

**Report of the Third Review of the
National Environment Protection Council Acts
(Commonwealth, State and Territory)
December 2012**

**National Environment Protection Council Response
to the Report of the Third Review of the
National Environment Protection Council Acts
(Commonwealth, State and Territory)
April 2013**

NEPC



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This document comprises two parts.

REPORT OF THE THIRD REVIEW OF THE NATIONAL
ENVIRONMENT PROTECTION COUNCIL ACTS
(COMMONWEALTH, STATE AND TERRITORY)
DECEMBER 2012

NATIONAL ENVIRONMENT PROTECTION COUNCIL RESPONSE
TO THE REPORT OF THE THIRD REVIEW OF THE NATIONAL
ENVIRONMENT PROTECTION COUNCIL ACTS
(COMMONWEALTH, STATE AND TERRITORY)
APRIL 2013

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CONTENTS

Executive Summary	1
1 Introduction and Reviews of the National Environment Protection Council Acts	19
1.1 First Review of the National Environment Protection Council Acts—2001	20
1.2 Second Review of the National Environment Protection Council Acts—2006	21
1.3 Third Review of the National Environment Protection Council Acts	22
2 Context of the National Environment Protection Council Acts	24
2.1 National Environmental Protection	24
2.2 Standing Council on Environment and Water	24
2.3 National Environment Protection Council Agenda	25
2.4 National Environment Protection Council Governance	26
3 Opportunities for Achieving Nationally Consistent Guidance and Standards Including Best Practice Models for Environment Protection	29
3.1 Seamless Environment Protection Regulation	29
3.2 A Sustainable and Liveable Australia	29
3.3 Managing the Impacts of Growth and Enhancing Liveability	30
3.4 A Toolkit to Meet Future Need	30
3.5 Product Standards	31
3.6 Best Practice Models for Environment Protection	33
3.7 Council of Australian Governments' Reforms	35
3.8 Conclusion - Opportunities for Achieving Nationally Consistent Guidance and Standards	36
4 Effectiveness of the National Environment Protection Measures System as a Framework for Achieving National Consistency	37
4.1 Object of the National Environment Protection Council Acts	39
4.2 Effectiveness of Individual National Environment Protection Measures	39
4.3 Scope and Effectiveness of the National Environment Protection Measures System	40
4.4 Broadening the Scope of the Toolkit for National Action	41
4.5 Implementation of National Environment Protection Measures	42
4.6 Conclusion—Effectiveness of the National Environment Protection Measures System	44

5	Operation and Efficiency of the National Environment Protection Council Acts and Efficiency of the National Environment Protection Measures Process	46
5.1	Nature and Form of National Environment Protection Measures	46
5.2	Efficiency of National Environment Protection Measures Processes and Streamlining Consultation Processes	47
5.3	National Environment Protection Measure Reviews and Variation	50
5.4	Making, Amending and Revoking National Environment Protection Measures	51
5.5	Conclusion—Efficiency of the National Environment Protection Measures Process	52
6	Annual Reporting and Review of National Environment Protection Measures	53
6.1	National Environment Protection Council Annual Report	53
6.2	Reviews of the National Environment Protection Council Act	54
6.3	Reporting on Individual National Environment Protection Measures	54
6.4	Conclusion—Reporting	55
7	Efficiency of National Environment Protection Council Operations and the National Environment Protection Council Service Corporation	57
7.1	Efficiency of National Environment Protection Council Operations	57
7.2	Efficiency of the National Environment Protection Council Service Corporation	58
7.3	Conclusion—Efficiency of the National Environment Protection Council and the National Environment Protection Council Service Corporation	61
8	Conclusion	63
Attachments		
A	Terms of Reference for the Third Review	71
B	National Environment Protection Measure Activity	73
C	Model National Environment Protection Council Secretariat	74
D	Effectiveness of Individual National Environment Protection Measures	78
E	Reporting for Individual National Environment Protection Measures	84
F	History of Variations	88
G	European Union Models for Environmental Protection	91
H	Approaches to Environment Protection	93
	References	100

EXECUTIVE SUMMARY

This report presents the findings of the third review of the National Environment Protection Council Acts (Commonwealth, state and territory). Section 64 of the Commonwealth Act requires that the National Environment Protection Council cause a review to be undertaken every five years and tabled in parliament. This review of the National Environment Protection Council Acts addresses the:

1. Effectiveness of the Acts in achieving their objectives.
2. Operation of the Acts and the framework of National Environment Protection Measures they establish.
3. Effectiveness of National Environment Protection Measures as a framework for achieving nationally consistent guidance and standards, including possible alternative approaches based on best practice models.

The review also considered the efficiency of the council and secretariat operations. When formally initiating the review of the National Environment Protection Council Acts, the National Environment Protection Council also made the decision to expedite removal of the National Environment Protection Council Service Corporation. This followed extensive review of the operation of and budget for the corporation before and following its move from Adelaide to the Department of Sustainability, Environment, Water, Population and Communities offices in Canberra.

The review found that effective mechanisms for establishing consistent national standards and requirements are important elements in ensuring environment protection and minimising costs to business.

The National Environment Protection Measures framework provides a unique mechanism with clearly defined processes that enable a collaborative approach to establishing consistent national standards and requirements with flexibility in implementation to integrate with existing jurisdictional systems and to meet local requirements. There are significant benefits associated with the statutory basis for standards and requirements established through National Environment Protection Measures.

Review of the National Environment Protection Council Acts has also provided an opportunity to consider whether government has the range of tools necessary to meet future environmental challenges. Increasingly, government has moved to develop specific legislation to address environmental issues, such as the Water Efficiency Labelling Scheme. It may be more efficient—and increasingly more useful and understandable to stakeholders—to develop and use framework legislation to address environmental issues. The National Environment Protection Council Acts and the Commonwealth *Product Stewardship Act 2011* are examples of this.

In considering the tools needed to meet future environmental challenges a framework approach could be adopted, where new tools or approaches are necessary, by amending the National Environment Protection Council Act, developing new framework legislation, or amending other legislation to provide for broader application. If the Standing Council on Environment and Water determines

this proposal has merit, two issues that it is currently actively considering, namely the National Plan for Clean Air and Council of Australian Governments' Chemical Reform Program, provides a practical opportunity to apply it.

Reform of the National Environment Protection Council Acts or other legislative reform could provide a broader framework for national environmental decisions and environmental standards, including standards for the environmental performance of products and equipment—an important tool in addressing diffuse impacts on environmental quality. After almost two decades, the National Environment Protection Council Act and National Environment Protection Measures are well known to stakeholders. Consideration should be given to broadening the National Environment Protection Council Act to provide a framework for national environmental decisions and standards.

However, the National Environment Protection Council Act currently includes process prescriptions that are not consistent with contemporary administrative practices. This means that making, reviewing, varying and reporting on National Environment Protection Measures is time consuming and inefficient, and that the operation of the National Environment Protection Council and the National Environment Protection Council Service Corporation is not efficient.

There is significant opportunity to reform the National Environment Protection Council Act and the associated framework to significantly improve the operation, responsiveness and efficiency of the system. Without such reforms, use of the National Environment Protection Council Act in the future may be limited.

Improved implementation of National Environment Protection Measures and, in particular, a focus on consistency between jurisdictions will reduce business costs and improve environmental outcomes, while retaining flexibility where this is necessary.

WHAT THE ACTS ARE TRYING TO ACHIEVE

The National Environment Protection Council Acts¹ seek to ensure:

1. People enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia.
2. Decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.

The Acts establish the National Environment Protection Council and the National Environment Protection Measures as a primary mechanism to achieve these objectives.

¹ In response to the Intergovernmental Agreement on the Environment made in 1992 the Commonwealth and each Australian state and territory have passed a National Environment Protection Council Act that establishes the National Environment Protection Council and a mechanism for National Environment Protection Measures.

METHODOLOGY

The review was undertaken by a review team comprising officials from each jurisdiction. The review team considered:

- past reviews
- reviews of individual National Environment Protection Measures
- recent annual reports
- a range of governance reviews and projects that were undertaken in the process of the National Environment Protection Council Service Corporation transitioning to Canberra.

Workshops were also conducted involving senior officials from all jurisdictions. Guidance was provided by the National Environment Protection Council and the National Environment Protection Council Committee. While no new public consultation was undertaken, if the National Environment Protection Council wishes to pursue recommendations from the review then consultation should be undertaken where the regulatory burden for business and for the community is materially altered.

REVIEW FINDINGS AND RECOMMENDATIONS

The review considered past reviews, the context of the National Environment Protection Council Acts (Parts 1 and 2) and opportunities for achieving nationally consistent guidance and standards including best practice models for environmental protection (Part 3). This report contains the review's findings and recommendations on the:

- National Environment Protection Council Act in the current Council of Australian Governments' context (Part 3)
- effectiveness of the National Environment Protection Council Acts and National Environment Protection Measures framework—now and in the future (Part 4)
- operation and efficiency of the National Environment Protection Council Acts and the efficiency of the National Environment Protection Measures process (Part 5) and annual reporting and review of National Environment Protection Measures (Part 6)
- operation and efficiency of the National Environment Protection Council and the National Environment Protection Council Service Corporation (Part 7).

Recommendations are provided at the ends of these parts and are summarised below. Part 8 provides an overall assessment against the terms of reference and presents the report's conclusions.

COUNCIL OF AUSTRALIAN GOVERNMENTS' REFORMS —PART 3

Since the National Environment Protection Council Act came into effect in 1994, there have been a number of changes to the purposes and membership of overarching ministerial councils. It is important that the ministerial decision-making body overseeing the making of National Environment Protection Measures is considered in the context of the ministerial council system determined by the Council of Australian Governments.

The Council of Australian Governments has asked that references to ministerial councils that pre-date commencement of the new council system on 13 February 2011 be amended by 30 June 2016. It has requested that references be amended to refer instead to the 'Ministers with responsibility for [...]'.

This change should be considered in the context of proposals to use the National Environment Protection Council as a vehicle for making national statutory decisions, such as that considered as part of the Council of Australian Government's chemical reforms proposals. This change will require substantial redrafting of the Acts, with the focus on providing a framework for National Environment Protection Measures and potentially other national approaches, rather than on establishing the National Environment Protection Council.

- Consider amendments that give effect to adopting the Council of Australian Governments' decision to remove any references to the National Environment Protection Council in the Act and replace them with references to Ministers with responsibility for environment protection.
- The Acts should retain a process for developing National Environment Protection Measures and potentially other future national decisions.

EFFECTIVENESS OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES SYSTEM AS A FRAMEWORK FOR ACHIEVING NATIONAL CONSISTENCY, NOW AND IN THE FUTURE—PART 4

The National Environment Protection Measures framework provides a unique cooperative mechanism to establish consistent national standards, requirements, guidelines and protocols for environment protection, with flexibility in implementation to meet specific jurisdictional requirements.

The Acts provide an important statutory basis for this and define roles and processes for development, review and implementation.

The Acts have worked well to date and the National Environment Protection Measures framework is a useful tool for environmental protection. Stakeholder feedback in relation to existing National Environment Protection Measures has generally been supportive of their retention as a basis for consistent national standards and guidelines. This is particularly the case in relation to ambient

environmental quality standards and establishing a basis for consistent regulatory requirements (such as the National Pollutant Inventory and Movement of Controlled Waste).

- National Environment Protection Measures are an important tool for national action for environment protection and should be retained.

OBJECTIVES OF THE ACTS (4.1)

The review considered whether the objects of the Acts remain current and consistent with the policy intention in establishing consistent national standards and requirements. The review noted that the objects are framed in terms of the establishment of the National Environment Protection Council and that the Council of Australian Governments has required that the Standing Council on Environment and Water proceed to remove references in legislation to the National Environment Protection Council.

- Consideration should be given to amending the Act to more directly state the purpose of the Act, rather than having the object of the Act dependent on the establishment of the National Environment Protection Council.
- The objects of the Act should be amended to:
 - recognise the purpose of protection of the Australian community and the environment from harm
 - better reflect the Council of Australian Governments' objectives of a seamless and harmonised national economy.

BROADENING THE SCOPE OF THE TOOLKIT FOR NATIONAL ACTION (4.4)

The current National Environment Protection Measures framework is not always the most appropriate tool to use in response to all current and future environmental challenges. For example:

- the scope of matters for which a National Environment Protection Measure may be made is limited
- the objects of the Acts and the definitions of standard, goal and protocol² focus on ambient environmental quality. Addressing some future challenges may require a framework for nationally consistent decisions about other matters that contribute to protection of environmental quality (such as environmental performance standards for products and equipment), supported by either or both national and jurisdictional implementation
- flexibility in implementation creates additional risks when seeking to establish national requirements in relation to products for sale or occupations, due to the requirements of the *Mutual Recognition Act 1992* and supporting state and territory implementation legislation.

² The Acts identify that a National Environment Protection Measure must contain one or more of the following: standard, goal, protocol and guideline.

Current priorities of the Standing Council on Environment and Water for which these issues are relevant include:

- the National Plan for Clean Air and, as part of this, consideration of emission or other controls on products such as wood heaters and non-road diesel engines
- labelling of certain equipment in relation to noise
- the Council of Australian Governments' Chemical Reform Program, including proposals to establish a national standard-setting body and framework for developing and implementing decisions for environmental controls on industrial chemicals.

Such issues are likely to gain priority due to the increasing importance of diffuse impacts on the environment and the association of these with population growth.

The review found that there are reform opportunities to enhance the toolkit available to support national action for environment protection. In particular, the opportunities include:

- broadening the application of the existing National Environment Protection Measures framework
- amending other legislation or developing new legislation to support action on current Standing Council on Environment and Water priorities (as outlined above).

Note that in considering legislative proposals to address current Standing Council on Environment and Water priorities a framework approach should be considered to maximise the future use and application of the tools.

This would complement other frameworks for national action on environmental matters such as the Commonwealth *Product Stewardship Act 2011*.

Without such reforms the future use of National Environment Protection Measures is likely to be limited to the existing scope and application.

To the extent that new models/tools are required to establish national standards and requirements for areas beyond the scope of the current National Environment Protection Measures framework, the preferred model should be determined as each policy initiative is considered (such as product standards under the National Plan for Clean Air or the Council of Australian Governments' Chemical Reform Program).

- The scope of the National Environment Protection Council Acts should be amended to allow the National Environment Protection Council to make a National Environment Protection Measure on any environmental protection matter as determined unanimously by the National Environment Protection Council.

- Any proposal to amend the National Environment Protection Council Acts should investigate broadening the scope of the Acts and establishing a framework for national decisions implemented through jurisdictions, and enable the setting of environmental performance standards for products and equipment. The preferred approach should be determined following detailed consideration of the specific needs of any scheme.
- As the Standing Council on Environment and Water considers the National Plan for Clean Air, the Council of Australian Governments' Chemical Reform Program and other priorities, consideration should be given to adopting a framework approach in any legislative proposals to maximise the utility of the toolkit available for national action. Such proposals should include consideration of amending the National Environment Protection Council Acts, as well as alternative legislative approaches.

