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Federalism in the Regulation of Chemical Pollutants in Australia

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ABSTRACT *In response to the growth of the environment movement and increasing citizen concern for the environment, the Commonwealth and the Australian states moved to set up government departments of environment, or Environment Protection Agencies, in the early 1970s. At first the issues which engaged the public were 'green' ones, involving land and marine degradation, biodiversity (a term not then in use), and activities such as logging, mining and the generation of hydro-electric power. These were soon joined on the public agenda, however, by concerns over 'brown' issues such as chemical pollution and the management of hazardous chemicals and chemical wastes, but these were less well understood by the general public than the more visible 'green' issues. At this time, also, Australian governments took significant steps to achieve nationally consistent regulation through the work of ministerial councils, notably the Australian Environment Council (AEC) and subsequently the Australian and New Zealand Environment and Conservation Council (ANZECC). A further wave of environmentalism in the late 1980s and early 1990s, coupled with further development of the federalism model for environmental regulation that flowed from high-level inter-government meetings that were formalised as the Council of Australian Governments (COAG), gave rise to the formation of the National Environment Protection Council (NEPC). This body, while not giving more power to the Commonwealth, achieves national harmonisation of regulations through slightly more coercive processes than are available to the older-style ministerial councils. These continue to exist, however, operating in parallel with NEPC. For chemicals coming into use, there are national schemes under which the Commonwealth, states and territories regulated industrial, agricultural and veterinary chemicals, therapeutic substances, and food additives. Most 'brown' issues, however, remain with the successor to ANZECC, the Environment Protection and Heritage Council, as part of which NEPC continues to develop national approaches. In both periods of rapid change, there was a coincidence of environmentalism and federalism, but international developments were also important—in the first phase the United Nations' first 'environment' meeting, held in 1972 in Stockholm, and in the second the developments flowing from the so-called 'Earth Summit' held in Rio de Janeiro in 1992. Although public environmentalism continues to be mainly concerned with 'green' issues, the 'brown' issues remain a focus for governments and some non-government organisations.*

Keywords: waste chemicals, pollution, regulation, policy, Commonwealth–state cooperation, national–international influences.

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Introduction

In this paper I shall attempt to place the growth of environmental legislation, which has as its object the prevention or minimisation of chemical pollution in Australia, in the twin contexts of federalism and environmentalism, two 'isms' which have had profound and sometimes conflicting effects on Australian life in the middle and latter years of the twentieth century. Federalism will be discussed here, not in a general sense, but only insomuch as it impacts on the theme of the paper, for excellent accounts are available of the processes leading to federation in 1901[1] and of the federal system of government.[2] To see the roots of environmentalism we need to traverse a similar time period. An important dimension of European migration to Australia in the nineteenth and twentieth century was the move from crowded, polluted and unhealthy environments to a land of wide spaces, sunshine and pristine environment.[3] This is the stuff of myth, but there is a deeper reality: there was—indeed, still is—more space, more sunshine and less pollution, although little of the Australian environment could now be considered pristine and some of Australia's larger cities suffer from significant levels of air, water and land pollution.[4]

For many years there has been a strong conservation movement in Australia, made up mainly of local and state-based groups but with two national organisations, the Australian Conservation Foundation and Greenpeace Australia, being especially active in the last two decades. During this period there has also been a shift from the original 'conservation' basis of community concern and activism ('green' issues), towards concern with 'brown' issues such as industrial pollution and damage to air quality caused by automotive transport and other mobile and stationary sources. Although anti-nuclear sentiments have been the drivers of some of the most visible environmental activism of the last quarter of the twentieth century, radioactive substances are set apart from chemical 'brown' issues and not discussed here. Most accounts of environmentalism, and especially those dealing with state and Commonwealth responsibilities, have concentrated on the nature of the political process and on conservancy and 'green' issues[5] although a few of them have touched briefly on urban issues and pollution.[6] Over the same period, more effort has been expended in Australia to get a national approach rather than one based solely on state and territory legislation and regulation. The methods by which this has been achieved, and the nature of the ensuing action to combat chemical pollution, form the subject matter of this article.

While chemicals entering the environment as pollutants are the subject of this article, chemicals becoming available for legitimate use are regulated by one of four national schemes, all of which divide responsibilities between the Commonwealth, on the one hand, and the states and territories on the other. These schemes date from the early 1990s, and their formation involved the states and territories ceding some of their powers, especially those for registration and assessment, to the new Commonwealth agencies while retaining power to regulate local activities.

The National Industrial Chemicals Notification and Assessment Scheme (NICNAS) owes it existence to a 1989 Act, and rests within the National Occupational Health and Safety Commission (NOHSC). Both are now part of the Health and Aged Care portfolio, but originally they came under Employment. Strictly speaking, NICNAS lists but does not register new industrial chemicals, and as with NOHSC itself it leaves administrative details such as control of Material Safety Data Sheets to the states and territories.

Control of rural chemicals is exercised more tightly by the National Registration Authority for Agricultural and Veterinary Chemicals, which was established in 1994 under the aegis of the Agriculture, Fisheries and Forestry portfolio. Registration, assessment and review of agvet chemicals at the national level are allied with control of labelling and use by the states and territories.

