297,000 m^3 of soil contaminated by PCBs, asbestos, foundry slag and ash, and electroplating wastes containing mercury, chromium, cadmium, nickel, arsenic, copper and zinc..
* The National Transmission Authority, in 1996, was reported to be storing over 33 tonnes of highly toxic poly-chlorinated biphenyl (PCB) material at its 500 sites throughout Australia, posing 'significant health and environment risks'.[i]

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[7] An substantially different version of this paper was prepared for the Parliamentary Research Service, Parliament House, Canberra, as Bills Digest No.113.
[8] ANAO (1996) *Environmental Management of Commonwealth Land, Site Contamination and Pollution Prevention*, Audit Report No.31, p.3.
[9] ANAO, op.cit., p.82. This list is based on larger list entitled *Contaminated Land Valuation Practice Standard* (1994) adopted by the Australian Institute of Valuers and Land Economists.
[10] Environment and Natural Resources Committee of the Parliament of Victoria, *The Environmental Impact of Commonwealth Activities and Places in Victoria*, November 1994, pp.51-61.
[11] Ibid, pp.43-45.

Origins of the NEPMI Bill

This Bill's origins can be traced back far beyond its introduction to Federal Parliament in October 1997. It forms part of a series of legislative and policy initiatives arising from the Intergovernmental Agreement on the Environment (IGAE) of 1992.

The Bill aims to complete the creation of the 'National Environment Protection Measures' (NEPM) scheme commenced by the IGAE. The objective of making NEPMs is to harmonise national environmental protection standards. According to the Explanatory Memorandum, this should "give all Australians the benefit of equivalent environment protection."[12] Uniform national standards should also deter 'forum shopping' by developers seeking to establish their projects in those jurisdictions presenting the weakest environmental standards.[13]

The National Environment Protection Council Act 1994

The first legislative step towards the creation of the NEPM scheme was the passage of the *National Environment Protection Council Act 1994* (Cth) (the *NEPC Act*) and complementary State legislation.[14] The *NEPC Act* created the National Environment Protection Council (NEPC), a Ministerial Council, charged with making NEPMs, and reporting on their implementation and effectiveness.[15]

The *NEPC Act* provides that NEPMs can be made to address seven particular environmental issues: air quality, water quality, noise standards, site contamination, hazardous waste, recycling, and motor vehicle emissions.[16] To date, draft NEPMs have been prepared on the following topics: the National Pollutant Inventory (NPI); air standards; hazardous waste; and contaminated sites.

Gaps In Commonwealth Environmental Protection Laws

Focussing attention purely on the laudable goal of creating a scheme for uniform national environmental standards could divert one's attention from the specific purpose of this Bill. Lurking beyond the details of the NEPM scheme is the much neglected issue of the adequacy of regulation of the environmental impacts of Commonwealth activities and places.

A genuine need to improve the environmental regulation of Commonwealth activities exists. The next section sets out the reasons why it can be argued that, at present, Commonwealth activities are often inadequately regulated from an environmental point of view.

Commonwealth legislation exists to address environmental issues in selected areas arising from Commonwealth activities including environmental impact assessment, heritage protection, and endangered species protection. However, there are many areas of environmental performance inadequately regulated by Commonwealth laws. These areas are traditionally regarded as the province of State governments and legislatures. In broad terms (and subject to some caveats) these include pollution control, contaminated land laws, and planning laws.

For example, there is no Commonwealth legislation of general application which seeks to monitor, prevent and control environmental pollution from Commonwealth activities in the same as the *Environmental Protection Acts* of the States. Nor is there a Commonwealth statute to address land contamination problems. Those Commonwealth Acts which touch upon pollution issues, such as the

[12] NEPM Implementation Bill 1997, Explanatory Memorandum.

[13] Ogle (1997), *The Bush Lawyer : a Guide to Public Participation in Commonwealth Environmental Laws*, Environmental Defender's Office Ltd, Sydney, p.10.

[14] For background refer Department of Parliamentary Library, *Bills Digest : National Environment Protection Council Bill*, No.102 of 1994.

[15] s.12 *NEPC Act 1994*.

[16] The list is further qualified, in that NEPMs on noise and motor vehicle emissions can only be made if 'differences in environmental requirements....would have an adverse effect on national markets for goods and services.'