IMPLEMENTATION OF NATIONAL ENVIRONMENT PROTECTION MEASURES (4.5)

Flexibility in implementation to meet specific jurisdictional requirements and to integrate implementation with existing jurisdictional systems is a strength of the current framework. However, there is the opportunity to improve environmental outcomes and reduce business costs by more consistent implementation, while still retaining flexibility where this is needed. The review notes that under the Council of Australian Governments' priority for the Standing Council on Environment and Water on Seamless Environmental Regulation, agencies are focusing on practical measures to harmonise environmental regulation. Depending on the specific issues considered by each National Environment Protection Measure, there may be areas which are a priority for consistency in implementation. For example, industry has previously identified movement of wastes between jurisdictions as an area for focus on harmonisation. The Movement of Controlled Waste National Environment Protection Measure covers the movement of certain wastes between jurisdictions and provides a basis for consistency; however, further coordinating implementation is likely to improve these outcomes.

- The National Environment Protection Council should determine the most appropriate approach to support consistent implementation of each National Environment Protection Measure—focusing on areas where consistent implementation can strengthen environmental outcomes and reduce business costs.
- Where greater consistency in implementation is of benefit, particularly when inconsistent implementation has a negative impact on business, it is recommended that jurisdictions:
 - work together to pursue opportunities to improve and harmonise implementation of National Environment Protection Measures, including improved regulatory practice
 - ensure timely translation of National Environment Protection Measure requirements into jurisdictional instruments.

OPERATION AND EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS AND EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES PROCESS—PART 5

The National Environment Protection Council Act is a product of its time in terms of detailed prescriptions—the Act as currently drafted is process focused and the governance frameworks do not reflect recent advances in this area. The processes laid out in the Act are administratively cumbersome and resource intensive.

Application of the Act in the future in developing new National Environment Protection Measures will be limited unless there are significant changes to:

- the agreed scope for National Environment Protection Measures (as discussed above)
- streamline and improve processes, including reporting
- the nature and form of National Environment Protection Measures so as to support streamlined processes.

Major findings and recommendations of the review are to change processes and procedures to improve efficiency by decreasing costs and focusing efforts to maximise benefits.

NATURE AND FORM OF NATIONAL ENVIRONMENT PROTECTION MEASURES (5.1)

Consistent techniques for standards and application of technical approaches to environmental monitoring and reporting are vital to develop a clear and consistent dataset of ambient environmental conditions. It is also important that such data is collected on a regular basis—often in a synchronised manner—and kept up to date. Some National Environment Protection Measures specify such monitoring and reporting approaches, techniques and standards. However, this specificity can have a perverse outcome.

The nature and form of the National Environment Protection Measures, particularly the inclusion of detailed technical information, has contributed to the time taken to review and update the National Environment Protection Measures. This has also led to criticism about some technical information being out of date. The issue is how to best ensure rigour and direction without creating inflexible approaches that are difficult, costly and time consuming to keep up to date.

Consideration could be given to simplifying National Environment Protection Measures to focus on goals, key performance indicators, standards and high-level protocols, and referencing detailed technical information in a manner that allows it to be more readily updated.

- A contemporary model for National Environment Protection Measures should be developed that focuses on outcomes and allows for flexibility to enable rapid updates as new information becomes available.

- Any new model should ensure National Environment Protection Measures contain a clear outcome statement with goals, key performance indicators, standards and/or high-level protocols.
- Technical monitoring and reporting processes should be included in a separate subordinate instrument that can be readily amended or updated when required, while still providing certainty for business. Formal regulation impact statements or Office of Best Practice Regulation mechanisms may not be required where there is no significant business impact.

EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION MEASURES PROCESSES AND STREAMLINING CONSULTATION PROCESSES (5.2)

The review notes that the existing arrangements in the National Environment Protection Council Acts duplicate other consultation requirements and proposes that the Acts be amended to contain less prescription in relation to processes for making, varying or revoking National Environment Protection Measures. This would enable better alignment with consultation processes specified by the Council of Australian Government and relevant legislation such as the Commonwealth *Legislative Instruments Act 2003*.

When making National Environment Protection Measures, the National Environment Protection Council should specifically consider the need to include a sunset clause or, where the intent is that the National Environment Protection Measure is ongoing, a review clause. The clause should specify the frequency of review.

The Act currently requires the same process to revoke a National Environment Protection Measure as to make a National Environment Protection Measure, regardless of changes in circumstance or whether the intent of the measure was always for it to apply for a specific period (for example the Air Toxics National Environment Protection Measure).

The Act should adopt a streamlined review mechanism for subordinate instruments of National Environment Protection Measures.

- The National Environment Protection Council Act should be amended to remove prescriptions around public consultation and development of impact statements, while retaining the requirement for consultation. Further:
 - the nature and extent of consultation should be determined by National Environment Protection Council and Council of Australian Governments specified consultation processes, relevant legislation such as the *Legislative Instruments Act 2003* and any other requirements for consultation that may be in effect from time to time
 - the National Environment Protection Council should retain the ability to introduce any additional consultation mechanisms and impact statements as it sees fit.

MAKING, AMENDING AND REVOKING NATIONAL ENVIRONMENT PROTECTION MEASURES (5.4)

The process of revoking a National Environment Protection Measure is the same as the process of making a National Environment Protection Measure, including the requirement to prepare a draft of the proposed revocation and consult on an impact statement. This process is a significant barrier to revoking otherwise redundant regulation. While no National Environment Protection Measure has been revoked to date, the review has found that the Air Toxics and Diesel Vehicle Emissions National Environment Protection Measures in particular are close to having achieved their outcomes. Consideration should be given to the review of the Air Toxics and Diesel Vehicle Emissions National Environment Protection Measures to determine whether they are required in current or amended form to meet future needs or whether revocation should be considered—noting, for example, that the Air Toxics National Environment Protection Measure eight-year review is due in 2012.

When making or reviewing a National Environment Protection Measure, the National Environment Protection Council should consider including:

- a sunset clause for National Environment Protection Measures that by their nature have a limited operational life
- a requirement for review within a specified period where the nature of the National Environment Protection Measure is such that, subject to assessment of its effectiveness and efficiency, the measure should be ongoing. In this case the National Environment Protection Measure should specify that it will be reviewed within 10 years
- review of National Environment Protection Measures should focus on policy and implementation as well as the detailed scientific methodology—with the aim of determining the ongoing need for each National Environment Protection Measure and moving towards better and more responsive frameworks
- National Environment Protection Measures should be revoked if no longer necessary and the National Environment Protection Council Act should be amended to allow for a streamlined process to revoke National Environment Protection Measures, making provision for flexibility on the method of public consultation
- consideration should be given to the ongoing costs and benefits of the Air Toxics National Environment Protection Measure and the Diesel Vehicle Emissions National Environment Protection Measure. The National Environment Protection Council should be advised on the desirability and timing of review and variation of these National Environment Protection Measures or their formal revocation under section 20 of the National Environment Protection Council Act.

ANNUAL REPORTING AND REVIEW OF NATIONAL ENVIRONMENT PROTECTION MEASURES—PART 6

NATIONAL ENVIRONMENT PROTECTION COUNCIL ANNUAL REPORT (6.1)

The requirement for preparing and tabling an annual report on implementation and effectiveness of National Environment Protection Measures should be replaced by a requirement for specified, public, internet-based reporting against key performance indicators, outcomes and deliverables as specified in the National Environment Protection Measures. This will strengthen public access to relevant information, and reduce costs associated with preparation and tabling of an overall annual report on implementation and effectiveness.

Jurisdictions should report to their parliaments on implementation of the respective Acts through existing annual reporting processes of agencies and departments. Overall implementation and effectiveness should be considered through periodic review of the Acts and National Environment Protection Measures.

The requirement for preparation and tabling of an annual report in every jurisdiction on implementation of National Environment Protection Measures should be replaced by departmental/agency annual reporting.

REPORTING ON INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES (6.3)

Information about the National Environment Protection Measures should be made regularly available to the public. Changes in reporting opportunities means much of the key information about National Environment Protection Measures is most effectively made available on the internet. For example, many jurisdictions now report ambient air quality in real time on the internet.

- National Environment Protection Measures should explicitly address the need for reporting with the aim of ensuring relevant information is made available in readily accessible forms, particularly by on the internet, for the purpose of informing the community and business sectors and for use by government in policy and decision making.
- Future reviews of National Environment Protection Measures should carefully consider the reporting requirements specific to each National Environment Protection Measure to ensure that effort is focused on producing useable, valuable and targeted information in a cost-effective manner.
- Consideration should be given to developing/refining key performance indicators for the implementation and effectiveness of National Environment Protection Measures.

- Jurisdictions should continue to report annually on data arising out of National Environment Protection Measures; however, this could be done separately via jurisdictional websites or similar means rather than in the form of tabled annual reports.
- Reporting on the effectiveness of National Environment Protection Measures should be conducted as part of a National Environment Protection Measure review process.

OPERATION AND EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION COUNCIL OPERATIONS AND THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION—PART 7

EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION COUNCIL OPERATIONS (7.1)

The Acts contain prescriptions about processes for operation of the National Environment Protection Council that limit its operation and are not consistent with contemporary legislative practice.

- The National Environment Protection Council should have more flexibility in determining its operating and meeting procedures.
- The Act should enable the National Environment Protection Council, and committees of the council, to meet and make decisions out of session, including by electronic means such as email, fax, phone or video.

EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION (7.2)

The National Environment Protection Council Service Corporation has provided important services to the National Environment Protection Council and jurisdictions for almost 20 years and has supported the effective operation of the federal approach to environment protection. The changing context of ministerial councils has warranted re-examining the need for a small, stand-alone statutory authority to provide these services.

Concurrently with the broader National Environment Protection Council Act Review, the National Environment Protection Council Committee considered the costs and governance of the National Environment Protection Council Service Corporation. In reviewing the National Environment Protection Council Service Corporation, the committee focused on establishing clear and accountable governance arrangements, particularly in relation to financial governance, and improving the efficiency of the National Environment Protection Council and the National Environment Protection Council Service Corporation.

The National Environment Protection Council concluded that the costs and risks associated with a stand-alone service corporation model could no longer be justified

and it was appropriate to amend the National Environment Protection Council Act promptly to abolish the National Environment Protection Council Service Corporation, replacing it with a fit-for-purpose modern secretariat for the National Environment Protection Council which reflects secretariat arrangements provided for other Council of Australian Governments' ministerial councils.

The Australian Department of Finance and Deregulation can give consideration to potential amendments of the National Environment Protection Council Act, via omnibus amendment to Commonwealth financial framework legislation, to move the functions of the National Environment Protection Council Service Corporation within the Commonwealth financial framework. This approach provides an opportunity to rapidly streamline the operation of National Environment Protection Council processes and secretariat services, with the possibility of new arrangements being in effect at the start of the 2013–14 financial year.

On 24 August 2012 the National Environment Protection Council endorsed the Commonwealth expediting amendment to the Commonwealth National Environment Protection Council Act to improve the efficiency of National Environment Protection Council processes, principally by bringing the functions of the National Environment Protection Council Service Corporation into the Commonwealth financial framework.

The review notes that the National Environment Protection Council has moved to abolish the National Environment Protection Council Service Corporation and replace it with a flexible, fit-for-purpose secretariat within the financial framework of the Commonwealth.

Subject to a decision to abolish the National Environment Protection Council Service Corporation, financial reporting on National Environment Protection Measure expenditure will be via annual reporting by the Commonwealth on a special account established for the purpose of, inter alia, establishing and managing National Environment Protection Measures and covering the operating costs of the secretariat.

RECOMMENDATIONS

OPPORTUNITIES FOR ACHIEVING NATIONALLY CONSISTENT GUIDANCE AND STANDARDS INCLUDING BEST PRACTICE MODELS FOR ENVIRONMENTAL PROTECTION—PART 3

COUNCIL OF AUSTRALIAN GOVERNMENTS' REFORMS (3.7)

- Consider amendments that give effect to adopting the Council of Australian Governments' decision to remove any reference to the National Environment Protection Council in the Act and replace it with references to Ministers with responsibility for environment protection.

- The Acts should retain a process for developing National Environment Protection Measures and potentially other future national decisions.

EFFECTIVENESS OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS AND NATIONAL ENVIRONMENT PROTECTION MEASURES FRAMEWORK, NOW AND IN THE FUTURE—PART 4

- National Environment Protection Measures are an important tool for national action for environmental protection and should be retained.

OBJECTS OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS (4.1)

- Consideration should be given to amending the Act to more directly state the purpose of the Act—rather than have the object of the Act dependent on the establishment of the National Environment Protection Council.
- The objects of the Act should be amended to:
 - recognise the purpose of protection of the Australian community and the environment from harm
 - better reflect the Council of Australian Governments’ objectives of a seamless and harmonised national economy.

BROADENING THE SCOPE OF THE TOOLKIT FOR NATIONAL ACTION (4.4)

- The scope of the National Environment Protection Council Acts should be amended to allow the National Environment Protection Council to make a National Environment Protection Measure on any environmental protection matter as determined unanimously by the National Environment Protection Council.
- Any proposal to amend the National Environment Protection Council Acts should investigate broadening the scope of the National Environment Protection Council Acts and establishing a framework for national decisions implemented through jurisdictions, and enable the setting of environmental performance standards for products and equipment. The preferred approach should be determined following detailed consideration of the specific needs of any scheme.
- As the Standing Council on Environment and Water considers the National Plan for Clean Air, Council of Australian Governments’ chemicals reforms and other priorities, consideration should be given to adopting a framework approach in any legislative proposals to maximise the utility of the toolkit available for national action. Such proposals should include consideration of amending the National Environment Protection Council Acts, as well as alternative legislative approaches.

IMPLEMENTATION OF NATIONAL ENVIRONMENT PROTECTION MEASURES (4.5)

- The National Environment Protection Council should determine the most appropriate approach to support consistent implementation of each National Environment Protection Measure—focusing on areas where consistent implementation can strengthen environmental outcomes and reduce business costs.
- Where greater consistency in implementation is of benefit, particularly when inconsistent implementation has a negative impact on business, it is recommended that jurisdictions:
 - work together to pursue opportunities to improve and harmonise implementation of National Environment Protection Measures, including improved regulatory practice
 - ensure timely translation of National Environment Protection Measure requirements into jurisdictional instruments.

OPERATION AND EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS AND EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES PROCESS—PART 5

NATURE AND FORM OF NATIONAL ENVIRONMENT PROTECTION MEASURES (5.1)

- A contemporary model for National Environment Protection Measures should be developed that focuses on outcomes and allows for flexibility to enable rapid updates as new information becomes available.
- Any new model should ensure National Environment Protection Measures contain a clear outcome statement with goals, key performance indicators, standards and/or high-level protocols.
- Technical monitoring and reporting processes should be included in a separate subordinate instrument that can be readily amended or updated when required, while still providing certainty for business. Formal Regulation Impact Statements or Office of Best Practice Regulation mechanisms may not be required where there is no significant business impact.

EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION MEASURE PROCESSES AND STREAMLINING CONSULTATION PROCESSES (5.2)

- The National Environment Protection Council Act should be amended to remove prescriptions around public consultation and development of impact statements, while retaining the requirement for consultation. Further:
 - the nature and extent of consultation should be determined by National Environment Protection Council and Council of Australian Governments specified consultation processes, relevant legislation such as the Commonwealth *Legislative Instruments Act 2003* and any other requirements for consultation that may be in effect from time to time
 - the National Environment Protection Council should retain the ability to introduce any additional consultation mechanisms and impact statements as it sees fit
 - consideration should be given to a streamlined National Environment Protection Measure revocation process or a specific sunset period.