The Therapeutic Goods Administration (Therapeutic Goods Act 1989) registers and assesses prescription and non-prescription medicines, including complementary ('natural') and homeopathic preparations. The Australia New Zealand Food Authority dealt with food additives from its creation in 1994: it was recently reviewed and its name changed to Food Science Australia and New Zealand.

Environmental Regulation in the Australian States

When the six colonies were federated in January 1901, and the Commonwealth of Australia was formed, the new national Constitution left much unsaid, and it was understood that unspecified powers remained with the states as part of their continuing sovereign power. Although there was a large degree of commonality in their approaches, each state did things in its own peculiar way, and management of the environment was an aspect of this in which there was particular diversity. It was many years, of course, before environmental regulation and management began to be vested in a single authority in the state rather than being distributed amongst government departments of lands, conservation, primary industries, mining and agriculture, and a host of boards and authorities with narrower charters covering such things as waterways and urban and rural planning and development. Victoria was ahead with its *Environment Protection Act 1970* which led to the formation of the country's first Environment Protection Authority the following year.[7] Some other states have similarly all-embracing Acts[8] but only New South Wales has an Environment Protection Authority like that of Victoria. Other states have kept their operational staff as part of the usual public service departmental structure, although some have established statutory authorities with the EPA title. Some jurisdictions place the function in omnibus departments, such as the Northern Territory's Department of Lands, Planning and Environment, while others have taken a further nomenclative step, as in the Australian Capital Territory which has Environment ACT, mimicking in name the Commonwealth department, Environment Australia.

Beginning in about 1970 there was a world-wide growth in environmentalism, by which I mean environmental consciousness on the part of governments, industries and citizens, largely those of the developed countries. Australia was, of course, affected by this sea change. In each of the states and at Commonwealth level, environmental legislation and regulation had existed for many years before the initiatives of the early 1970s to consolidate administration in one body, or at least a small number of bodies. In Victoria, for example, at the time of formation of its EPA, water quality was the subject of 22 Acts administered by 26 separate authorities and this instance could be multiplied many times in respect of air quality, pesticide control, and transport of hazardous materials, to name just a few of the areas which came under EPA control. Although the new Act removed much of this fragmentation, some government departments and authorities were loathe to relinquish their powers and even today EPA cabinet submissions can be opposed by other government departments who might feel their territory being encroached upon. This, of course, is the essence of Cabinet Government—that 'boundary'

issues should be settled at meetings where all views can be heard—but it can be hard for new departments to establish their areas of responsibility in the face of alternative claims. Responsibility for environmental matters in the greater Melbourne area had been the province of the Melbourne and Metropolitan Board of Works,[9] and this continued until the Board's replacement in 1993 by a set of water supply and distribution companies and an integrated parks authority, but none of these has retained the Board's wide-ranging environmental powers and responsibilities which thus devolve to the EPA.

Any EPA or its equivalent will sometimes be criticised for what is held to be lenience in its dealing with industries, particularly in the management and disposal of hazardous waste. However, a study of particular instances concluded that there was no evidence for this contention, despite it being argued vehemently by environmentalists who were not prepared to accept that the EPA, as a government agency, needs to balance political and economic factors against purely environmental ones.[10] This conceptualisation of the role of the government body as an enforcement agency—one set up to 'command and control', rather than one that needs to operate in a political environment—is very strong among environmentalists, and underlies much of the pressure they exert for national regulation which they believe will be less influenced by local loyalties and considerations. The antithesis of 'command and control' is the mixture of persuasion and incremental change that is more typical of Australian practice.

The various state authorities can be seen to share a common history, being founded in the early 1970s following a decade of growing environmental awareness—what we might term the first wave of environmentalism—and then undergoing only minor change until the early 1990s when the second wave arrived with its stronger emphasis on federalism as a way to achieve national action. In the next section these themes will be examined from a federal point of view.

Role of the Commonwealth

Crisp, in his definitive text,[11] has listed the areas of responsibility which remained with the states after federation. Since environmental matters were not of widespread concern at the time of federation, and hardly more so in 1965 when Crisp first produced his summary, we should not be surprised to find that he makes no explicit mention of this responsibility. Instead, there are entries on water and soil conservation under the general heading 'development'.[12] The balance between a broad range of state and federal responsibilities has shifted since federation, notably through Commonwealth payments to the states for health and education. Although shared funding of national environment programmes has been common, the Commonwealth has seldom borne the whole cost of anti-pollution measures. An exception is the National Pollutant Inventory, the introduction of which was largely funded (and continues to be funded) by the Commonwealth.

On environmental as on other matters there are sometimes tensions between the Commonwealth and the states and territories. This observation should not be taken to suggest that these latter jurisdictions are unanimous in their views, because it is well known that rivalries between the states, in particular between the 'developed' states of New South Wales and Victoria, and the 'developing' states of Queensland and Western Australia, go far beyond environmental matters. The foundation Director and Chairman of the Western Australia Environmental

Protection Authority (1971–77), Dr B. J. O'Brien has characterised the difference as an east–west divide which is as significant as that which divides developed and developing countries but which, he claims, is often neglected in development of national environment policy in Australia.[13]

Constitutionally, the Commonwealth government can only intervene in environmental matters where there is a direct relationship between those matters and Australian government powers.[14] There are few instances to report of the exercise of such powers, but, as an example, sand mining ventures have been effectively blocked because the Commonwealth has indicated that export licenses would not be granted for the mineral products of the proposed mines,[15] the Commonwealth relying here on its powers to regulate trade and commerce with other countries under Section 51(i) of the Constitution, whereas, in the case of proposed dams in Tasmania, it relied on its foreign affairs power to have areas of Australia protected by World Heritage listing.[16] Actions thus taken by the Commonwealth under the terms of international treaties to which Australia is a signatory may be divisive, often confrontational, but they are rare, and probably occur only when an all-or-nothing decision (such as to build a dam) has to be taken, rather than in the more normal cases of incremental change described above as typical of Australian practice.