Ozone Protection Act 1989, *Hazardous Waste (Regulation of Exports and Imports) Act 1989* and *Environment Protection (Sea Dumping) Act 1981*, can be characterised as dealing with matters on the periphery of the pollution control issues dealt with in State legislation.

If State laws do not apply because of claimed Commonwealth immunity, and there are no relevant Commonwealth laws, then the only applicable regime may be non-legislative policies, manuals, environmental management systems or guidelines.

Although many of the Commonwealth departments and authorities with potential to cause significant environmental impacts, such as Defence, already have in place substantial environmental management policies, plans and systems, these plans are not legally binding, and there are no penalties for non-compliance.

Applying NEPMs to the Commonwealth

The issue of improving the regulation of Commonwealth environmental performance could conceivably have been addressed using a number of different mechanisms. However, in this Bill the government has chosen to adopt the NEPM approach, applying NEPMs to the Commonwealth and its authorities.

The decision to bind the Commonwealth to NEPMs can be explained by the logical desire to create consistency in the national scheme. The less obvious rationale is to fend off behind the scenes criticism from State government agencies over deficiencies in Commonwealth environmental performance. The Commonwealth's unwillingness to be explicitly bound by State environmental protection laws has long been subject to criticism by State governments.[17]

However, it appears that progress is being made towards the goal of improving Commonwealth environmental performance, as the COAG announced in November 1997 that it had decided the States and Commonwealth would work towards 'improved compliance by the Commonwealth and the States with State environment and planning legislation.'[18]

The three options open to the Commonwealth for achieving this aim of applying NEPMs to the Commonwealth would have been as follows: exclusive use of Commonwealth legislation, or exclusive application of State legislation to the Commonwealth, or by a combination of both. In the end, the drafters appear to have selected the latter option, a combination of both State and Commonwealth legislation. (see below).

The Question Of Commonwealth Immunity From State Laws

Surrounding the Bill is a complex web of questions about the extent to which State environmental laws actually apply to the Commonwealth and its authorities. This has long been an area of legal confusion and uncertainty.

The importance of such matters becomes evident when the interplay of Commonwealth and State law leads to a situation where the environmental impacts of a Commonwealth activity are essentially unregulated, or are managed only by reference to non-binding departmental policies or guidelines.

It is not possible in an article of this size to comprehensively review the law governing the application of State environmental laws to the Commonwealth, its authorities, and 'Commonwealth places'. In this area of law and practice, it is often asserted that the Commonwealth is immune from State environmental laws. However, one must identify the circumstances in which the notion of Commonwealth immunity from State laws is genuinely applicable, and those where it is not. This is especially important because of recent judicial decisions. Where it turns out to be the case that the

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[17] House of Representatives Standing Committee on Environment, Recreation and the Arts (1997), *Environmental Management of Commonwealth Land: A review of Audit Report No.31 - Environmental Management of Commonwealth Land : Site Contamination and Pollution Prevention*, March, 43pp., at p.15-16.
[18] COAG Communique, 7.11.97.; *Sydney Morning Herald*, 8.11.97, p.7.

Commonwealth is not bound by State laws, it is still open to the Commonwealth to enact legislation to bind itself to State laws. The present bill, to some extent, falls into this category of laws.

The capacity of States to effectively make laws that regulate the activities of the Commonwealth is somewhat limited by the Constitution, which provides three potential sources of immunity for the Commonwealth from State laws. These are: the operation of s.52(i);[19] the operation of s.109 ('the inconsistency provision');[20] and the operation of a general implied immunity sometimes referred to as the *Cigamatic* immunity. This is an immunity founded in judicial interpretation of the Constitution based on the inherent qualities of Australia's federal system of government.[21]

The general position taken by the Commonwealth has long been that it is not bound by State environment protection laws, due to the operation of various immunities and the inconsistency provision of the Constitution. However, the High Court's decision of August 1997 in *Henderson* has considerably reduced the extent to which the Commonwealth and its agents can claim a broad Constitutional immunity from State laws.[22] The Court found that NSW residential tenancy applied to the activities of the Defence Housing Authority. A 6:1 majority rejected the broad proposition that the Commonwealth cannot be bound by State legislation. The Court laid down a general proposition that:

> Certain State laws of general application are capable of binding the Commonwealth. In order to determine whether a particular State law binds the Commonwealth it will still be necessary to determine whether, as a matter of statutory construction, the State law is intended to have that effect.[23]

The question of binding the Commonwealth is determined partly by an examination of the scope of any clause within the particular State Act under examination which purports to bind the Crown to see whether the clause can be interpreted as also applying to the Crown in the right of the Commonwealth as well as the State.