MAKING, AMENDING AND REVOKING NATIONAL ENVIRONMENT PROTECTION MEASURES (5.4)

- When making or reviewing a National Environment Protection Measure, the National Environment Protection Council should consider including:
 - a sunset clause for National Environment Protection Measures that by their nature have a limited operational life
 - a requirement for review within a specified period where the nature of the National Environment Protection Measure is such that, subject to assessment of its effectiveness and efficiency, the measure should be ongoing. In this case the National Environment Protection Measure should specify that it will be reviewed within ten years.
- Review of National Environment Protection Measures should focus on policy and implementation as well as the detailed scientific methodology—with the aim of determining the ongoing need for each National Environment Protection Measure and moving towards better and more responsive frameworks.
- National Environment Protection Measures should be revoked if no longer necessary and the National Environment Protection Council Act should be amended to allow for a streamlined process to revoke National Environment Protection Measures, making provision for flexibility on the method of public consultation.
- Consideration should be given to the ongoing costs and benefits of the Air Toxics National Environment Protection Measure and the Diesel Vehicle Emissions National Environment Protection Measure. The National Environment Protection Council should be advised on the desirability and timing of review and variation of the National Environment Protection Measures or their formal revocation under section 20 of the Commonwealth *National Environment Protection Council Act 1994*.

ANNUAL REPORTING AND REVIEW OF NATIONAL ENVIRONMENT PROTECTION MEASURES—PART 6

NATIONAL ENVIRONMENT PROTECTION COUNCIL ANNUAL REPORT (6.1)

- The requirement for preparation and tabling of an annual report in every jurisdiction on the implementation of National Environment Protection Measures should be replaced by departmental/agency annual reporting.

REPORTING ON INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES (6.3)

- National Environment Protection Measures should explicitly address the need for reporting with the aim of ensuring relevant information is made available in readily accessible forms, particularly on the internet, for the purpose of informing the community and business sectors and for use by government in policy and decision making.
- Future reviews of National Environment Protection Measures should carefully consider the reporting requirements specific to each National Environment Protection Measure to ensure that effort is focused on producing useable, valuable and targeted information in a cost-effective manner.
- Consideration should be given to developing/refining key performance indicators for National Environment Protection Measures implementation and effectiveness.
- Jurisdictions should continue to report annually on data arising out of National Environment Protection Measures; however, this could be done separately via jurisdictional websites or similar means rather than in the form of tabled annual reports.
- Reporting on the effectiveness of National Environment Protection Measures should be conducted as part of a National Environment Protection Measure review process (Refer to Part 5).

OPERATION AND EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL AND THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION—PART 7

NATIONAL ENVIRONMENT PROTECTION COUNCIL OPERATIONS

- The National Environment Protection Council should have more flexibility in determining its operating and meeting procedures.
- The Act should enable the National Environment Protection Council, and committees of the council, to meet and make decisions out of session, including by electronic means such as email, fax, phone or video.

NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

The review notes that the National Environment Protection Council has moved to abolish the National Environment Protection Council Service Corporation and replace it with a flexible, fit-for-purpose secretariat within the financial framework of the Commonwealth.

Subject to the decision to abolish the National Environment Protection Council Service Corporation, financial reporting on National Environment Protection Measure expenditure will be via annual reporting by the Commonwealth on a special account established for the purpose of, inter alia, establishing and managing National Environment Protection Measures and covering the operating costs of the secretariat.

1 INTRODUCTION AND REVIEWS OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS

The Commonwealth *National Environment Protection Council Act 1994* and complementary state and territory legislation passed from 1994 to 1996 (collectively the National Environment Protection Council Acts) implemented a key platform of the 1992 Intergovernmental Agreement on the Environment to create a body to make national environment protection standards, guidelines, goals and associated protocols—National Environment Protection Measures.

The National Environment Protection Council is made up of ministers from each participating jurisdiction. The Commonwealth, state and territory governments participate in the National Environment Protection Council.

The object of the National Environment Protection Council Acts is to ensure that, by means of the establishment and operation of the National Environment Protection Council:

1. People enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia.
2. Decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.

The National Environment Protection Council Acts empower the National Environment Protection Council to make National Environment Protection Measures in the form of standards, guidelines, goals or protocols on:

1. Ambient air quality.
2. Ambient marine, estuarine and fresh water quality.
3. The protection of amenity in relation to noise (but only if differences in environmental requirements relating to noise would have an adverse effect on national markets for goods and services).
4. General guidelines for the assessment of site contamination.
5. Environmental impacts associated with hazardous wastes.
6. The reuse and recycling of used materials.
7. Motor vehicle noise and emissions (in conjunction with the National Transport Commission as set out in section (14(2))³).

The National Environment Protection Council has made seven National Environment Protection Measures, which are discussed further at 3.1 in this report. The National Environment Protection Council is also responsible for assessing and reporting on

³ References to the Act refer to the relevant section in the Commonwealth Act and the equivalent provision of the corresponding Act of each participating state and territory.

the implementation and effectiveness of National Environment Protection Measures in participating jurisdictions.

The National Environment Protection Council Act establishes the National Environment Protection Council Committee (which includes a nominee from each member of the National Environment Protection Council and has been to date an officials committee), the National Environment Protection Council Service Corporation and the National Environment Protection Council Executive Officer to support the National Environment Protection Council.

The National Environment Protection Council initially operated as a stand-alone ministerial council, then from 2001–2011 operated within the Environment Protection and Heritage Council—a body with a broader agenda of environmental and heritage issues. In 2011, following a review of the ministerial council system by the Council of Australian Governments, the Standing Council on Environment and Water was established and given responsibility for the National Environment Protection Council Acts. The National Environment Protection Council meets simultaneously with the Standing Council on Environment and Water, and the membership of both groups is generally the same.

Pursuant to section 36(aa) of the Commonwealth National Environment Protection Council Act, the National Environment Protection Council Service Corporation and the National Environment Protection Council Executive Officer have been directed to support the Standing Council on Environment and Water as well as their primary function of supporting the National Environment Protection Council.

Section 64 of the National Environment Protection Council Acts provides for a review of the operation of the Acts and the extent to which the object of the Acts has been achieved.

The National Environment Protection Council has previously reviewed the National Environment Protection Council Acts in 2001 (the McMichael Review) and 2006 (the Ramsay Review).

1.1 FIRST REVIEW OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS—2001

The first National Environment Protection Council Acts review was commissioned in 2000 and conducted by Professor Don McMichael (the McMichael Review). This review occurred soon after the Acts had become fully operational and five National Environment Protection Measures had been made, although their implementation was still in the early stages.

The terms of reference for the McMichael Review included an examination of the effectiveness of both the National Environment Protection Council 'model' and the current National Environment Protection Measures in terms of meeting the environmental protection and non-distortion objectives of the Act. The terms of reference also included an examination of the various procedural practices of the National Environment Protection Council and its development

of National Environment Protection Measures. The McMichael Review made 14 recommendations, with a focus on improvements to the National Environment Protection Council model.

In its response to the McMichael Review, the National Environment Protection Council concluded that substantial progress had been made on issues of national environmental protection and that only minor amendments to the Act, which were highlighted in the review, were needed. These amendments were:

- the establishment of a simplified procedure for implementing minor variations to the National Environment Protection Measures
- allowing the National Environment Protection Council Service Corporation to provide support and assistance to other ministerial councils
- introducing five-yearly reviews of the Act.

Each of the Acts has been amended to give effect to the findings of the McMichael Review.

1.2 SECOND REVIEW OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS—2006

In 2005 the National Environment Protection Council commissioned a second review of the Acts by John Ramsay Consulting (the Ramsay Review). The terms of reference for the Ramsay Review included an emphasis on whether the Acts had the scope to meet the requirements of the Environment Protection and Heritage Council's strategic plan and to consider the findings of the Commonwealth's 2004 governance review of the National Environment Protection Council Service Corporation, including whether it had the powers, governance structure, funding and resources to perform its function.

The Ramsay Review concluded that the National Environment Protection Council system is operating reasonably effectively, given its legislative and financial limitations'. It recognised the benefits and costs of jurisdictional participation in the National Environment Protection Measure processes and concluded that the core aspects of National Environment Protection Council activity and processes were sound. It found that National Environment Protection Measures were a useful, streamlined, reasonably cost-effective mechanism to achieve nationally consistent environmental regulation. The review made a number of recommendations aimed at updating what was considered a robust national system.

Ramsay's key recommendations included that:

- National Environment Protection Measure implementation by jurisdictions should be improved
- National Environment Protection Measure content could be updated to include measures of environmental and cost-effectiveness and to provide the National Environment Protection Council with an improved evidence base

- the Acts should be amended to enable the National Environment Protection Council to have committees to support its implementation and National Environment Protection Measure assessment function
- the choice by the National Environment Protection Council about whether to make, review or vary a National Environment Protection Measure should be underpinned by clear, consistent and streamlined policy and process documentation
- the National Environment Protection Council Acts should be amended to increase the National Environment Protection Council's scope to make National Environment Protection Measures on any environmental matter provided there were adequate safeguards.

Following the Ramsay Review, a number of policy changes were introduced to clarify and streamline the processes of the National Environment Protection Council and the service corporation. The National Environment Protection Council also agreed that the Acts be amended to include provisions to enhance National Environment Protection Measure content, implementation and performance by:

- establishing committees to assist and provide advice to the National Environment Protection Council on assessing and reporting on the implementation and effectiveness of National Environment Protection Measures
- broadening the scope of environmental protection matters for which National Environment Protection Measures can be made by providing that a National Environment Protection Measure can be made on any environmental matter as determined unanimously by the National Environment Protection Council.

Due to the time frames for the legislative process and the other high-priority issues given precedence on the Australian Government's legislative program, these amendments to the Acts did not proceed.

The legislative issues raised in the Ramsay Review remain relevant to this review.

1.3 THIRD REVIEW OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS

This third review of the National Environment Protection Council Acts was initiated by the National Environment Protection Council in mid 2012. On 24 August 2012 the National Environment Protection Council formally approved the terms of reference (Refer to Attachment—A).

The terms of reference require this review to examine and report on:

1. The operation of the National Environment Protection Council Acts as required by section 64(1)(a).
2. The extent to which the object set out in section 3 of the Act has been achieved, as required by section 64(1)(b).

3. The status and effectiveness of National Environment Protection Measures as a framework for achieving nationally consistent guidance and standards, including possible alternative approaches based on best practice models.
4. Whether any amendments to the National Environment Protection Council Acts and/or the National Environment Protection Measure process should be progressed at this time.

The review was conducted by a working group of officials (the review team) and overseen by the National Environment Protection Council Committee. The views expressed in this report are the views of the review team and do not represent the views of member jurisdictions or of the National Environment Protection Council.

The views expressed in this review do not indicate a commitment to a particular course of action.

The review was a desktop review and focused on the operation and effectiveness of the Act itself rather than reviewing individual National Environment Protection Measures and National Environment Protection Measure processes. However, the review team did consider the National Environment Protection Measures and National Environment Protection Measure processes in so far as they assisted in addressing the terms of reference. The review considered the results from previous public consultations for the individual National Environment Protection Measures and the previous Act reviews but, as no legislative changes or new National Environment Protection Measures have been made since the Ramsay Review in 2006, it was agreed that the review did not require further public consultation. The review focused on legislative, administrative and policy changes and issues since previous reviews (and issues not fully addressed in previous reviews). The review team notes that, if the National Environment Protection Council decides to consider regulatory changes that would impact on business or the community, it may wish to consult on the outcomes of this review to inform its decision making.

2 CONTEXT OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS

2.1 NATIONAL ENVIRONMENTAL PROTECTION

In 1992 the Intergovernmental Agreement on the Environment was agreed by the Commonwealth, states, territories and local government in recognition that environmental concerns and impacts respect neither physical nor political boundaries and were increasingly taking on interjurisdictional significance. Schedule 4 of the Intergovernmental Agreement on the Environment acknowledged that there was benefit to the people of Australia in establishing national environmental protection standards, guidelines, goals and associated protocols (measures) to protect the environment, and that business and markets were not distorted or fragmented by implementation of such measures. The Intergovernmental Agreement on the Environment also provided for the enactment of legislation to enable such measures.

Twenty years later the need for such measures has increased, together with an increased understanding of the environment and expectations around its protection.

There is also a stronger emphasis on the importance of a seamless national economy and the reduction of unnecessary burdens on business.

2.2 STANDING COUNCIL ON ENVIRONMENT AND WATER

The recent review by the Council of Australian Governments of its ministerial council system resulted in a council system focused on identifying and addressing strategic national priorities. As part of the council system announced in February 2011 the Council of Australian Governments established the Standing Council on Environment and Water to promote the protection of the environment and sustainable water management in order to enhance social, human health, economic and environmental outcomes in a sustainable manner for current and future generations. As a part of its broader remit, this new council is responsible for the National Environment Protection Council Acts, and incorporates the National Environment Protection Council.

The Standing Council on Environment and Water, like all Council of Australian Governments standing councils, has been established to achieve strategic themes of the Council of Australian Governments by pursuing and monitoring priority issues of national significance which require sustained collaborative efforts, and by addressing key areas of shared Commonwealth, state and territory responsibility and funding. The Standing Council on Environment and Water is tasked with pursuing Council of Australian Governments' strategic themes in relation to a sustainable and liveable Australia, a national economy driven by our competitive advantages, and closing the gap for Indigenous Australians.

At any one time a standing council will be tasked by the Council of Australian Governments with a small number of issues or reforms which it will pursue within its broad scope. These priority issues will be of national significance, warrant oversight by first ministers and be consistent with Council of Australian Governments' strategic themes. The Council of Australian Governments has initially tasked the Standing Council on Environment and Water with pursuing reform in relation to the following priority issues of national significance:

- pursuing seamless environmental regulation and regulatory practice across jurisdictions
- progressing national water reform, including through implementing the National Water Initiative, the outcomes of the forthcoming Council of Australian Governments review of the National Water Initiative, and other Council of Australian Governments' commitments on water
- implementing the National Waste Policy
- implementing a national partnership approach to the conservation and management of land, waters, the marine environment and biodiversity at the landscape and ecosystem scale, and to building resilience in a changing climate
- developing and implementing a National Plan for Clean Air to improve air quality and community health and wellbeing.

In pursuing these priorities the Standing Council on Environment and Water wishes to support the Council of Australian Governments' deregulation agenda by addressing and, if appropriate, removing unnecessary regulation. This includes streamlining processes to reduce costs for business (for example by harmonising environmental requirements and their implementation across jurisdictions) and reducing the cost of government operations.

2.3 NATIONAL ENVIRONMENT PROTECTION COUNCIL AGENDA

The National Environment Protection Council agenda supports the broader Council of Australian Governments' agenda. The existing National Environment Protection Measures support the current National Waste Policy and the development of the National Plan for Clean Air. In particular the Ambient Air Quality National Environment Protection Measure is likely to be a central statutory tool to support the outcomes of the National Plan for Clean Air.

The National Environment Protection Council has not initiated a new National Environment Protection Measure since 2004; instead it has chosen different approaches, even where the matter being addressed is similar to or the same as a National Environment Protection Measure—such as water quality guidelines. Since 2004, jurisdictions have agreed on several alternative approaches to national standard setting, including the Commonwealth *Product Stewardship Act 2011* and *Water Efficiency Labelling and Standards Act 2005*. The National Water Quality Guidelines are currently being updated with the intention that revised guidelines will be considered by the Standing Council on Environment and Water.