More positive and constructive actions have flowed from cooperative federal–state mechanisms which began to evolve in the early 1970s, including formal agreements such as that on Commonwealth–state consultation over development of the Australian position in treaty negotiations.[17] An example of the smooth operation of such mechanisms has been the phase-out of ozone-depleting substances under the Montreal protocol.[18] In a few instances there has been recourse to the courts to clarify Commonwealth and states rights to deal with industrial pollution. Commenting on these, Opie describes the use of Section 51(i) of the Australian Constitution which pertains to trade and commerce, drawing attention to circumstances in which the Commonwealth has refused or threatened to refuse to issue an export licence, and speculating that the power might in future be used to limit the use of DDT and other insecticides.[19] These specific instances all involve the exercise of Commonwealth power to stop something, often a proposed development, rather than actions which would help to avoid pollution or environmental degradation.[20] Actions of this type will in future, it is thought, be dealt with under the *Environment and Biodiversity Conservation Act* 2000, but its advent is too recent to allow assessment of its impact on brown issues.

The Commonwealth Parliament had, however, begun in a more measured way to consider environmental matters, with the setting up in April 1968 of a Senate Select Committee[21] on Air Pollution which was charged 'to enquire into and report upon air pollution in Australia including (a) causes and effects (b) methods of prevention and control and (c) matters incidental thereto'. Among the recommendations of the Select Committee were that the Commonwealth should enact appropriate legislation in the territories, that a Commonwealth–State Bureau of Air Pollution should be established, and that a Division of Air Pollution should be established in CSIRO.[22] In the following month the Senate established a Select Committee 'to inquire into and report upon water pollution and quality of water for different uses in Australia' under the same headings as were provided for the air pollution study. Again, the Committee recommended a national approach, with the formation of a National Water Commission with commissioners drawn from the Commonwealth and the states.[23]

The national approach was most in demand for visible damage to the environment, but invisible 'brown' issues also found their way onto the agenda, often raised by regulatory bodies such as state EPAs and by small sections of the environment movement. One matter for which there is no specific agreement but in which there is active cooperation is that of potentially contaminated land being transferred from the Commonwealth to a state or territory. The Commonwealth is not obliged to abide by the legislation of any state or territory in which land resides, but when surplus—for example, defence—land is to be disposed of, the Commonwealth meets the local requirements for clean-up to acceptable standard.

In March 1976 the Senate recognised the need for continuing attention to environmental problems when it established its Standing Committee on Science and the Environment. One of the Committee's first undertakings was a review of the implementation of the recommendations of the 1968 Select Committee on Air Pollution.[24] Whilst observing that 'an ounce of prevention is worth a pound of cure', the Standing Committee found that in seven years since the Select Committee reported there had been little progress although the National Health and Medical Research Council had established an Air Pollution Control Sub-Committee (air pollution had always been seen as a 'health' problem), the Australian Environment Council had been formed in 1971, and existing CSIRO Divisions of Atmospheric Physics and Environmental Mechanics were 'active in the study of the influence of air pollution'. Legislation for the Australian Capital Territory was still being drafted.[25]

The first Commonwealth department with an 'environment' title was established by the Conservative coalition government in the early 1970s. The Labor government which succeeded it later that year[26] followed with a Commonwealth Department of Environment and Conservation (and the first Environment Minister, Moss Cass), later just Environment, to bring together sections with cognate interests from other Commonwealth departments. 'Environment' was often part of multi-function ministries—for example, Environment, Housing and Community Development; Science and Environment; Arts, Heritage and Environment in 1983; Arts, Sport, Environment, Tourism and Territories in 1987. Over the next five years, first Tourism, then Arts, and finally Sport and Territories were removed. In 1992 the Commonwealth Environment Protection Agency was formed as part of the department, but its functions were subsumed into the department (now the Department of Environment and Heritage) as Environment Australia, in 1997. In going about its work, however, Environment Australia frequently works with those Commonwealth departments with overlapping interests such as Agriculture, Health, and Industrial Relations which are concerned respectively with regulation of pesticides, pharmaceuticals and industrial health and safety. This is not to say, however, that there are not areas of contest between departments over specific matters that could be seen as the responsibility of more than one portfolio.