It cannot be said that questions concerning the meaning and extent of any given possible inconsistency or immunity are straightforward. In some cases doubts will exist as to the extent of the Commonwealth law and thus, the degree to which State environmental laws will apply. If an immunity does in fact apply, it will fall to Commonwealth legislation or policy to provide the environmental protection framework. A case by case approach is necessary.[24]

According to the Office of the Australian Government Solicitor:

> The decision in *Henderson* emphasises the importance of s.109 of the Constitution in ensuring the Commonwealth enjoys a paramount position within its area of legislative competence. In future 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.[25]

How does the Bill alter the application of State laws to the Commonwealth ?

The Bill does not attempt to apply provisions of all State environmental laws to the Commonwealth. It only applies State laws that are 'implementing a NEPM'. It only allows for their application by

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[19] Hanks, P. (1996) *Constitutional Law in Australia*, 2nd edition, Butterworths, p.255-7; see also *Svikart v Stewart* (1994) 181 CLR 548 (5:2 decision; NT criminal code applicable to offence committed on RAAF base).
[20] *Botany MC v Federal Airports Corporation* (1992) 175 CLR 453.
[21] *Commonwealth v Cigamatic* (1962) 108 CLR 372 at 378; Dixon J in *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 509 at 528; *Trade Practices Commission v Manfal Pty Ltd [No.2]* (1990) 97 ALR 231 at 239-240 per Wilcox J; (1990) 27 FCR 22 at 31.
[22] *Re The Residential Tenancies Tribunal of NSW and Henderson; Ex Parte Defence Housing Authority ('Henderson')*, High Court of Australia, No.S75 of 1996, discussed in Australian Government Solicitor (1997), 'The Commonwealth's Implied Constitutional Immunity from State Law', *Legal Briefing* No.36, 30 August 1997.
[23] Australian Government Solicitor (1997), 'The Commonwealth's Implied Constitutional Immunity from State Law', *Legal Briefing* No.36, 30 August 1997, p.4.
[24] ibid
[25] ibid, p.5.

means of declarations (in Parts 2 and 3). The reach of these declarations may be limited by 'national interest' and other exemptions.

It is unlikely that the Bill will resolve the wider question of which State environmental laws will apply to the Commonwealth. The Bill only addresses this question peripherally, by subjecting the Commonwealth to specified provisions of State laws which purport to implement NEPMs. However, as the Bill chooses not to subject the Commonwealth to the majority of State environmental laws, in fact only addressing a small proportion of them, the larger questions and uncertainties about possible Commonwealth immunity from State environmental laws in a given situation are likely to persist.

This uncertainty is likely to be compounded by the operation of certain subject specific legislative confirmations of immunity (eg for airports), and by the operation of exemptions within the Bill. A senior legal policy officer of a State Environment Protection Authority expressed the view that: "The Bill exacerbates the existing uncertainties. No-one knows if and when State laws will apply."[26]

Laws to confirm or extend immunity in specific areas

The complicated legal landscape into which the Bill is entering is further complicated by a number of pre-existing statutory regimes conferring specific exemptions. These laws confer immunity from State environmental laws upon several specific Commonwealth authorities and activities. Such legislation applies to airports, telecommunications, Australian Defence Industries Ltd, and ANSTO.[27]

Potential Defects In The Nepm Approach

The effectiveness of the NEPM approach in achieving environmental protection goals will ultimately depend on the quality of the NEPMs themselves. This will be partly dictated by the capacity of the NEPC to make NEPMs of adequate quality.