The development of National Environment Protection Measures is still considered a valid option available to governments to address environmental problems. National Environment Protection Measures are currently being considered as a potential means to reduce packaging impacts and establish national product standards to reduce air pollution and noise emissions.

The Ramsay Review flagged the proposal for a Product Stewardship National Environment Protection Measure. This measure was not pursued; the Commonwealth instead enacted the *Product Stewardship Act 2011*.

Since the Ramsay Review was conducted in 2006 the National Environment Protection Council has continued to focus on managing and reporting on existing National Environment Protection Measures. This has resulted in:

- reviews of five of the seven National Environment Protection Measures
- variations to two National Environment Protection Measures (National Pollutant Inventory and Diesel Vehicle Emissions)
- minor variations to three of the National Environment Protection Measures (Movement of Controlled Wastes, Used Packaging Materials (varied twice) and Air Toxics)
- remaking of the Used Packaging Materials National Environment Protection Measure to address issues with registration in the 2005 and 2010 variation processes.

In addition, work has continued on the process to vary the Assessment of Site Contamination National Environment Protection Measure which was initiated in 2007, and on a further minor variation to address drafting errors in the 2010 variation to the Movement of Controlled Wastes National Environment Protection Measure. A summary of activity for individual National Environment Protection Measures is at 3.1.

2.4 NATIONAL ENVIRONMENT PROTECTION COUNCIL GOVERNANCE

NATIONAL ENVIRONMENT PROTECTION COUNCIL OPERATIONS

The Act currently requires the National Environment Protection Council to make operational decisions regarding the National Environment Protection Council Service Corporation, including appointment of the Executive Officer. While these powers have been delegated to the committee—and, in the case of the National Environment Protection Council Service Corporation, are expected to be removed when it is extinguished via amendments to financial framework legislation—more could be done to remove the burden of operational matters from the National Environment Protection Council, particularly considering the number of out-of-session decisions the council is required to make.

The current Act is highly prescriptive in nature regarding the operations of the National Environment Protection Council and the National Environment Protection Council Committee. While some of this is still necessary given the legal regime that the council and committee operate within, parts of the Act are overly prescriptive and at variance with current Council of Australian Governments' processes.

NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

The National Environment Protection Council Service Corporation, established under the Commonwealth National Environment Protection Council Act, provides an independent secretariat to the National Environment Protection Council and the National Environment Protection Council Committee, as well as the Standing Council on Environment and Water and the Senior Officials Committee of the Standing Council on Environment and Water. The National Environment Protection Council Service Corporation is a relatively small independent corporation carrying the standing costs associated with any separate Public Service entity. It has particularly costly reporting requirements and its financial operation is only partly covered by Commonwealth financial legislation. It also maintains a completely separate financial system that is separately audited.

In June 2011 the National Environment Protection Council Service Corporation moved from Adelaide to a new office within the premises of the Commonwealth Department of Sustainability, Environment, Water, Population and Communities. Resources for the National Environment Protection Council Service Corporation are provided by the department under a service level agreement. The move of the National Environment Protection Council Service Corporation and the establishment of the new Standing Council on Environment and Water have led to a comprehensive review of existing policies and procedures.

Provisions for the establishment and running of the National Environment Protection Council Committee are prescriptive and should be determined by the National Environment Protection Council in consultation with the committee.

EXPEDITING REMOVAL OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

Concurrently with the broader National Environment Protection Council Act Review, the National Environment Protection Council Committee considered the costs and governance of the National Environment Protection Council Service Corporation. In reviewing the corporation, the committee focused on establishing clear and accountable governance arrangements, particularly in relation to financial governance, and on improving the efficiency and reducing the costs of management of the National Environment Protection Council and the National Environment Protection Council Service Corporation.

On 24 August 2012 the National Environment Protection Council agreed to support the Commonwealth expediting amendments to the National Environment Protection Council Act to improve the efficiency of National Environment Protection Council processes and bring the functions of the service corporation into the Commonwealth financial framework.

The National Environment Protection Council concluded that the costs and risks associated with the service corporation model could no longer be justified and it was appropriate to amend the National Environment Protection Council Act promptly to abolish the service corporation and replace it with a fit-for-purpose modern secretariat for the National Environment Protection Council which reflects secretariat arrangements provided to other Council of Australian Governments' ministerial councils.

The Australian Department of Finance and Deregulation is progressing amendment of the National Environment Protection Council Act, via omnibus amendment to Commonwealth financial framework legislation, to move the functions of the National Environment Protection Council Service Corporation within the broader Commonwealth financial framework. The service corporation was created under the Commonwealth legislation, so the changes do not require amendment of the state and territory Acts. Amendments will be subject to Commonwealth parliamentary processes and time frames. This approach provides an opportunity to rapidly streamline National Environment Protection Council and secretariat processes, with the possibility of new arrangements being in effect at the start of the 2013–14 financial year.

3 OPPORTUNITIES FOR ACHIEVING NATIONALLY CONSISTENT GUIDANCE AND STANDARDS INCLUDING BEST PRACTICE MODELS FOR ENVIRONMENT PROTECTION

The terms of reference for this review include consideration of the status and effectiveness of National Environment Protection Measures as a framework for achieving nationally consistent guidance and standards, *including possible alternative approaches based on best practice models*.

3.1 SEAMLESS ENVIRONMENT PROTECTION REGULATION

The object of the National Environment Protection Council Acts is to ensure that people enjoy equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia; and that decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.

A broader scope for the review fits comfortably within the terms of reference of the Standing Council on Environment and Water and supports the National Environment Protection Council's efforts to pursue seamless environmental regulation in areas of shared Commonwealth, state and territory responsibility. The review of the National Environment Protection Council Acts also provides an opportunity to consider whether jurisdictions have available the complete toolkit for national action to deliver seamless environmental regulation for environmental protection.

3.2 A SUSTAINABLE AND LIVEABLE AUSTRALIA

One of the Council of Australian Governments' strategic themes is a sustainable and liveable Australia. The National Environment Protection Council Act Review provides the opportunity to consider whether the objects of the National Environment Protection Council Act remain current and whether there are further opportunities to enhance environmental protection.

Proposals for environmental performance standards for products as the means of addressing diffuse sources of air pollution as part of the National Plan for Clean Air are an example of a mechanism to be considered as part of a toolkit for national action. The National Plan for Clean Air will also contribute to the Council of Australian Governments' strategic theme of a sustainable and liveable Australia.

3.3 MANAGING THE IMPACTS OF GROWTH AND ENHANCING LIVEABILITY

Key challenges for environment protection in Australia over the next 10 to 20 years are likely to include:

- further reducing the regulatory burden to support improved business productivity, including seamless operations across Australia
- establishing clear environmental standards and requirements and streamlined approvals processes that support business investment
- supporting and managing the impacts of economic and population growth
- enhancing liveability, particularly in our growing urban environments, and dealing with legacies such as contaminated sites and landfills
- working within an increasingly connected national and international context
- protecting productive environments that support food production and other services
- managing the impacts of increasingly diffuse sources of pollution (in part due to population growth)
- reducing cost to government.

3.4 A TOOLKIT TO MEET FUTURE NEED

In order to ensure effective and efficient environmental policy making and implementation, policy makers need to be able to select the most appropriate and effective approach from a range of possible tools. A national approach would support the Council of Australian Governments' efficiency agenda and could mirror the work under way to reform environmental regulation processes.

There are a range of issues that need cooperative engagement. These include:

- setting ambient environmental quality standards (such as air standards and water quality standards)
- establishing standard regulatory approaches (such as the National Pollutant Inventory National Environment Protection Measure and the Movement of Controlled Waste National Environment Protection Measure)
- setting product standards—noting that this is really a subset of the application of common regulatory requirements and subject to legislative (mutual recognition) requirements
- developing uniform decision-making tools to identify acceptable environmental impacts and controls (e.g. environmental controls on chemical use)
- providing common professional accreditations, technology approvals and audit schemes
- providing guidance (such as the Assessment of Site Contamination National Environment Protection Measure)

- making agreements to implement common programs.

The existing policy and legislative framework does not provide a comprehensive, integrated, streamlined and accessible mechanism to address all these current and future needs. While it is possible to address each problem separately (either through action/legislation by individual states, territories or the Commonwealth or through mirror action/legislation), this approach is likely to be inefficient and will not provide the best outcomes for government and business.

Particular consideration needs to be given to developing agreed standards. In some cases, these can only effectively be established at the national level due in part to other national frameworks, such as those set by the Commonwealth *Mutual Recognition Act 1992* and implementing legislation in states and territories which apply to standards for saleable products and professional accreditation. For example, environmental standards for products may be an important tool in responding to diffuse source pollution but can only effectively be implemented nationally.

An effective national framework for environmental requirements and standards should minimise the regulatory burden for business. By ensuring consistency between jurisdictions and minimising divergence, business and government costs can be minimised and the effectiveness of interventions potentially improved. While national consistency will usually deliver benefits, there can be circumstances where local conditions require different approaches. Therefore, there is a need to be judicious in the application of particular tools.

While further work is required to scope this reform, there may be benefit in a tool (or tools) that:

- streamlines processes for making national standards
- clearly defines tools available to address different types of national challenges
- provides a product standards framework that enables a range of applications
- allows flexibility in the use of legislation in application of national standards
- enables appropriate delegation to facilitate prompt decision making.

3.5 PRODUCT STANDARDS

There is currently no readily available tool to support development and application of national environmental product standards; however, there would be efficiencies in having a streamlined and strategic approach to address such issues at a national level.

A comprehensive toolkit of environment protection measures is necessary to meet the broad objects of environment protection and maintenance of human amenity—of which the ability to set product standards is a critical part as a tool to address diffuse sources of pollution and to ensure that Australians benefit from improvements in the environmental performance of products overseas, rather than being a market for products that are not able to be sold in other developed markets such as Europe and the United States.

To date product standards setting has been via unique legislation tailored to particular outcomes, such as water conservation via water efficiency labeling legislation. While this approach has led to useful outcomes, it risks development of environmental/product standards that are inconsistent in approach and that may not be mindful of the broader context of harmonised regulation or seamless business operating environments.

There is no satisfactory approach to establishment of national product standards. Currently the only type of National Environment Protection Measure that might be applied relates to establishment of national environment protection guidelines. Given that national uniformity is crucial to any standards approach, a guidelines approach is not appropriate. Additionally National Environment Protection Measure implementation, enforcement, and reporting are the responsibility of each jurisdiction. This process is underpinned by mirror legislation in each jurisdiction. However, the current mirror legislation approach as adopted for the National Environment Protection Council Act may not provide sufficient consistency for a product standards approach because variations in implementation from jurisdiction to jurisdiction may lessen the standards applying—that is, if one jurisdiction does not effectively implement the standards, then the standard is not effective nationally.

The main options for implementing a product standards scheme are:

1. A National Environment Protection Measure and reliance on enhanced harmonisation of implementation.
2. Commonwealth legislation only (noting that this option may not provide a comprehensive regulatory scheme).
3. Commonwealth legislation supported by a referral of powers by the states.
4. A cooperative legislation scheme through:
 - an applied laws scheme
 - a mirror legislation scheme (similar to the application of the National Environment Protection Council Act)
 - a combination of both.

Other than further amendments to the National Environment Protection Council Act (potentially by expanding the objects, including allowing for the setting of environmental standards for products and firming up commitment to joint implementation), any of the last three options above would entail either new legislation or expanding existing Commonwealth legislation, such as product stewardship legislation.

3.6 BEST PRACTICE MODELS FOR ENVIRONMENT PROTECTION

A range of models have been used in Australia and overseas for nationally (and internationally) consistent guidance, standards and requirements. Each model reflects its specific context and setting, the desired policy outcomes and the nature of the requirements, standards or guidance that was subsequently required.

For example, when considering international models for consistent guidance, requirements and standards, consideration needs to be given to the specific historical, political, cultural and constitutional context in each case. In the case of Europe, the European Union has powers to issue directives setting outcomes to be achieved by member jurisdictions, and member jurisdictions are given flexibility to achieve those outcomes in the most appropriate manner. However, the directives are accompanied by a compliance regime that ultimately can impose significant penalties on member states for failure to adequately implement the directives. (Refer to Attachment G.)

Similarly the United States federal government has powers to establish minimum requirements for implementation by United States and, where necessary, to require compliance.

By comparison the powers of the Australian Government are more constrained and this is reflected in models available for implementation in Australia.

MODELS FOR CONSISTENT APPROACHES TO ENVIRONMENT PROTECTION

Within Australia a wide range of models have been used to establish consistent national standards, requirements and guidance. The preferred model in any case is a reflection of factors including:

- the policy outcomes being sought and the nature of the intervention required to achieve them
- whether the powers to intervene most appropriately lie with the Commonwealth or with states and territories (or both for different elements of the problem)
- the extent to which flexibility or uniformity in implementation is required
- costs and benefits associated with the intervention, noting that uniform multi-jurisdictional legislative approaches can be relatively costly
- the requirement for legal standing, certainty, longevity and stakeholder confidence.

The table at Attachment H sets out a number of options or models for developing consistent national standards, guidelines and requirements, examples of the application of each of these, and the advantages and disadvantages of each. The key models, possible uses and advantages/disadvantages are as follows.

Harmonisation

- *Guidelines* For example, a guidelines-based model could be used in place of the Assessment of Site Contamination National Environment Protection Measure or the Ambient Air Quality National Environment Protection Measure. Currently the National Environment Protection Measures framework provides for streamlined translation into jurisdictional statutory schemes and the statutory basis for any guidelines assists in building stakeholder confidence. Adoption of a guidelines-based model outside the National Environment Protection Measures framework would not have these benefits. It is also possible that a regulation impact statement could still be required either at the national or jurisdictional level depending on the guidelines' use in regulatory contexts. If this were the case there would be little saving in time or cost associated with their development.
- *Intergovernmental Agreements* For example, an intergovernmental agreement could be used as the basis for establishing the National Pollutant Inventory and the Movement of Controlled Waste Framework. The requirements currently established in the National Environment Protection Measures could be presented as a model attached to the agreement, for implementation at a jurisdictional level. This may require a full regulatory development process in each participating jurisdiction. Some current National Environment Protection Measures may be more suited to this model, such as the Diesel Vehicle Emissions National Environment Protection Measure and the Air Toxics National Environment Protection Measure.

Statutory Approaches with Jurisdictional Implementation

- This model is exemplified by National Environment Protection Measures with national standards, goals, protocols or guidelines established under the National Environment Protection Council Acts, with implementation through jurisdictional arrangements.

Cooperative/Uniform Legislation

- Such a model could be used as an alternative to some National Environment Protection Measures, resulting in directly enforceable requirements and standards. For example, the requirements set out in the Controlled Waste National Environment Protection Measure could be translated into a cooperative legislative scheme that has direct enforceability. However, this would incur significant additional costs and potentially duplicate some elements of existing jurisdictional arrangements for waste movements.

Commonwealth Legislation

- Such a model is highly effective if sufficient constitutional jurisdiction exists, as with the *Greenhouse and Energy Minimum Standards Act 2012*. The legislation can set product standards and require compliance at all levels (at borders and domestically) due to constitutional powers arising from the existence of the relevant international convention. However, without a relevant international treaty there is insufficient constitutional power for the Commonwealth to comprehensively regulate activity at all levels.