Australian Environment Council

Councils comprising the responsible ministers from the states and territories and the Commonwealth have come into existence during the last 30 years to facilitate the introduction of nationally consistent legislation and regulation in a number of fields where the formal responsibility lies with the states and not the Commonwealth.[27] In the case of uniform divorce law, there is substantially identical

legislation in all jurisdictions, but the more recent approach to 'uniform' gun laws has seen lesser conformity and the outcome is best described as 'nationally consistent' rather than 'national'. Reaching consensus through ministerial councils, a practice which began in the 1970s with meetings of those holding particular portfolios, was eventually adopted by the political leaders themselves—Prime Minister, state Premiers, territory Chief Ministers, and the president of the Local Government Association—who since 1992 have met as the Council of Australian Governments. Arriving at national consistency through ministerial councils has been said to have its downside: secrecy, lack of public participation and lack of accountability are listed by Barrie[28] in her discussion of the matter, in which she concludes that these are outweighed by the advantages of informality and the opportunities for repeated discussion of issues, leading to eventual agreement. Put more plainly, recalcitrant members[29] of the ministerial council feel the pressure exerted by their colleagues' desire to have national consistency, and a two-stage process means that many difficulties are resolved at the meetings of officials which precede the ministerial council meetings and provide a preview of positions likely to be adopted by different ministers on behalf of their jurisdictions.

The Australian Environment Council (AEC) was set up in April 1972 by the McMahon Government in preparation for Australia's participation at the United Nations' first Conference on the Human Environment, held in Stockholm in July of that year. Commonwealth preparation for the international conference involved the preparation of documents and consultation with the states and the issuing of a statement on environment policy.[30] This flurry of activity marked the beginning of serious involvement by the Commonwealth in environmental matters, at a time when few of the Australian states had established environment departments. A formal beginning can be noted in the promise of Prime Minister Gorton in 1970, during a campaign for the election of Senators, to establish a Commonwealth Office of the Environment. This was done in May 1971, but no staff were appointed—there was lengthy discussion as to whether scientists or administrators should make up the staff of the new body—and nor was a Ministry established. These necessary steps were taken in early 1972 with the appointment of Peter Howson as Minister for Environment, the Arts, Aboriginal Affairs and Tourism,[31] and the establishment of a small staff. Environmental initiatives are commonly associated with the political left, and the political role of Australia's Labor party will be touched on later in this article, but it is worth noting here that the formation of a Commonwealth environment department and the preparations for the Stockholm conference took place under a Conservative coalition government, although the first dedicated Department of Environment and Conservation was set up by the Whitlam Labor Government in 1972. Environmental matters, especially those involving industrial pollution, have usually enjoyed a broad measure of bipartisan support at national level.

Once established, the Australian Environment Council met approximately semi-annually.[32] One of its early achievements, in 1973, was an agreement on the broad principles upon which environmental impact studies would be based, an agreement formalised through the passing in December 1974 of the Commonwealth *Environment Protection (Impact of Proposals) Act*.[33] The Commonwealth clearly had the power to enact such legislation, and this *Act* was designed to be triggered by new proposals for which other existing legislation was insufficient. Domestic matters, however, were usually handled by means of agreements reached through the AEC. Actions under external affairs powers came later. In its early days the new Council

commissioned reports on a number of matters which could be seen to be of national concern in that all jurisdictions faced similar problems, and examples which are relevant to this paper include a report commissioned and received by the AEC in 1975 from a working party on air monitoring networks. Although the report was not published separately the substance of it appeared in a volume edited by a member of staff of the Department of Environment, Housing and Community Development.[34] Another working group reported on environmentally hazardous chemicals in the Australian environment,[35] drawing on the work of a body of state and Commonwealth experts established by the AEC in 1977 as the National Advisory Committee on Chemicals. Working with the International Register for Potentially Dangerous Chemicals and the United Nations Organization for Economic Cooperation and Development (OECD), this project led to the drafting in 1981 of a notification and assessment scheme for new industrial chemicals.[36] The AEC also published reports on environmental issues such as air pollution, mercury, and leaded petrol, as well as a compendium of environmental legislation.[37]

After they had operated for just a few years, the meetings of environment ministers were taken as a model for meetings of Commonwealth and state ministers with responsibility for fauna and flora and especially for national parks. Paradoxically in view of their designation, although some national parks are administered by the Commonwealth (Kakadu, Uluru, Great Barrier Reef Marine Park, for example), most are administered by the states. The environment (or equivalent) ministers came together first in January 1974 as CONCOM—the Council of Nature Conservation Ministers—which from that time existed alongside AEC. Both bodies accorded observer status to New Zealand and to Papua New Guinea, but in July 1989 New Zealand requested and was granted full membership of both ministerial councils, causing the environment body to become ANZEC although CONCOM's title and acronym remained unchanged. There were obvious overlaps in the spheres of interest of the two ministerial councils, and they occasionally met jointly, as for instance in Hobart in June 1982. An outcome of the joint meeting was the publication of a report identifying significant environment and nature conservation achievements over the past 10 years,[38] and the AEC/CONCOM Declaration on the Environment and Conservation.[39] The report listed several AEC projects involving hazardous chemicals and referred to the international links Australia enjoyed in the Environment Program of the OECD and through the United Nations Environment Programme. It forecast that in the period 1982–92 the two ministerial councils would 'remain the principal mechanisms for formal Commonwealth/State liaison on environmental protection and nature conservation', and this was indeed an accurate prediction, but change followed soon after the passing of that decade.