The use of Ministerial Councils to address pressing national environmental problems was criticised by Professor Bates as long ago as 1992, when he wrote:

> Despite expanding federal constitutional power, it seems that governmental emphasis through 'cooperative federalism' will be geared to bolstering the role of ministerial councils and other co-operative arrangements despite the fact that they have been of limited effect in delivering national environmental policies in the past...Ministerial Councils would not be the quickest or most certain means of achieving consensus on strategies for action...[28]

Related criticism is that because of the difficulties in reaching consensus as to the content of national environmental standards, it is possible that the NEPC will be tempted to settle upon 'lowest common denominator' outcomes. A Victorian Parliamentary Committee in 1994 described the NEPM approach as 'sub-optimal', for several additional reasons:

- a NEPM may constitute a goal, guideline, protocol or standard. As such, NEPMs may in effect be no more than statements of policy, that fall short of mandatory standards;
- NEPMs relate to ambient air and water quality and not to the quality of emissions from specific sources. This potentially makes it extremely difficult for emissions from Commonwealth agencies to be subjected to EPA controls.[29]

The making of NEPMs is constrained by a statutory requirement to have regard to a range of social, economic and regional factors.[30] Among these are requirements to consider the environmental, economic and social impact of the measure; and any regional environmental differences in Australia.

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[26] P rs. comm., 18.11.97.
[27] s.116(1) *Telecommunications Act 1991, Telecommunications (Exempt Activities) Regulations* 1991, s.122A Defence Act 1903, s.7A *Australian Nuclear Science and Technology Organisation Act 1987*, s.11A(2)(b) *Civil Aviation Act 1988*, r.9 *Federal Airports Regulations 1992*.
[28] Bates (1992) *Environmental Law in Australia*, 3rd edition, Butterworths, pp.66-8.
[29] Environment and Natural Resources Committee of the Parliament of Victoria, *The Environmental Impact of Commonwealth Activities and Places in Victoria*, November 1994, 226pp at p.169.

The NEPM Bill compounds the difficulties already inherent in the NEPM scheme. A crucial point about the Bill is that it does not seek to bind the Commonwealth and its agencies to *all* relevant State and Territory environment protection laws. It merely aims to bind the Commonwealth to *certain* State laws, where those laws implement NEPMs.

Relevant factors within the Bill include the extent of exemptions for the Commonwealth provided in the Bill for 'national security' and 'administrative efficiency'.

The Bill provides a range of methods by which the Commonwealth can implement NEPMs, in order that they will apply to the Commonwealth. These are by:

applying certain State laws to Commonwealth places;

applying certain State and Territory laws to Commonwealth activities;

the making of regulations;

environmental audits or environmental management plans; and

the use of existing Commonwealth laws.

Conclusion

Many will welcome the *NEPM Implementation* Bill as a step towards realising the important goal of nationally uniform environmental protection standards.

Some observers have suggested that the Bill has a number of serious shortcomings.[31] The provisions of the Bill which state that the Commonwealth and its agencies are not to be subject to criminal sanction under State law, and are not to be required to obtain permits, authorisations, or environmental impact statements under State law have received particular criticism.

The Bill will apply selected provisions of State environmental laws to the Commonwealth in order to implement NEPMs. However, at this stage NEPMs can only be made on a limited range of subjects. The effectiveness of this Bill depends fundamentally on the quality of the NEPMs it implements, and the method by which that implementation is attempted.

Critics also ask whether the approach embodied in the Bill is consistent with the Commonwealth's commitment at COAG in November 1997, to work towards 'improved compliance with State environment and planning legislation.'

The issue of the environmental performance of federal facilities and agencies is a significant one. It has also often been overlooked. The United States[32] and Canada have both attempted to confront aspects of similar problems. Let us hope that Australia does not squander this opportunity to address the problem.

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[30] s.15 *NEPC Act*.

[31] Refer to submissions on the Bill by the ACT Government, NSW Government, and EDO (NSW) to the Senate Environment, Recreation, Communication and the Arts Committee, January 1998.

[32] In the United States, the considerable extent of the contribution of Federal facilities to the total pollution load is well recognised, and consequently this source of pollution is well regulated, by specific clauses waiving Crown immunity, in addition to a *specific Federal Facilities Compliance Act 1992* and several Executive Orders (Nos 12580, 12856, 12873, 12902, 12843, 12844, 12845, 12088).. See also US EPA (1996) Federal Facilities Sector Notebook : A Profile of Federal Facilities. For comment on individual federal officer liability provisions see Minister, M. (1994) "Federal Facilities and the Deterrence Failure of Environmental Laws: the Case for Criminal Prosecution of Federal Employees", 18 *Harvard Environmental Law Review* 137; Harris, C., Cavanaugh, P., (1991) "Environmental Crimes and the Responsible Government Official", 6 *Natural Resources and Environment* 20 at 23.