Detailed analysis of the above approaches should be pursued. Principles, guidelines and criteria should be developed to identify which approach is most appropriate. The current work being undertaken to develop a National Plan for Clean Air and the Council of Australian Governments' Chemicals Reforms will be very useful in determining issues around an appropriate approach to standards setting. The Productivity Commission's *Chemicals and Plastics Regulation: Lessons for National Approaches to Regulation*, Supplement to Research Report, provides a useful summary of mechanisms for implementing national approaches.⁴

When considering these models, establishing a framework approach in legislation (such as the Commonwealth product stewardship legislation) should be considered as an addition to the toolkit available to address future environmental challenges.

To the extent that new models/tools are required to establish national standards and requirements for areas beyond the scope of the current National Environment Protection Measures framework, the preferred model should be determined as each policy initiative is considered (such as product standards under the National Plan for Clean Air, or the Council of Australian Governments' chemicals reforms).

Depending on the preferred model, this may be most effectively implemented by amendment of the existing National Environment Protection Council Acts (utilising the existing institutional infrastructure), amendment of other legislation (such as the *Product Stewardship Act 2011*), or new stand-alone legislation.

3.7 COUNCIL OF AUSTRALIAN GOVERNMENTS' REFORMS

The Council of Australian Governments has asked that references to ministerial councils that pre-date commencement of the new council system on 13 February 2011 be amended by 30 June 2016. It has requested that references should be amended to refer instead to the 'Ministers with responsibility for [...]'.⁴

It is necessary to ensure ministers are capable of making decisions within a legislative framework. To ensure clear support for any measure, the provision that a decision must be supported by the votes of at least two-thirds of the members should be retained. The goal is for clarity and certainty so that ministers can make legally binding decisions on a broad range of matters.

⁴ Productivity Commission 2009, *Chemicals and Plastics Regulation: Lessons for National Approaches to Regulation*, Supplement to Research Report, Melbourne.

3.8 CONCLUSION—OPPORTUNITIES FOR ACHIEVING NATIONALLY CONSISTENT GUIDANCE AND STANDARDS

The review has noted the value of many of the current National Environment Protection Measures and the desirability of an ongoing collaborative approach to environmental regulation. The review has identified a number of emerging needs for cooperative work that supports the objects of the National Environment Protection Council Act but finds that the National Environment Protection Council Act in its current form is not the best tool to address these emerging needs because either:

- they are outside the current scope of the Act (such as management of contaminated sites)
- the process for making National Environment Protection Measures is not sufficiently flexible to allow a high volume of binding standards to be developed and implemented quickly
- they raise mutual recognition issues that are better addressed via consistent national legislation.

4 EFFECTIVENESS OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES SYSTEM AS A FRAMEWORK FOR ACHIEVING NATIONAL CONSISTENCY

The National Environment Protection Council Acts empower the National Environment Protection Council to make National Environment Protection Measures in the form of standards, guidelines, goals or protocols on matters specified in section 14 of the Act. Once National Environment Protection Measures are made, the National Environment Protection Council must assess and report on their implementation and effectiveness.

It should be noted that review and variation processes for National Environment Protection Measures take so long that they tend to overlap—that is, reviews are required every five years but, as with the Ambient Air Quality and Assessment of Site Contamination National Environment Protection Measures, have tended to take five to six years to complete.

In considering the effectiveness of the National Environment Protection Measures system as a framework for achieving national consistency, it must be remembered that National Environment Protection Measures are intended as one of the tools available to jurisdictions to support collaborative national environmental protection. Currently, implementation of National Environment Protection Measures is at the discretion of each participating member, using laws and arrangements appropriate for each jurisdiction. Each of the existing National Environment Protection Measures addresses a complex policy area as one of a suite of tools being used by governments.

Once National Environment Protection Measures are made, the National Environment Protection Council's role is to maintain the National Environment Protection Measure and analyse and report on its implementation and effectiveness. As National Environment Protection Measure reporting is a key feature of the National Environment Protection Measures system, reporting is discussed in Part 5 of this report.

- National Environment Protection Measures are an important tool for national action for environmental protection and should be retained.
- Currently there are seven National Environment Protection Measures, as follows.

AIR TOXICS NATIONAL ENVIRONMENT PROTECTION MEASURE

This measure is to improve the information base regarding ambient air toxics within the Australian environment in order to facilitate the development of standards.

AMBIENT AIR QUALITY NATIONAL ENVIRONMENT PROTECTION MEASURE

This measure is to achieve national environment protection standards as assessed in accordance with a (set) monitoring protocol.

ASSESSMENT OF SITE CONTAMINATION NATIONAL ENVIRONMENT PROTECTION MEASURE

This measure is to establish a nationally consistent approach to the assessment of site contamination to ensure sound environmental management practices by the community, which includes regulators, site assessors, environmental auditors, landowners, developers and industry.

DIESEL VEHICLE EMISSIONS NATIONAL ENVIRONMENT PROTECTION MEASURE

This measure is to reduce exhaust emissions from diesel vehicles by facilitating compliance with in-service emissions standards from diesel vehicles.

MOVEMENT OF CONTROLLED WASTE NATIONAL ENVIRONMENT PROTECTION MEASURE

This measure is to assist in achieving the desired environmental outcomes by providing a basis for ensuring that controlled wastes which are to be moved between states and territories are properly identified, transported, and otherwise handled in ways which are consistent with environmentally sound practices for the management of these wastes.

NATIONAL POLLUTANT INVENTORY NATIONAL ENVIRONMENT PROTECTION MEASURE

This measure is to collect a broad base of information on emissions and transfers of substances on the reporting list, and to disseminate the information collected to all sectors of the community in a useful, accessible and understandable form.

USED PACKAGING NATIONAL ENVIRONMENT PROTECTION MEASURE

This measure is to reduce environmental degradation arising from the disposal of used packaging and conserve virgin materials through encouragement of re-use and recycling of used packaging materials by supporting and complementing the voluntary strategies in the Australian Packaging Covenant.

4.1 OBJECT OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS

The previous reviews considered the cost-effectiveness of the National Environment Protection Measures model. Both reviews were broadly supportive of the National Environment Protection Measures framework as a tool available to the council alongside other regulatory approaches. The Ramsay Review concluded that:

National Environment Protection Measures are a useful, streamlined, reasonably cost-effective mechanism to achieve nationally consistent environmental regulation ... However, the review finds that the potential usefulness of National Environment Protection Measures is compromised because the scope of the Act is becoming progressively outdated. (pp.13–14)

The current objectives of the National Environment Protection Council Acts are to ensure, by means of the establishment and operation of the National Environment Protection Council, that:

1. People enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia.
2. Decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.

This third review also considered whether the objects of the Acts remain current and consistent with the policy intention in establishing consistent national standards and requirements. The review noted that the objects of the Act are given effect through the establishment and operation of the National Environment Protection Council; however, the objects should directly relate to the purpose and desired outcomes of the Act. Also the language of the objects of the Act appears dated and is couched in the negative.

The review noted that the Council of Australian Governments has required that the Standing Council on Environment and Water proceed to remove references in legislation to the National Environment Protection Council.

4.2 EFFECTIVENESS OF INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES

To date the National Environment Protection Council has made National Environment Protection Measures relating to monitoring ambient air quality, general guidelines for the assessment of site contamination, managing environmental impacts associated with hazardous wastes, the re-use and recycling of used materials, and cooperative activity on reducing emissions from motor vehicles. While there have been other priority areas—including ambient marine, estuarine and fresh water quality and the protection of amenity in relation to noise—in which the National Environment Protection Council has not developed National Environment Protection Measures, many of these issues have been addressed through other regulatory or policy-based approaches. Each of the seven National Environment Protection Measures made to date is described in Attachment D.

The individual National Environment Protection Measure reviews and the National Environment Protection Council annual report cover each National Environment Protection Measure in detail; therefore this review has focused on the effectiveness of National Environment Protection Measures as a whole. National Environment Protection Measures deal with a range of needs, so the National Environment Protection Measure instruments themselves vary significantly. Each measure is discussed in turn in Attachment D, with a focus on considering how the measure supports the object of the National Environment Protection Council Acts.

4.3 SCOPE AND EFFECTIVENESS OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES SYSTEM

There have been no new National Environment Protection Measures made since 2004 and, while National Environment Protection Measures are being considered as an option under current processes to develop new measures, it is considered unlikely that new National Environment Protection Measures will be pursued in the near future. National Environment Protection Measures have been considered as a tool to address a range of issues such as emission reduction standards for non-road diesel engines, non-road spark engines and equipment, wood heaters and surface coatings (and are options in current regulation impact statements) but are not currently the preferred instrument where consistent implementation is a key requirement.

In the last eight years the National Environment Protection Council system has been limited to maintenance of existing measures and it is likely that, without changes to the scope of the National Environment Protection Council Act, this will continue to be the case. The potential usefulness of National Environment Protection Measures is compromised because the defined scope of the National Environment Protection Council Act (under section 14) is becoming progressively outdated or shifted.

The *Mutual Recognition Act 1992* and supporting state and territory implementation legislation and the *Trans-Tasman Mutual Recognition Act 1997* in particular require consistency of legislation in relation to the regulation of products and occupational licenses. The fundamental purpose of mutual recognition is to promote economic integration and increased trade between participants by reducing regulatory impediments to the movement of goods and people in registered occupations across jurisdictions. In broad terms, under mutual recognition arrangements, goods produced in or imported into one state or territory or New Zealand that may lawfully be sold in that jurisdiction may be sold in any other state or territory or New Zealand. Similarly, a person registered to practise an occupation in one state or territory is entitled to be registered to practise an equivalent occupation in another jurisdiction.

The extent to which the National Environment Protection Council can make National Environment Protection Measures is prescribed in the Act. The Act currently provides that the National Environment Protection Council may, by instrument in writing, make a measure, to be known as a National Environment Protection Measure, that relates to any one or more of the following:

- ambient air quality

- ambient marine, estuarine and fresh water quality
- the protection of amenity in relation to noise (but only if differences in environmental requirements relating to noise would have an adverse effect on national markets for goods and services)
- general guidelines for the assessment of site contamination
- environmental impacts associated with hazardous wastes
- the re-use and recycling of used materials
- except as provided in subsection 14(2), motor vehicle noise and emissions.

4.4 BROADENING THE SCOPE OF THE TOOLKIT FOR NATIONAL ACTION

The current National Environment Protection Measures framework is not always the most appropriate tool to use in response to all current and future environmental challenges. For example:

- the scope of matters for which a National Environment Protection Measure may be made is limited
- the objects of the Acts and the definitions of standard, goal and protocol⁵ focus on ambient environmental quality. Addressing some future challenges may require a framework for nationally consistent decisions about other matters that contribute to protection of environmental quality (such as environmental performance standards for products and equipment), supported by either or both national and jurisdictional implementation
- flexibility in implementation creates additional risks when seeking to establish national requirements in relation to products for sale or occupations due to the requirements of the *Mutual Recognition Act 1992* and supporting state and territory legislation.

Current priorities of the Standing Council for Environment and Water for which these issues are relevant include:

- the development of the National Plan for Clean Air and consideration of emission or other controls on products such as wood heaters and non-road diesel engines
- labelling of certain equipment in relation to noise
- the Council of Australian Government' Chemical Reform Program, including proposals to establish a national standard-setting body and national framework for environmental controls for industrial chemicals.

Such issues are likely to gain priority due to the increasing importance of diffuse impacts on the environment and the association of these with population growth.

⁵ The Acts identify that a National Environment Protection Measure must contain one or more of the following: standard, goal, protocol and guideline.

The review found that there is a reform opportunity to enhance the toolkit available to support national action for environment protection. In particular, the opportunities include:

- broadening the application of the existing National Environment Protection Measures framework
- amending other legislation or developing new legislation to support action on current Standing Council on Environment and Water priorities (as outlined above).

Note that in considering legislative proposals to address current Standing Council on Environment and Water priorities a framework approach should be considered to maximise the future use and application of the tools. This would complement other frameworks for national action on environmental matters such as the Commonwealth Product Stewardship Act. Without such reforms the future use of National Environment Protection Measures is likely to be limited to the existing scope and application.

4.5 IMPLEMENTATION OF NATIONAL ENVIRONMENT PROTECTION MEASURES

Once made by the National Environment Protection Council, each National Environment Protection Measure is tabled in, and subject to disallowance by, the Commonwealth Parliament. The National Environment Protection Council Acts provide that it is the parliament's intention that National Environment Protection Measures 'will be implemented by such laws and other arrangements as are necessary'. However, the Acts do not themselves provide the basis for regulatory action to implement National Environment Protection Measures.

How each jurisdiction chooses to implement a National Environment Protection Measure varies between jurisdictions. A common approach is to adopt a National Environment Protection Measure by reference in specific legislation. For example, section 17A of the Victorian *Environment Protection Act 1970* provides that, by Order, any National Environment Protection Measure in force at a particular time or in force from time to time, with or without modification, may be incorporated in a state environmental protection policy. A less common approach is to adopt all National Environment Protection Measures by reference. For example, section 12A of the Tasmanian *State Policies and Projects Act 1993* provides that a National Environment Protection Measure is taken to be a state policy and is taken to have been approved by both houses of parliament. For the Commonwealth, the *National Environment Protection Measures (Implementation) Act 1998* provides a basis to apply National Environment Protection Measures to its activities and to apply state and territory laws as necessary.

This variable approach to implementation is both a strength and a weakness of the National Environment Protection Measures framework. The framework allows for jurisdictions to apply the measures consistently with regional differences, with solutions tailored to the relevant jurisdictional circumstances. The ability of a National

Environment Protection Measure to be easily inserted into an existing regulatory framework is a benefit that is not realised in other national standard-setting processes.

A potential consequence of the flexible approach to implementation is inconsistency between jurisdictions and potentially higher costs and complexity for businesses working in a national market. These inconsistencies can compromise the contribution a National Environment Protection Measure is able to make to the objects of the National Environment Protection Council Act.

Both the McMichael Review and the Ramsay Review noted issues associated with National Environment Protection Measure implementation. The Ramsay Review noted that ‘the timing and mode of implementation and enforcement of National Environment Protection Measure requirements remain key issues to the achievement of national consistency’. Implementation issues were highlighted by stakeholders in the consultation on the reviews, and these observations remain relevant. Similarly this review has found that different approaches to implementation have been a potential key issue affecting the experience of business and the effectiveness of the measures in achieving the objects of the Act.

An independent review of the *National Environment Protection Measures (Implementation) Act 1998* by Baker and McKenzie found that the Act was not effective in implementing its objectives. The review outlined a number of possible options to address this, including repealing the Act and instead inserting a power in the National Environment Protection Council Acts to implement National Environment Protection Measures.

While the National Environment Protection Council Act does not give the National Environment Protection Council a role in implementation, there are other existing mechanisms to allow greater collaboration between jurisdictions which would improve the consistency of National Environment Protection Measures. There is the potential for a cross-jurisdictional group (for example the heads of environment protection agencies) to work collaboratively to improve the consistency of implementation frameworks in each jurisdiction.

The aim should be to promote consistency rather than to require consistency, unless that is necessary for effective action (such as the imposition of product standards or professional qualifications).