Rapid growth in environmental concern in the late 1960s which led to the administrative arrangements adopted by states and the Commonwealth and described above, came again in the late 1980s. Change loomed in sight when Prime Minister Hawke 'opened a period of Commonwealth–State relations when the rhetoric of cooperation was heard as often as the sound of battle'—to use Martin Painter's words[40]—when he brought the heads of government together in 1990 at a Special Premiers' Conference to seek ways to improve cooperation. Flowing from this initiative, the two ministerial councils were amalgamated in July 1991 under the rubric of the Australian and New Zealand Environment and Conservation Council (ANZECC), in which the Commonwealth, all Australian states and territories, and New Zealand were represented. Papua New Guinea, independent since 1975,

retained its observer status, and the committees of senior officials which had been associated with ANZEC and CONCOM, SCEP (Standing Committee on Environment Protection) and SCC (Standing Committee on Conservation) also remained in place to support the work of the new council. There was a parallel development in a closely related field when a ministerial council, the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ), and its officials' body, the Standing Committee on Agriculture and Resource Management (SCARM), were formed in 1992, taking over from the Australian Agricultural Council, the Australian Soil Conservation Council and the Australian Water Resources Council.

While at government level it was ministers and government officials who were the main actors, the House of Representatives Standing Committee on Environment and Conservation conducted an inquiry into hazardous chemicals in Australia,[41] and also reported upon the nature and extent of Australia's participation in international environmental organisations.[42] In this second report the Standing Committee noted Australia's involvement with the OECD Environment Committee and the United Nations Environment Programme (UNEP), the latter having the broader scope because it dealt with problems of the developing world as well as those of the more developed countries which comprised the OECD membership. Until that time Australia's involvement had been mainly with the OECD programme, and the Standing Committee heard evidence from an environment group that UNEP, which had been set up following the 1972 Stockholm conference, had been a 'brilliant failure'. Consequently, among the Standing Committee's recommendations was one that 'continued active participation' in the OECD programme was to be encouraged, and another that the role of UNEP and the level of Australian financial support for it should be reviewed.[43] The analogous Senate Committee also took an interest in hazardous chemical wastes, their 1994 inquiry being triggered by reports prepared under ANZECC auspices.[44]

These administrative arrangements proceeded in parallel with, and to some extent were driven by, the strong forces which characterised the federal politics of that period. Paul Kelly, in his account of the Labor governments of the 1980s and 1990s,[45] describes how the government of the day took up the issues, formed alliances with the environment movement, and used to electoral advantage the 'green' image so created. This was the high point of the environmental movement's influence on government, and a recent book advances the claim that there has been subsequent decline.[46] Some quantitative data published by the Australian Bureau of Statistics in 2001 suggest that situation is more complicated, with general 'concern' by respondents giving way to specific issues such as greenhouse and salinity.[47] Although the opposition conservative parties had stronger links to development interests and were less in tune with public demands for environmental protection, they had in their day taken strong measures and would show, when returned to power in 1996, that the issues at stake were largely bipartisan ones. Nonetheless, the centralist tendencies of Labor governments found a match with those of environmental organisations who concentrated their efforts on achieving change at the national level, although it is true that these organisations never abandoned state-by-state warfare in pursuit of their aims. The Prime Minister's July 1989 statement 'Our Country—Our Future',[48] whilst prepared with an election in mind, nonetheless set out an agenda for action, labelled by Kelly as 'a tolerable balance between practical solutions and political extravagance'.[49] Amongst other

issues, the special conference in October 1990 of the Prime Minister, state Premiers and the Chief Ministers of Territories considered the conflict over environmental matters, and questions of states rights *vs* Commonwealth ability and responsibility to exercise its constitutional powers. The ministers attempted to go beyond their oft-assumed feudal positions by commissioning an Intergovernmental Agreement on the Environment (IGAE), which was completed and signed by all Australian governments in 1992,[50] shortly before the United Nations Conference on Environment and Development which was held in Rio de Janeiro in June[51] and came to be known as the 'Earth Summit'. The nine ESD Working Groups established by the Hawke Government in 1990 worked for about 18 months to produce reports and recommendations that had significant influence on policies and programmes, and in the approach taken by Australia at the Rio meeting.

The year 1992 also saw the formation of the Council of Australian Governments (COAG) which formalised the interactions of the chief ministers of the various jurisdictions and facilitated joint action on environmental and many other matters. This and the Schedules to the IGAE of 1992 provided the basis for much of what was to happen over the next few years.

The Prime Minister's statement of July 1989 alluded to the sensitive issue of Commonwealth *vs* states' rights. It did not propose the formation of an overarching bureaucracy but rather suggested taking a national approach to environmental policies and strategies by working through the existing ministerial councils. However, it also revealed that the government had 'written to industry, union and conservation representatives proposing the establishment of a forum that will enable discussion of their concerns in a constructive way with a view to narrowing and resolving differences to the greatest possible extent',[52] presumably as an adjunct or advisory body to the ministerial council. Commonwealth plans went further than this, however, and shortly before the 1990 federal election, Prime Minister Hawke made an environment statement in which he pledged 'the establishment of a new federal environment protection agency to oversee national standards on pollution controls'.[53] After the election, however, Environment Minister Ros Kelly announced that the new Environment Protection Agency would be set up as a division within her department. A newspaper report appended to news of the government's decision the comment that 'the announcement is sure to raise conservationists' concerns, who believe the EPA should be an independent statutory authority'.[54] A more independent body would have been well-received by the environment movement, who saw in the proposal not just the 'closer partnership' mentioned in the initial statement but also a way to meet the preferences of environmental and industry groups for more consistent regulatory action across the nation. Governments and these two non-government constituencies had different reasons for preferring to operate a single national authority. Industry, especially those companies operating in more than one state or territory, naturally benefited if there were common regulations governing their operations. Governments, on behalf of their populations, would see advantage in common regulations which could help to avoid situations where particular states might become 'dumping grounds' for others' wastes, although experience shows that states would usually prefer national legislation to reflect their own, rather than be forced to adopt standards developed in other jurisdictions. Environmentalists were concerned about 'dumping grounds' but also placed their emphasis on one-stop-shopping for tougher environmental legislation, partly because of limitations on their funding and on the availability of their members to lobby a multiplicity of