There are three broad approaches to, or options for, implementation of National Environment Protection Measures:

1. Uniform approach (clear standards set nationally and the same legal framework applies—either Commonwealth legislation or mirror legislation).
2. Consistent approach agreed by ministers (same uniform approach, but implementation determined by jurisdictions).
3. Harmonised approach (similar jurisdictional objectives/direction, but implementation can vary. Jurisdictions still work together to promote consistency within the context of flexibility to meet local needs).

The desired approach should be specified in a National Environment Protection Measure to provide clarity, ensure appropriate implementation and enable clear reporting against objectives.

Flexibility in implementation to meet specific jurisdictional requirements and to integrate implementation with existing jurisdictional systems is a strength of the current framework. However, there is the opportunity to improve environmental outcomes and reduce business costs by more consistent implementation while still retaining flexibility where this is needed. The review notes that, under the Council of Australian Governments' priority on Seamless Environmental Regulation, agencies are focusing on practical measures to harmonise environmental regulation. Depending on the specific issues considered by each National Environment Protection Measure, there may be areas which are a priority for consistency in implementation. For example, industry has previously identified movement of wastes between jurisdictions as an area for focus on harmonisation. The Movement of Controlled Waste National Environment Protection Measure covers the movement of certain wastes between jurisdictions and provides a basis for consistency; however, further coordinating implementation is likely to improve these outcomes.

It is proposed that consideration be given to amending the National Environment Protection Council Acts to include a power to make regulations to implement National Environment Protection Measures.

4.6 CONCLUSION—EFFECTIVENESS OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES SYSTEM

This review has found that National Environment Protection Measures can be valuable instruments giving nationally consistent legislative underpinning to support jurisdictional regulation. This is particularly true in relation to developing National Environment Protection Measures around ambient environmental quality standards; provision of guidance where legislative underpinning is valuable; and formalising an agreement to introduce consistent regulatory requirements.

The objects of the Act are high level and National Environment Protection Measures are only one element in strategies to improve environmental quality, so it is often difficult to assess their effectiveness.

The strengths of the National Environment Protection Measures system are longevity, flexibility, and the provision of statutory underpinning.

The limitations of the National Environment Protection Measures system are relatively narrow scope, costliness to develop and implement both financially and in terms of time, and inflexibility.

Implementation is the key to achieving the objects of the Act. While the Act does not preclude greater cooperation on implementation, it is not designed to facilitate this.

Any proposal to amend the National Environment Protection Council Acts should investigate broadening the scope of the Acts, establishing a framework for national decisions implemented through jurisdictions and enabling the setting of environmental performance standards for products and equipment. The preferred approach should be determined following detailed consideration of the specific needs of any scheme.

IMPLEMENTATION OF NATIONAL ENVIRONMENT PROTECTION MEASURES (4.5)

The National Environment Protection Council should determine the most appropriate approach to support consistent implementation of each National Environment Protection Measure, focusing on areas where consistent implementation can strengthen environmental outcomes and reduce business costs.

- Where greater consistency in implementation is of benefit, particularly when inconsistent implementation has a negative impact on business, it is recommended that jurisdictions:
 - work together to pursue opportunities to improve and harmonise implementation of National Environment Protection Measures, including improved regulatory practice
 - ensure timely translation of National Environment Protection Measure requirements into jurisdictional instruments.
- The National Environment Protection Council should consider amendment of the National Environment Protection Council Acts to include a power to make regulations to implement National Environment Protection Measures.

5 OPERATION AND EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS AND EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES PROCESS

The National Environment Protection Council Acts were developed in the early 1990s and contain significant detail about the processes and establishment of National Environment Protection Measures. Best practice approaches would now suggest that legislation focus more on outcomes and key performance indicators and that process prescription be kept to a minimum. The National Environment Protection Council Acts have been reviewed in this context, with the aim of removing detailed process prescriptions that are not necessary or have been overtaken by contemporary government practice.

As no National Environment Protection Measures have been made since the Ramsay Review, this review has focused on the efficiency of the National Environment Protection Measure variation process. Since 2007 there have been six National Environment Protection Measure variations undertaken or initiated, three of these being minor variations.

5.1 NATURE AND FORM OF NATIONAL ENVIRONMENT PROTECTION MEASURES

The National Environment Protection Measure reviews have generally been focused on technical issues (such as investigating the right testing protocol or monitoring method) and responding to specific issues raised by stakeholders rather than also addressing policy issues (determining if the National Environment Protection Measure is effective in achieving its goals). This has been reflected in the subsequent variations, which have predominantly addressed technical details.

This review of the National Environment Protection Council Act has found that:

- there is a significant delay between initiation of a review of a National Environment Protection Measure and any resultant change to the measure
- National Environment Protection Measures in themselves should not be lengthy documents
- much of the volume of some National Environment Protection Measures relates to detailed technical processes or measures/standards that inevitably and continually need updating as knowledge evolves
- National Environment Protection Measures are often overly prescriptive. Concern has been expressed as to the length and complexity of particular measures, which can be many hundreds of pages long. In addition the protocols in the two air National Environment Protection Measures, while not long, contain significant

prescriptive detail and references. This can obscure the purpose or intent of the measure.

The nature and form of the National Environment Protection Measures, particularly the inclusion of detailed technical information, has contributed to the time taken to review and update them. This has also led to criticism about some technical information being out of date. Lack of dedicated resources and oversight of reviews has also contributed to this. Consideration could be given to simplifying National Environment Protection Measures to focus on goals, key performance indicators, standards and high-level protocols, and referencing detailed technical information in a manner that allows it to be more readily updated.

For every National Environment Protection Measure the object to be achieved, the desired outcome sought, the key performance indicators, reporting requirements and review/evaluation mechanisms should be specified. Detailed processes or complex methodologies should be left to other instruments.

However, it is important that in the move to streamline National Environment Protection Measures and improve/streamline approaches to varying National Environment Protection Measures the National Environment Protection Council is mindful of the potential for perverse outcomes. A risk-based approach to developing and varying National Environment Protection Measures should be adopted to optimise the balance between being sufficiently detailed to provide guidance to stakeholders and yet enabling rapid/cost-effective amendment to respond to changed circumstances and/or knowledge.

5.2 EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION MEASURES PROCESSES AND STREAMLINING CONSULTATION PROCESSES

The Act prescribes in detail the consultation processes for development of a National Environment Protection Measure and the requirements for developing impact statements. Since the National Environment Protection Council Act came into force in 1994, legislative processes have evolved, and in particular the Council of Australian Governments has determined principles for consultation and the requirements for regulation impact statements. There are some inconsistencies between the National Environment Protection Council Act and the Council of Australian Governments' requirements which have resulted in the need for repetitive processes (for example the need to prepare a regulation impact statement that meets the Council of Australian Governments' requirements and also meets the requirements of the National Environment Protection Council Act).

The Act prescribes consultation processes around making and varying National Environment Protection Measures. A specific example of the process focus of the Act is the requirement in section 16 to publish a notice of intention to prepare a draft measure, which specifies that it be in a newspaper for at least two days. This is unduly prescriptive and also out of step with the way many Australians now receive

their information. It may no longer provide the accessibility and transparency initially envisaged in the Act. Consultation should include internet-based approaches.

It should be noted that the McMichael Review argued against making a National Environment Protection Measure to incorporate the water quality guidelines as it would require the guidelines to be put through the full National Environment Protection Measure development process, including repeating consultation. McMichael was concerned that this would unnecessarily delay the guidelines' adoption. The McMichael Review recommended provision for recognition of alternative, equivalent consultative processes.

COUNCIL OF AUSTRALIAN GOVERNMENTS' REGULATION IMPACT STATEMENT PROCESS

The Council of Australian Governments has put in place a rigorous process to ensure balanced and transparent decision support mechanisms including a regulation impact statement process and additional oversight by the Office of Best Practice Regulation.

- The primary role of a regulation impact statement is to improve government decision-making processes by ensuring that all relevant information is presented to the decision maker when a policy decision is being made. The regulation impact statement analysis should outline the desired objective of the response, a range of alternative options to achieve the objective, and an assessment of the impact of each option, and should be informed by effective consultation.

Generally a Council of Australian Governments' regulation impact statement process comprises a consultation and a decision regulation impact statement. This process is as follows:

- the primary purpose of the consultation regulation impact statement is to seek early feedback from stakeholders that can be used to inform the Council of Australian Governments when the final decision is being made
- a decision regulation impact statement provides more detail and is required to include particular elements such as evaluation of the compliance burden on business when complying with regulations, an assessment of the competition effects of any policy options and analysis of relevant international standards that may be affected by the proposed regulation
- the decision regulation impact statement will usually include a distributional analysis which describes the impacts of proposed policies on different groups
- the decision regulation impact statement should define any risks to implementation of any of the options, and identify appropriate responses and review their effectiveness
- a detailed consultation report, summarising feedback gathered in the consultation regulation impact statement process and any other relevant consultations, is included in the decision regulation impact statement

- the decision regulation impact statement should provide a clear statement as to which is the preferred option and why
- the decision regulation impact statement should provide information on how the preferred option would be implemented, monitored and reviewed. Interactions between the preferred option and existing regulation of the sector should be clearly identified.

ROLE OF THE OFFICE OF BEST PRACTICE REGULATION IN A DECISION REGULATION IMPACT STATEMENT

The decision regulation impact statement must be forwarded to the Office of Best Practice Regulation for clearance prior to a decision being made by a ministerial council. The Office of Best Practice Regulation will assess if the decision regulation impact statement meets the Council of Australian Governments' regulation impact statement requirements, including whether the:

- Council of Australian Governments' regulation impact statement guidelines have been followed
- analysis is robust and the depth of analysis is commensurate with the potential economic and social impacts of the proposal
- regulation impact statement presents the analysis in a balanced manner and whether the conclusions and recommendations are reasonable, on the balance of the evidence presented.

LEGISLATIVE INSTRUMENTS ACT 2003

National Environment Protection Measures are legislative instruments under the Commonwealth *Legislative Instruments Act 2003*, which also sets out consultation requirements—that is, that the lawmakers ensure that persons likely to be affected by the proposed instrument have an adequate opportunity to comment on its proposed content.

- Given the exhaustive process put in place by the Council of Australian Governments and Office of Best Practice Regulation around public consultation and analysis of the potential impacts of measures such as National Environment Protection Measures, the process put in place by the National Environment Protection Council Act is duplicative and redundant.

STREAMLINED PROCESSES

The review notes that the existing arrangements in the National Environment Protection Council Act are duplicative with other consultation requirements and proposes that the Acts should adopt alternative, less prescriptive processes for making, varying or revoking National Environment Protection Measures. This would enable better alignment with consultation processes specified by the Council of Australian Governments and relevant legislation such as the Commonwealth *Legislative Instruments Act 2003*.

When making National Environment Protection Measures, the National Environment Protection Council should specifically consider the need to include a sunset clause or, where the intent is that the National Environment Protection Measure is ongoing, a review clause. The clause should specify the frequency of review.

The Act currently requires the same process to revoke a National Environment Protection Measure as to make a National Environment Protection Measure, regardless of changes in circumstance or whether the intent of the measure was always for it to apply for a specific period. Consideration should be given to a streamlined National Environment Protection Measure revocation process or a specific sunset period.

Also, should the recommendation to move technical/process material from National Environment Protection Measures to subordinate instruments be implemented, the Act should adopt a streamlined review mechanism for subordinate instruments.

5.3 NATIONAL ENVIRONMENT PROTECTION MEASURE REVIEWS AND VARIATION

The National Environment Protection Council Act allows for National Environment Protection Measures to be varied and sets out the process for doing so. While not required by the National Environment Protection Council Act, all National Environment Protection Measures contain a clause providing for their review from between five to ten years after commencement. To date many of these reviews have led to or are expected to lead to a formal variation of the National Environment Protection Measure.

Concerns about the efficiency of the National Environment Protection Measures process were identified in the McMichael Review and addressed by amending the Act to provide the option for the National Environment Protection Council to use a streamlined process for amending National Environment Protection Measures where the change does not involve a significant change in the effect of the measure. This streamlined process, which can only be adopted with unanimous agreement of the council, replaces a requirement for a formal impact statement with a requirement for a statement of the reasons for the proposed variation, the nature and effect of the variation, and the reasons why the National Environment Protection Council is satisfied that the variation is a minor variation. The National Environment Protection Council must still conduct public consultation and have regard to submissions it receives; however, the public consultation period is shorter, with a minimum of a single month rather than the two months required for a regular variation.

The National Environment Protection Council has applied a comprehensive process of review for each National Environment Protection Measure, involving the development of an issues paper and a discussion paper, a formal public consultation process and the production of a final report. Independent reviewers have been appointed in many instances. Should the National Environment Protection Council decide that a review provides justification for variation of the National Environment Protection Measure, it can initiate a formal National Environment Protection Measure variation or minor variation process involving preparation, consultation and decisions

on draft measures and impact statements. Recent experience is that it will take at least two years, and often significantly more, between commencement of a review and the resulting National Environment Protection Measure variation. An example of an extended process is the Assessment of Site Contamination National Environment Protection Measure, for which the review commenced in 2004 and was published in 2006. The resulting variation process was initiated in 2007 but has not yet been finalised due to limited resources and the extent of new scientific work completed by the Cooperative Research Centre for Contamination.

ASSESSMENT AND REMEDIATION OF THE ENVIRONMENT

In this case the long lead time between initiating a National Environment Protection Measure review and subsequent variation of the measure has been a concern for some stakeholders. In the input to the Ramsay Review and the Assessment of Site Contamination National Environment Protection Measure review, stakeholders expressed frustration with the long lead times to update the methodologies included in the National Environment Protection Measure and to reflect significant advances in technology and knowledge in relation to soil and water contamination. These frustrations are likely to have grown over the subsequent five years.

5.4 MAKING, AMENDING AND REVOKING NATIONAL ENVIRONMENT PROTECTION MEASURES

The process of revoking a National Environment Protection Measure is the same as the process of making a National Environment Protection Measure, including the requirement to prepare a draft of the proposed revocation and consult on an impact statement. This process is a significant barrier to revoking otherwise redundant regulation. While no National Environment Protection Measure has been revoked to date, the review has found that the Air Toxics and Diesel Vehicles National Environment Protection Measure in particular are close to having achieved their outcomes. Consideration should be given to the review of the Air Toxics and Diesel Vehicle Emissions National Environment Protection Measures to determine whether they are required in a current or amended form to meet future needs or whether revocation should be considered. Note, for example, that the Air Toxics National Environment Protection Measure eight-year review is due in 2012.

The Air Toxics National Environment Protection Measure was made in 2004 with a goal to 'improve the information base regarding ambient air toxics within the Australian environment in order to facilitate the development of standards ... within eight years'. Parts of the Diesel Vehicle Emissions National Environment Protection Measure are focused on addressing older diesel vehicles, which are progressively being retired. New South Wales, for example, in its 2010–11 report on implementation and effectiveness of the Diesel Vehicle Emissions National Environment Protection Measure notes that diesel vehicles manufactured prior to 1996 (and the introduction of Australian Design Rules with tighter emissions standards for new vehicles for oxides of nitrogen and particles) comprised only 18.3 per cent of the diesel fleet in the state, with a trend of approximately four per cent reduction per year. Further, elements of the Diesel Vehicle Emissions National

Environment Protection Measure may be affected by the introduction of the National Heavy Vehicle Regulator. The relevance of both National Environment Protection Measures in their current form will further diminish over time.

It is better practice that regulations are kept up to date and only remain in force for as long as needed. The Commonwealth *Legislative Instruments Act 2003* applies a standard sunset clause of 10 years to all Commonwealth regulation. However, National Environment Protection Measures are exempt from this requirement as they are made under an intergovernmental agreement. National Environment Protection Measures should include provisions for sunset clauses or formal review.

5.5 CONCLUSION—EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES PROCESS

The review has found that there are inefficiencies in the operation of the Act which can only be addressed through legislative change. The proposed changes and implications are discussed below.

The established pathway for making a National Environment Protection Measure, the ability to prepare a single regulation impact statement to meet the needs of all jurisdictions, and the common pathways for implementation within many jurisdictions all serve to demonstrate the utility of National Environment Protection Measure processes. The Ramsay Review found that the National Environment Protection Council's legal authority, administrative structures and processes generally facilitated a streamlined nationally consistent approach. However, there are still significant costs and time associated with developing, agreeing and regulating at a national level.

The review team notes that many of the National Environment Protection Measure reviews and subsequent variation processes have focused on technical methodologies. The need to undertake a formal variation process (even a minor variation process) introduces significant delays and has the potential to limit the value of and public confidence in the National Environment Protection Measure.

For example, the Ambient Air Quality National Environment Protection Measure could include the goal, the air quality standard and the requirement to report on emissions data, and have separate to the National Environment Protection Measure agreed details on the monitoring methods and reporting protocol. Changes to the detailed supporting documents would need to be negotiated, agreed and made available but with processes appropriate to the scale, level of stakeholder concern and impact of the likely changes.

6 ANNUAL REPORTING AND REVIEW OF NATIONAL ENVIRONMENT PROTECTION MEASURES

Reporting is a key feature of the National Environment Protection Council model. The National Environment Protection Council's role, as well as making National Environment Protection Measures, is to analyse and report on the implementation and effectiveness of National Environment Protection Measures. Under the National Environment Protection Council Act both jurisdictions and the National Environment Protection Council itself report annually on the implementation and effectiveness of National Environment Protection Measures. In addition each National Environment Protection Measure requires jurisdictions to report on specific details of performance or compliance. These reporting requirements are discussed below.

6.1 NATIONAL ENVIRONMENT PROTECTION COUNCIL ANNUAL REPORT

It is not clear that the National Environment Protection Council annual report as it is currently presented provides a clear and cost-effective report to parliaments or the public. Reporting requirements as currently prescribed by the Act do not take into account the new media and public expectations around readily accessible information (for example on the internet). The current approach also requires significant resources to prepare and table a report every year. There is little evidence that the tabled annual reports are of much utility or have a wide audience.

The National Environment Protection Council Acts are highly prescriptive regarding annual reporting. Under the Acts, the National Environment Protection Council must produce an annual report that contains a report from each jurisdiction on the implementation and effectiveness of National Environment Protection Measures and the National Environment Protection Council's overall assessment of the implementation and effectiveness of those measures. The annual report must be laid before the parliaments of each participating jurisdiction and is currently the primary accountability mechanism for the National Environment Protection Council system. The annual report also includes the financial statements from the National Environment Protection Council Service Corporation and addresses the requirements of the National Environment Protection Council Service Corporation set by the Commonwealth Parliamentary Joint Committee on Public Accounts and Audit.

The National Environment Protection Council Act requires reports on the implementation and effectiveness of National Environment Protection Measures. The National Environment Protection Council's practice has been to produce reports on each measure. This means that National Environment Protection Council Annual reports include reports on seven National Environment Protection Measures from the nine participating jurisdictions plus the council's overall report on implementation and effectiveness of each National Environment Protection Measure, a total of seventy individual reports. The National Environment Protection Council's report is a summary of information presented in each of the jurisdictional reports.

A different approach in which each jurisdiction and the National Environment Protection Council provides a single report on implementation and effectiveness of National Environment Protection Measures (that is one report per jurisdiction and one report from the National Environment Protection Council, or ten reports) would be consistent with the requirements of the National Environment Protection Council Act. However, any approach should address specific reporting requirements as set out in each of the National Environment Protection Measures.

As a principle, reporting processes should be streamlined, provide adequate information on each measure and be readily available to parliaments, the public and the business community as necessary.

6.2 REVIEWS OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACT

The requirement for five-yearly reviews of the operation of the National Environment Protection Council Act, including reporting on the implementation and effectiveness of the Act and the relevance of approaches to developing and implementing National Environment Protection Measures, is costly and inefficient. A period of five years is insufficient to properly review changes in the needs of and operation of specific provisions of the Act. This requirement could be removed and replaced with a period of 'not greater than ten years'. This provision would enable the National Environment Protection Council to undertake a review at a smaller interval if it felt that there was a need to do so.

6.3 REPORTING ON INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES

The Ramsay Review recommended changes to the annual reporting format and called on the National Environment Protection Council to include measurable performance indicators for each National Environment Protection Measure. The National Environment Protection Council in its response fully supported this recommendation and noted that community support for National Environment Protection Measures would be enhanced if their effectiveness and environmental outcomes were more transparent.

In addition to the annual reporting requirements set out in the National Environment Protection Council Act, most of the National Environment Protection Measures include a requirement for jurisdictions to provide annual reports to the National Environment Protection Council. The reporting requirements are not consistent between National Environment Protection Measures but generally require each jurisdiction to evaluate its performance in relation to the National Environment Protection Measure.

Regular review is better practice. However, the National Environment Protection Council may wish to consider whether there are options to streamline and tailor the review process to the nature of the National Environment Protection Measure and its perceived performance.

Individual National Environment Protection Measure reporting requirements (which are in addition to the general requirement to report on the implementation and effectiveness of National Environment Protection Measures) have worked well in a number of circumstances and less well in others. The reporting arrangements for each National Environment Protection Measure are discussed at Attachment E.

Financial reporting on National Environment Protection Measure expenditure could be via annual reporting by the National Environment Protection Council secretariat based on a special account established for the purpose of, inter alia, establishing and managing National Environment Protection Measures (at section 7).

Annual assessments by jurisdictions and the National Environment Protection Council of the effectiveness of National Environment Protection Measures have not led to a clear picture of which measures are working well. The assessments contain limited evidence to support claims and provide little data on outcomes or trends. This may be due to lack of time and resources to conduct this analysis, or the low level of change from year to year. The review found that it is difficult and of little value to conduct annual analysis of outcomes or trends around the complex environmental issues covered by National Environment Protection Measures.

6.4 CONCLUSION—REPORTING

This review has considered what reporting is required and how it could be delivered in a more efficient and effective manner without compromising transparency or community expectations. The review has found that reporting, while a key function of the National Environment Protection Council Act, is unnecessarily complex and taking a disproportionate amount of the National Environment Protection Council's effort.

Reporting annual data has been a useful feature of the National Environment Protection Council framework and should be retained where it is cost effective and useful to the target audience (whether government, business or the public). The review notes in particular the public support for the publication of annual air quality data and the emissions data presented in the National Pollutant Inventory. It is proposed that jurisdictions should continue to provide this data for use by the public, business, governments and the National Environment Protection Council itself.

The value of the National Environment Protection Council's annual overall assessment of the implementation of National Environment Protection Measures is unclear. To date the National Environment Protection Council's assessment has involved summarising issues identified by individual jurisdictions. The Act does not allow the National Environment Protection Council a role in implementation of National Environment Protection Measures beyond producing these reports and, potentially, varying or revoking the measure to address any issues raised.

Assessment of the implementation of National Environment Protection Measures by each jurisdiction is a good accountability mechanism and provides a useful feedback loop on the value of the measures. A different approach to the current model could have each jurisdiction address National Environment Protection Measure implementation separately as part of its own jurisdictional reporting. This would present the information to the relevant public (via a website) and to governments that have the responsibility and ability to respond to any identified issues.

The lack of clear performance indicators directly linked to the goals and outcomes of a National Environment Protection Measure limits the ability of the National Environment Protection Council or individual jurisdictions to assess overall effectiveness and progress towards meeting the objects of the Act or the goals and outcomes of the individual measures.

Jurisdictions are encouraged to continue to report on key data. Future reviews of National Environment Protection Measures should carefully consider the reporting requirements specific to each measure to ensure that effort is focused on producing affordable data that can be used to assess the operation of the regulation, its effectiveness in meeting the goal of the measure, and its impact on the object of the Act. The inclusion of environmental outcomes and key performance indicators is necessary in National Environment Protection Measures.

7 EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION COUNCIL OPERATIONS AND THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

7.1 EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION COUNCIL OPERATIONS

The National Environment Protection Council has operated well over the period since the last review. However, the integration of the National Environment Protection Council into first the Environment Protection and Heritage Council and now the Standing Council on Environment and Water has raised some process issues. To date these have been managed within existing operational frameworks.

On 16 September 2011 the National Environment Protection Council delegated to the National Environment Protection Council Committee the following functions and powers:

- direct the National Environment Protection Council Service Corporation to provide assistance and support to other ministerial councils (that is the Standing Council on Environment and Water) under paragraph 13(h) of the Act
- publish notices under subsections 16(1), 18(1), and 22B(1)
- appoint the Executive Officer under subsection 39(2)
- give directions to the National Environment Protection Council Executive Officer with respect to the conduct of the affairs of the National Environment Protection Council Service Corporation under subsection 41(1) of the Act
- make other determinations.

The National Environment Protection Council also delegated to the National Environment Protection Council Executive Officer the functions and powers to direct the National Environment Protection Council Service Corporation to:

- provide assistance and support to other Ministerial Councils (that is the Standing Council on Environment and Water) under paragraph 13(h) of the Act
- publish notices under subsections 16(1), 18(1), and 22B(1).

While these and other delegations have been made from time to time, the processes in the Act outlining the operations of the National Environment Protection Council are unduly prescriptive. In particular the Act as it is currently written precludes the National Environment Protection Council making decisions other than at a formal meeting, which in some instances has introduced unnecessary costs and time delays.

The Acts contain prescriptions about processes for operation of the National Environment Protection Council that limit its operation and are not consistent with contemporary legislative practice.

The Act prescribes membership of the National Environment Protection Council and requires that nominations be in writing. This provision should be removed and normal appointment and membership provisions left to Council of Australian Governments' ministerial council appointment processes. Similarly the Act prescribes chairing arrangements, arrangements for deputies, and procedures for convening and running meetings. These should follow Council of Australian Governments' processes and be left to the National Environment Protection Council to decide.

However, where decisions relate to making or amending National Environment Protection Measures, the current provision of a two-thirds majority (as recommended in 2.2), or unanimous agreement in the case of setting national product standards (as recommended in 3.3), should be retained.

Provisions for establishing and running the National Environment Protection Council Committee are similarly prescriptive and should be determined by the National Environment Protection Council.

The Act currently requires the National Environment Protection Council to make operational decisions regarding the National Environment Protection Council Service Corporation, including appointment of the Executive Officer. While these powers have been delegated to the committee—and, in the case of the service corporation, are expected to be removed with the extinguishment of the corporation via financial framework amendment legislation—more could be done to remove the burden of operational matters from the National Environment Protection Council, particularly considering the number of out-of-session decisions the council is required to make.

Consideration should be given to delegating to the committee responsibility for managing consultation around making or amending National Environment Protection Measures and undertaking minor variations or technical amendments to National Environment Protection Measures.

Currently the National Environment Protection Council can establish committees, in addition to the National Environment Protection Council Committee, to assist in developing National Environment Protection Measures. This provision should be broadened to enable other committees to be established for any purpose consistent with the objects of the Act.

7.2 EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

The National Environment Protection Council Service Corporation is a small intergovernmental organisation operating with approximately nine staff. Its purpose is to provide assistance and support to the National Environment Protection Council, as well as the National Environment Protection Council Committee and any other committees established under section 33 of the Act. In addition, the National Environment Protection Council Service Corporation may provide assistance to other ministerial councils as directed by the National Environment Protection Council.

The National Environment Protection Council Service Corporation provides secretariat support and manages project funds for the National Environment Protection Council and its committees. In addition, the corporation provided secretariat services to the Environment Protection and Heritage Council until June 2011 and is now supporting the Standing Council on Environment and Water.

In 2011 the National Environment Protection Council Committee decided to relocate the offices of the service corporation from Adelaide to Canberra. The new office of the corporation is housed within, but independent of, the Australian Department of Sustainability, Environment, Water, Population and Communities.

GOVERNANCE AND FINANCIAL FRAMEWORK

The National Environment Protection Council Service Corporation is a body corporate with a common seal and the capacity to acquire and hold assets in its own right and to sue and be sued in its own name.

The corporation's financial and legal independence is established by the National Environment Protection Council Act. It is established by the Commonwealth National Environment Protection Council Act but is not a Commonwealth authority for the purposes of the *Commonwealth Authorities and Companies Act 1997*. However, provision has been made in section 59 of the National Environment Protection Council Act for parts of the Commonwealth Authorities and Companies Act (sections 9, 18 and 20) to apply as if the corporation were a Commonwealth authority.

The National Environment Protection Council Executive Officer manages the affairs of the National Environment Protection Council Service Corporation in accordance with the functions and powers described by sections 36 and 37 respectively of the National Environment Protection Council Act and as directed by National Environment Protection Council. In turn, the executive officer is directly accountable to the National Environment Protection Council for his/her own performance and for that of the National Environment Protection Council Service Corporation.

The National Environment Protection Council Committee provides the governance nexus between the National Environment Protection Council and the executive officer. The committee has formed an audit and governance committee to support its oversight of the National Environment Protection Council Service Corporation.

The Commonwealth National Environment Protection Council Act, and in particular parts 5 and 6 of the Act, together with sections 9, 18 and 20 of the Commonwealth Authorities and Companies Act, establish the financial framework of the National Environment Protection Council Service Corporation. The combined National Environment Protection Council Acts establish the purpose and workings of the National Environment Protection Council, the National Environment Protection Council Committee, the National Environment Protection Council Service Corporation and the Executive Officer.

As an intergovernmental body with legal and financial independence from any single jurisdiction, the National Environment Protection Council Service Corporation owns and manages its own assets and has the power to invest surplus funds for the purposes of generating revenue, which ultimately reduces the overall funding commitment from each jurisdiction. The Executive Officer is accountable to the National Environment Protection Council and to each participating parliament for their financial management of the National Environment Protection Council Service Corporation.

The National Environment Protection Council has established strong governance arrangements to support its operations. These include a defined governance policy and governance handbook, a formal audit and governance committee, and clear roles and responsibilities. The National Environment Protection Council Committee in particular is focused on governance, and in particular on the financial governance and reporting of the National Environment Protection Council Service Corporation. This approach ensures financial management is appropriate, statutory requirements are met, and reporting is in line with best practice. It provides responsive and strategic oversight and accountability.

When the National Environment Protection Council Committee decided to co-locate the National Environment Protection Council Service Corporation within the department it anticipated that this would enable the corporation to draw on the expertise and support structures of the Commonwealth, resulting in both improved governance and cost efficiencies.

OPERATIONAL BUDGET PRESSURES

The Commonwealth, states and territories all contribute to funds for the operation of the National Environment Protection Council Service Corporation according to an agreed population-based formula, with 50 per cent from the Commonwealth and 50 per cent from the states and territories on a pro rata population basis. In addition, jurisdictions contribute project funds on an agreed basis and the corporation manages those funds on behalf of the National Environment Protection Council. The National Environment Protection Council Service Corporation held \$5,064,825 in funds at 30 June 2012.