governments. It has been suggested[55] also that they saw the power of the Commonwealth purse as the key element in Commonwealth–state cooperation and thus directed their efforts to this nucleus, but relatively little funding has flowed from the Commonwealth to the states specifically for environment protection. A detailed statement of support for the 1989 proposal, prepared by a legal academic on behalf of the Australian Conservation Foundation and Greenpeace Australia Ltd, urged 'that the Federal EPA should not be a "lame-duck" organisation, but rather should be the principal instrument for the performance of a new role by the federal government in the field of environment protection'.[56] The renaming of the responsible section of the federal bureaucracy as the Commonwealth Environment Protection Agency, rather than the establishment of the sort of national regulatory and investigative body that the environment groups had in mind, took place before the Australian Conservation Foundation and Greenpeace could publish their document but the Commonwealth government had given no indication that it was prepared to accept such advice. There was a subsequent development, however, and it could be seen to have had its genesis in Hawke's 1989 statement and the Commonwealth–state consultations which had preceded and followed it. This was the formation of the National Environment Protection Council which is the subject of the next section.

National Environment Protection Council

ANZECC and its predecessors had sought to achieve uniformity of legislation, or at least national consistency (later called harmonisation), on matters coming before it, by producing guidelines which the jurisdictions may call up in legislation, and this is expected to continue under the new ministerial council. There is great stress on the reaching of consensus at ministerial meetings, and also on attempts to assure this by the reaching of consensus at the meetings of officials which precede council meetings. The IGAE, however, provided for the establishment of a national body to make National Environment Protection Measures (NEPMs) which would be binding in all jurisdictions even in the absence of full consensus. Decisions of the NEPC were automatically to trigger complementary legislation in each jurisdiction. This resolution was given effect in the *National Environment Protection Act 1994* which was passed by the Commonwealth parliament and followed over the next year by mirror legislation in other Australian jurisdictions. While the signing of the IGAE and the establishment of the NEPC seem to provide the central regulatory authority sought by environmentalists, it needs to be borne in mind that the responsibility for implementing the decisions still rests with the states and territories. An inquiry into Commonwealth environment powers by a Senate Standing Committee[57] recently concluded, after considering submissions from NEPC and environmentalists, that there was no certainty that legal uniformity across the nation could be achieved, and that the implication that 'opting out' was acceptable was even enshrined in legislation.[58] So far, however, no 'opting out' has occurred, and harmonisation of regulation as a result of NEPC decisions is likely to make this latest multi-jurisdictional venture much more effective than those dating back several decades which never received such widespread support in the states.[59] So far, we have seen some inconsistencies persist in the face of NEPC-based harmonisation, but these are excused by the jurisdictions as being merely temporal and are expected to disappear over time. It remains to be seen how far such harmonisation will go.

The 1994 Act provided for the formation of the National Environment Protection Council (NEPC), with ministerial membership (although not necessarily a minister for the environment) from each jurisdiction. It also set out the functions and powers of the NEPC in making NEPMs and empowered it to assess and report on the implementation of the Measures and their effectiveness in participating jurisdictions. For each Measure, the NEPC is required to announce its intention to make a NEPM, then to prepare a draft Measure and an impact statement, and to undertake public consultation before finalising the Measure. The Act also sets up the NEPC Service Corporation, a Commonwealth/States secretariat, which is located in Adelaide. A most important feature of the NEPC *Act* is that it provides for voting by the Council such that a two thirds majority of members is required for the making of a decision, including a decision to make a NEPM, and that the member presiding has a deliberative vote only. The formation of the NEPC and agreement by the states and territories that NEPMs carried by a two-thirds majority would automatically be enacted in their jurisdictions *whether or not the representative of that jurisdiction voted in favour* represents a breakthrough in the way that the states and the Commonwealth may work together and promises to break deadlocks which might otherwise arise in the ANZECC forum through recalcitrance of a single jurisdiction. A way has been provided for identical, and not merely nationally consistent, legislation across the jurisdictions, but it is a way that does not involve the threat of a Commonwealth over-riding the states in the cause of perceived national interest or international obligation. For their parts, the states and territories share with the Commonwealth the legislative role and all steps leading up to it. By the end of 1999, five Measures had been adopted: the National Pollutant Inventory (February 1998), and NEPMs for Ambient Air Quality Standards (June 1998), Movement of Controlled Wastes between States and Territories (June 1998), Used Packaging Materials (July 1999, and backed by industry's entering into a voluntary Packaging Covenant) and Assessment of Site Contamination (December 1999, coming into effect in April 2000). This last Measure represents a further development of the 1992 *Guidelines for the Assessment & Management of Contaminated Sites* published jointly by ANZECC and the National Health and Medical Research Council. Development of NEPMs on diesel emissions and Air Toxics [benzene, toluene, xylene, formaldehyde, and polycyclic aromatic hydrocarbons (PAH)] are well advanced, as is an amendment to the Ambient Air Quality NEPM, extending it to finer particles $PM_{2.5}$.

A challenge ahead for environmental regulation in Australia might flow from the intention of the United Nations to establish a convention covering the use and manufacture of Persistent Organic Pollutants (POPs), which was opened for signing in 2001. While most of the substances presently on the POPs list are covered by the Management Plan for Organochlorine Pesticides, drawn up by the Scheduled Wastes group and accepted by ANZECC in 1999, some others such as polychlorodioxins and furans await regulation in Australia.[60] The National Dioxins Program, launched by Environment Australia in 2001 to coordinate environmental (include body-burden) monitoring and assessment of major emission sources, is part of Australia's response to increasing international harmonisation.

A second challenge will arise from the fact that some matters which are ostensibly regulated by the Commonwealth are, in fact, managed by the states and territories where true legal power resides. For example, although registration of agricultural and veterinary chemicals and the assessment and listing of industrial

chemicals is handled at national level, the control of use is a state/territory function. A scoping study of chemicals management in Australia, possibly leading to a full review, has recently been initiated by the new Environment and Heritage Protection Council.

Environment and Heritage Protection Council

The Environment and Heritage Protection Council (EHPC), a new ministerial council, came into being in mid–2002, following changes to natural resource and environment bodies that were agreed by COAG in June 2001. The EHPC takes over the environment protection function of ANZECC, brings in matters formerly dealt with by the Heritage ministers, and incorporates the National Environment Protection Council (NEPC) as its executive arm. The natural resource management function of ANZECC together with some functions from the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ) pass to a new Natural Resource Management Ministerial Council (NRMMC), while agriculture matters will be taken up by a third new council. The NEPC, however, will continue to have responsibility for the formation of National Environment Protection Measures.

This change represents a further consolidation of Commonwealth/state/territory arrangements for the management of chemical pollution. In the absence of truly national legislation and regulation, this federal model is increasingly important in Australia, being applied by various ministerial bodies to divorce law, biodiversity, gun ownership, workplace relations, school curricula and waste management. There is wide interest in seeing it applied to national problems such as security of water supply and the combating of salinity.

Concluding Remarks

This overview of 30 years of Commonwealth arrangements for the regulation of hazardous chemicals and chemical wastes shows clearly the two phases of development in government organisations. The first, in the early 1970s, led to the establishment of Commonwealth and state environment departments and also the ministerial council—AEC, later ANZECC—through which nationally consistent regulation was pursued. Renewed environmentalism in the late 1980s and early 1990s produced further change, which eventually produced the National Environment Protection Council. Both periods of change coincided with United Nations initiatives—the Stockholm meeting of 1972 and the Rio 'Earth Summit' of 1992—which acted as powerful drivers of action in Australia. Despite the strengthening over time of the Commonwealth's role in environmental matters, as it sought to assume and discharge international responsibilities, the authority for regulation has remained with the states and territories, and the Commonwealth has never sought to occupy the powerful position which members of the environmental movement wished for it. To achieve such hegemony would have required a change in Australia's Constitution, a step that no Commonwealth government ever seriously contemplated and one that is arguably unnecessary in view of the federal arrangements which have allowed governments a measure of independence whilst subscribing to a nationally consistent position. Instead, actions stemming from COAG and subsidiary ministerial councils established under its aegis have been the vehicles for the operation of a federal, as opposed to a national, system of

environmental legislation and regulation. This federalism has been sustained, as well, by strong support for public consultation and for involvement of representatives of the environment movement in decision-making circles. However, as mentioned earlier, this tide may be receding and it is likely that the extent of future consultation with stakeholders will be determined more by consideration of national priorities and imperatives than by seizing on issues raised by groups expressing concern. A recent OECD review of Australia's environmental performance,[61] conducted in 1997, perhaps came too early to give sufficient weight to the progress made in recent years in achieving national harmonisation in the regulation of chemical management and pollution abatement in Australia. Many of the developments covered in the present article are touched on in that report but there is little appreciation of the difficulties of taking a national approach in a federation, although a number of other OECD countries are federations—the United States, Canada, Germany, Mexico and Switzerland, for example. The course adopted in Australia has involved successive refinement of the federalism model through two major phases of environmentalism. Some useful steps have been taken and there is some prospect of further harmonisation resulting from the review of chemicals management commenced in late 2002 by the EHPC.

Notes and References

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11. Crisp, *op. cit.*

12. This categorisation is redolent of the on-going conflict between 'development' and 'environment' (including human health) which underlies protests about such matters as uranium mining, construction of urban freeways, and the siting of waste repositories.
13. O'Brien classifies Tasmania with the two developed eastern states, and includes in his definition of 'western' both Western Australia and Queensland. He seemed unsure about the classification of South Australia. B. J. O'Brien, *Environmental Strategies: 'East–West' Tensions Within Australia*, Eco Ethics, Brian J. O'Brien & Associates Pty Ltd, Perth, 1994. See also, B. O'Brien, 'East/West tensions: the missing link in Australian environmental strategies', *ATSE Focus* (Australian Academy of Technological Sciences and Engineering), 85, January/February 1995, pp. 4–12.
14. D. E. Fisher, *Environmental Law in Australia. An Introduction*, University of Queensland Press, St Lucia, 1980, pp. 19–30; S. Clark, M. Crommelin and C. Saunders (eds), *The Constitution and the Environment*, Centre for Comparative Constitutional Studies, University of Melbourne, Parkville, 1991; D. P. Barrie, *Environmental Protection in Federal States. Interjurisdictional Cooperation in Canada and Australia*, Federalism Research Centre Discussion Paper No. 18, Australian National University, Canberra, 1992; R. L. Mathews (ed.), *Federalism and the Environment*, Centre for Research on Federal Financial Relations, Australian National University, Canberra, 1985.
15. E. van Acker and E. Eddy, 'The Moreton Island sand mining conflict 1974–1990', in Walker, *op. cit.*, pp. 103–23.
16. P. J. Tighe, 'Hydroindustrialisation and conservation policy in Tasmania', in Walker, *op. cit.*, pp. 124–55; D. Lowe, *The Price of Power: The Politics Behind the Tasmanian Dams Case*, Macmillan, South Melbourne, 1984.
17. Attachment C of the meeting papers for the 14 June 1996 meeting of the Council of Australian Governments sets out the Principles and Procedures for Commonwealth–State Consultation on Treaties, and is available on the website of the department of Prime Minister and Cabinet (http://www.dpmc.gov.au/csrs/treaties.html). The State of the Environment Report 1996, *op. cit.*, includes a list of such treaties (pp. A1–A8) and bilateral arrangements (p. A9).
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21. The Commonwealth Parliament has a long-standing system of Standing Committees, which are described in G. S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901–1988. Ten Perspectives*, Melbourne University Press, Melbourne, 1989, pp. 368–81 and 393–97.
22. *Report of the Senate Select Committee on Air Pollution* (Commonwealth Parliamentary Paper No. 91 of 1970), Commonwealth Government Printing Office, Canberra, 1970.
23. *Water Pollution in Australia. Report from the Senate Select Committee on Water Pollution*, Commonwealth Government Printing Office, Canberra, 1970.
24. Senate Standing Committee on Science and the Environment, *Review of the Report of the Senate Select Committee on Air Pollution*, The Acting Commonwealth Government Printer, Canberra, 1977.
25. Such legislation was finally established in 1984: Department of Territories, *Air Pollution Ordnance. Annual Report 1984–85*, Australian Government Publishing Service, Canberra, 1986.
26. The shadow minister, Tom Uren (subsequently Minister for Urban and Regional Development) had raised the possibility (see: J. Glascott, 'In a Labor environment . . .', *The*

Australian, Thursday 4 May 1972, p. 6) that such a department could come under Urban Affairs or have a separate identity, but also presaged the passage of legislation by the Commonwealth and the states enabling the establishment of 'a joint Commonwealth and State authority to administer pollution and environmental control'. This has not yet happened except to the extent that the National Environment Protection Council (to be discussed later in this article) plays that role.

27. The ministerial councils and other power-sharing bodies are listed in the *Register of Commonwealth–State Co-operative Arrangements*, 4th revised edition, Advisory Council for Intergovernmental Relations, Hobart, 1986.
28. Barrie, *op. cit.*, pp. 25–7.
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30. *Summary Report of Australian Delegation to the United Nations Conference on the Human Environment*, Australian Government Publishing Service, Canberra, 1972.
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32. Council business was summarised in the *Australian Environment Council Newsletter*, which appeared up to four times a year between September 1971 and September 1987. The *Newsletter* also carried news from the state environment departments. Almost every issue carried some item on hazardous chemicals or chemical wastes.
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39. The *Declaration* was released on World Environment Day, 6 June 1982, commemorating the tenth anniversary of the Stockholm Conference on the Human Environment.
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41. House of Representatives Standing Committee on Environment and Conservation, *Hazardous Chemical Wastes—Storage, Transport and Disposal. First Report of the Inquiry into Hazardous Chemicals*, Australian Government Publishing Service, Canberra, March 1982; *Second Report of the Inquiry into Hazardous Chemicals*, Australian Government Publishing Service, Canberra, December 1982.

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49. Kelly, *op. cit.*, p. 533.
50. The IGAE is published as a Schedule to the *National Environment Protection Council Act 1994* and includes supplementary sections (schedules) which give a good idea of its intended scope: data collection and handling; resource assessment, land use decisions and approval processes; environmental impact assessment; national environment protection measures; climate change; biological diversity; national estate; world heritage; and nature conservation. The IGAE also includes the (for Australia) defining statement of the Precautionary Principle, which is variously reworked by protagonists in environmental disputes.
51. The meeting was attended by representatives of 176 states (including more than 100 heads of state) and adopted a number of texts, including N. A. Robinson, with P. Hassan and F. Burhenne-Guilmin, *The Rio Declaration on Environment and Development* and *Agenda 21*, Oceana Publications, New York, 1992–93, six volumes.
52. Hawke, *op. cit.*, p. 13.
53. The press coverage derived from knowledge of a speech to be made that day by the Prime Minister: 'ALP pledges funds boost for pollution', *The Australian*, Monday 19 March 1990, p. 4. It may be significant in what followed that the title of the proposed agency was given in lower case text, although by the next day the same newspaper had transformed this to a 'Federal Environment Protection Agency to monitor air and water pollution': 'The Green Guide. What the parties are offering and what the conservationists want', *The Australian*, Tuesday 20 March 1990, p. 8.
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