The National Environment Protection Council Service Corporation's operating budget for 2012–13 is \$1,334,000, with actual contributions from jurisdictions making up \$938,000. The remaining budget is derived from interest (as described under section 18 of the Commonwealth Authorities and Companies Act) and from project funds. The majority of the operational budget is to fund the salary expenses of the Executive Officer and eight support staff within the National Environment Protection Council Service Corporation.

Maintaining a deficit between the operational budget and jurisdictional contributions has been possible in the short term but desired services must meet the available budget.

7.3 CONCLUSION—EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL AND THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

While the National Environment Protection Council Committee and Executive Officer have a strong focus and commitment to governance, this review found that the complicated governance framework for the National Environment Protection Council Service Corporation increases risks framework because accountability and responsibility are diffused between the nine participating jurisdictions.

The review notes the ongoing budget pressures and the constrained ability to reduce costs because of the legal requirements that the National Environment Protection Council and Commonwealth and Authorities and Companies Acts impose on the Executive Officer and the National Environment Protection Council Service Corporation. The requirements to prepare an annual report and assess and report on the implementation and effectiveness of National Environment Protection Measures are also subject to specific guidelines and approaches, particularly in the case of the annual report. This takes considerable resources.

In the case of the Executive Officer's responsibilities, particularly for financial management, the Commonwealth Authorities and Companies Act sets out the legal obligations which must be undertaken, and these are relatively inflexible. However, there are significant costs in managing a small statutory agency such as the National Environment Protection Council Service Corporation and these costs are relatively inelastic to the size or budget of the corporation.

The Act review team has identified a number of options to reduce costs and increase reporting, financial and operational efficiencies for the National Environment Protection Council Service Corporation. Many of these options require legislative change to implement.

Delivery of secretariat services and financial management for the National Environment Protection Council and the National Environment Protection Council Committee do not now require an independent statutory agency for delivery.

Secretariat services for the National Environment Protection Council can be delivered within a jurisdiction, as is the case for most Council of Australian Governments councils. The current arrangements around the National Environment Protection Council Service Corporation are highly unusual within the Commonwealth financial management framework. Independent financial management, audit and preparation of financial statements can be incorporated into the existing Commonwealth financial framework following amendment of the National Environment Protection Council Act. This new secretariat arrangement would continue to support the National Environment Protection Council to make and report on National Environment Protection Measures and support the Standing Council on Environment and Water, and would include a delegate to support the National Environment Protection Council in its statutory role.

FUTURE OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

On 24 August 2012 the National Environment Protection Council agreed to support the Commonwealth expediting amendment to the Commonwealth National Environment Protection Council Act to bring the functions of the National Environment Protection Council Service Corporation into the Commonwealth financial framework. It is expected that this will come about by including provisions for the above amendment in a Commonwealth financial framework legislation amendment bill.

A proposed model for new secretariat arrangements is at Attachment C.

These changes do not impact on the objects of the Acts and do not diminish environmental protection. The proposed amendments are machinery in nature and should not impact on service to the National Environment Protection Council. They would support efficient governance and would not require a regulation impact statement. Any efficiencies in operation of the secretariat, and potential cost savings, would not be realised until passage of the amendments, and not prior to 2013–14.

8 CONCLUSION

Introduction of the National Environment Protection Council Acts in 1994 was an important reform that has supported improved environmental outcomes and reduced business costs through more consistent approaches to environmental protection between jurisdictions. Key features include:

- a mechanism to facilitate a cooperative national approach to environment protection, including the establishment of national requirements and environmental quality standards
- the establishment of a statutory decision maker
- collaborative processes for research, policy analysis and regulatory impact assessment
- a clear pathway for streamlined implementation at a jurisdictional level integrating with existing regulatory frameworks. (This also provides for flexibility in implementation to meet local requirements).

The National Environment Protection Council Acts are, however, a product of their time and changes are required to meet current and future environmental challenges and promote national consistency to reduce business costs and streamline operation of the Acts.

FIRST TERM OF REFERENCE: A REVIEW OF THE OPERATION OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACT AS REQUIRED BY SECTION 64(1)(A): THE OPERATION OF THIS ACT AND THE ACT OF EACH OTHER PARTICIPATING JURISDICTION THAT CORRESPONDS TO THIS ACT

National Environment Protection Measures are a valuable tool supporting national cooperation on environmental regulation. This review found, however, that there are inefficiencies in the operation of the Acts which can only be addressed through legislative change. The inefficiencies relate to:

- making, reviewing and revoking National Environment Protection Measures
- reporting on implementation and effectiveness of National Environment Protection Measures
- operation of the National Environment Protection Council
- the National Environment Protection Council Service Corporation and the Executive Officer.

In the last eight years, activity around the National Environment Protection Council system has been limited to maintenance of existing National Environment Protection Measures and, without changes to the scope of the National Environment Protection Council Act, it is likely this will continue.

COUNCIL OF AUSTRALIAN GOVERNMENTS' REFORMS (3.7)

- Consider amendments that give effect to adopting the Council of Australian Governments decision to remove any reference to the National Environment Protection Council in the Act and replace it with references to Ministers with responsibility for environment protection.
- The Acts should retain a process for developing National Environment Protection Measures and potentially other future national decisions.

EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION MEASURE PROCESSES AND STREAMLINING CONSULTATION PROCESSES (5.2)

The National Environment Protection Council Act should be amended to remove prescriptions around public consultation and development of impact statements, while retaining the requirement for consultation. Further:

- the nature and extent of consultation should be determined by the National Environment Protection Council and Council of Australian Governments specified consultation processes, relevant legislation such as the Commonwealth *Legislative Instruments Act 2003* and any other requirements for consultation as may be in effect from time to time
- the National Environment Protection Council should retain the ability to introduce any additional consultation mechanisms and impact statements as it sees fit
- consideration should be given to a streamlined National Environment Protection Measure revocation process or a specific sunset period.

MAKING, AMENDING AND REVOKING NATIONAL ENVIRONMENT PROTECTION MEASURES (5.4)

When making or reviewing a National Environment Protection Measure, the National Environment Protection Council should consider including the following:

- a sunset clause for National Environment Protection Measures that by their nature have a limited operational life
- a requirement for review within a specified period where the nature of the National Environment Protection Measure is such that, subject to assessment of its effectiveness and efficiency, the National Environment Protection Measure should be ongoing. In this case the National Environment Protection Measure should specify that it will be reviewed within 10 years
- review of National Environment Protection Measures should focus on policy and implementation as well as the detailed scientific methodology—with the aim of determining the ongoing need for each National Environment Protection Measure and moving towards a better and more responsive framework

- National Environment Protection Measures should be revoked if no longer necessary and the National Environment Protection Council Act should be amended to allow for a streamlined process to revoke National Environment Protection Measures, making provision for flexibility on the method of public consultation
- consideration should be given to the ongoing costs and benefits of the Air Toxics National Environment Protection Measure and the Diesel Vehicle Emissions National Environment Protection Measure, and the National Environment Protection Council should be advised on the desirability and timing of review and variation of the National Environment Protection Measures or their formal revocation under section 20 of the National Environment Protection Council Act.

NATIONAL ENVIRONMENT PROTECTION COUNCIL ANNUAL REPORT (6.1)

- The requirement for preparation and tabling of an annual report in every jurisdiction on implementation of National Environment Protection Measures should be replaced by departmental/agency annual reporting.

REPORTING ON INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES (6.3)

- National Environment Protection Measures should explicitly address the need for reporting with the aim of ensuring relevant information is made available in readily accessible forms, particularly by utilising the web, for the purpose of informing the community and business sectors and for use by government in policy and decision making.
- Future reviews of National Environment Protection Measures should carefully consider the reporting requirements specific to each National Environment Protection Measure to ensure that effort is focused on producing useable, valuable and targeted information in a cost-effective manner.
- Consideration should be given to developing/refining key performance indicators for National Environment Protection Measures implementation and effectiveness.
- Jurisdictions should continue to report annually on data arising out of National Environment Protection Measures; however, this could be done separately via jurisdictional websites or similar means, rather than in the form of tabled annual reports.
- Reporting on the effectiveness of National Environment Protection Measures should be conducted as part of a National Environment Protection Measure review process (Refer to Part 5).

EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL (7.1)

- The National Environment Protection Council should have more flexibility in determining its operating and meeting procedures.
- The Act should enable the National Environment Protection Council, and committees of the council, to meet and make decisions out of session, including by electronic means such as email, fax, phone or video.

EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION (7.3)

The review notes that the National Environment Protection Council has moved to abolish the National Environment Protection Council Service Corporation and replace it with a flexible and fit-for-purpose secretariat within the financial framework of a host jurisdiction.

Subject to the decision to abolish the National Environment Protection Council Service Corporation, financial reporting on National Environment Protection Measure expenditure will be via annual reporting by the host jurisdiction on a special account established for the purpose of, inter alia, establishing and managing National Environment Protection Measures and covering the operating costs of the secretariat.

SECOND TERM OF REFERENCE: A REVIEW OF THE EXTENT TO WHICH THE OBJECT SET OUT IN SECTION 3 OF THE ACT HAS BEEN ACHIEVED, AS REQUIRED BY SECTION 64(1)(B): THE EXTENT TO WHICH THE OBJECT SET OUT IN SECTION 3 OF EACH SUCH ACT HAS BEEN ACHIEVED

The object of the Act is to ensure that, by means of the establishment and operation of the National Environment Protection Council:

1. People enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia.
2. Decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.

The Acts provide for the development and implementation of National Environment Protection Measures as the primary tool to achieve the objects of the Acts. Achievement of the objects of the Act depends on implementation of the National Environment Protection Measures. The National Environment Protection Council and National Environment Protection Measures framework has focused on establishing common outcomes at a national level but allowing flexibility in jurisdictional implementation. It is difficult to quantitatively determine to what extent a greater focus on consistent application is required to ensure the objects are met.

Reviews of individual National Environment Protection Measures have identified contributions to achieving the objects of the Acts; however, this is limited by the lack of clear key performance indicators and reporting related to the objects.

Furthermore businesses in a significant number of sectors have sought or supported consistent approaches and standards to be applied by governments. The engagement and responses of the business community during the National Environment Protection Measures review and variation processes is a measure of the importance they put on consistent regulatory approaches and the significance National Environment Protection Measures processes can have.

The review makes the following recommendations.

EFFECTIVENESS OF THE NATIONAL ENVIRONMENT PROTECTION MEASURE SYSTEM (4)

- National Environment Protection Measures are an important tool for national action for environmental protection and should be retained.

OBJECTS OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS (4.1)

- Consideration should be given to amending the Act to more directly state the purpose of the Act rather than have the object of the Act dependent on the establishment of the National Environment Protection Council.
- The objects of the Act should be amended to:
 - recognise the purpose of protection of the Australian community and the environment from harm
 - better reflect the Council of Australian Governments' objectives of a seamless and harmonised national economy.

IMPLEMENTATION OF NATIONAL ENVIRONMENT PROTECTION MEASURES (4.5)

- The National Environment Protection Council should determine the most appropriate approach to support consistent implementation of each National Environment Protection Measure, focusing on areas where consistent implementation can strengthen environmental outcomes and reduce business costs.
- Where greater consistency in implementation is of benefit, particularly when inconsistent implementation has a negative impact on business, it is recommended that jurisdictions:
 - work together to pursue opportunities to improve and harmonise implementation of National Environment Protection Measures, including improved regulatory practice
 - ensure timely translation of National Environment Protection Measure requirements into jurisdictional instruments.

NATURE AND FORM OF NATIONAL ENVIRONMENT PROTECTION MEASURES (5.1)

- A contemporary model for National Environment Protection Measures should be developed that focuses on outcomes and allows for flexibility to enable rapid updates as new information becomes available.
- Any new model should ensure National Environment Protection Measures contain a clear outcome statement with goals, key performance indicators, standards and/or high-level protocols.
- Technical monitoring and reporting processes should be included in separate subordinate instruments that can be readily amended or updated when required, while still providing certainty for business. Formal regulation impact statements or Office of Best Practice Regulation mechanisms may not be required where there is no significant business impact.

THIRD TERM OF REFERENCE: THE STATUS AND EFFECTIVENESS OF NATIONAL ENVIRONMENT PROTECTION MEASURES AS A FRAMEWORK FOR ACHIEVING NATIONALLY CONSISTENT GUIDANCE AND STANDARDS, INCLUDING POSSIBLE ALTERNATIVE APPROACHES BASED ON BEST PRACTICE MODELS

National Environment Protection Measures are one of the tools available to governments to establish nationally consistent environment standards, requirements, guidelines and protocols. They provide for nationally consistent decisions implemented through jurisdictional arrangements, providing flexibility and enabling integration with existing regulatory systems. However, there are constraints on the scope of National Environment Protection Measures, and limits on their use and effectiveness.

The benefits of the National Environment Protection Measures framework depend on effective implementation by each of the participating jurisdictions. In particular, consistency of implementation is important in reducing business costs. If the broad objects of the Act are to be met, then the experience of business (and other regulated entities) is as critical as the rules, standards and laws themselves.

National Environment Protection Measures should be considered as part of a broader framework or toolbox for national action. Jurisdictions jointly need to consider the range of tools required over the next ten years to support national action in pursuit of the objects of the National Environment Protection Council Act. The existing National Environment Protection Measures framework, while valuable for many applications, is not likely to be the preferred tool where variations in implementation will limit its effectiveness. This is particularly the case for products, equipment or occupations that are subject to the Mutual Recognition Act.

The review makes the following recommendations:

BROADENING THE SCOPE OF THE TOOLKIT FOR NATIONAL ACTION (4.4)

- The scope of the National Environment Protection Council Acts should be amended to allow the National Environment Protection Council to make a National Environment Protection Measure on any environmental protection matter as determined unanimously by the National Environment Protection Council.
- Any proposal to amend the National Environment Protection Council Acts should investigate broadening the scope of the National Environment Protection Council Act and establishing a framework for national decisions implemented through jurisdictions and enable the setting of environmental performance standards for products and equipment. The preferred approach should be determined following detailed consideration of the specific needs of any scheme.

FOURTH TERM OF REFERENCE: THE REVIEW SHOULD RECOMMEND WHETHER ANY AMENDMENTS TO THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACT AND/OR THE NATIONAL ENVIRONMENT PROTECTION MEASURE PROCESS SHOULD BE PROGRESSED AT THIS TIME

This review has found that there are inefficiencies in the operation of the Acts which can only be addressed through legislative change. The review recommends changes to elements of the Acts' scope, operation and administration. The recommended amendments are set out above in relation to the first, second and third terms of reference.

Further amendment of the Acts should be considered to enable broader application, enabling more effective action to address current and emerging environmental issues. Without reforms of this kind the likely future application of the Acts and the associated National Environment Protection Measures framework will be limited.

It should be noted that, in light of the effectiveness of actions to implement recommendations of the Ramsay Review, and given increasing resource constraints on governments and competing priorities, any significant amendments to the National Environment Protection Council Act are best progressed in conjunction with other related reform measures.

The review recommends:

BROADENING THE SCOPE OF THE TOOLKIT FOR NATIONAL ACTION (4.4)

- As the Standing Council on Environment and Water considers the National Plan for Clean Air, the Council of Australian Governments' Chemical Reform Program and other priorities, consideration should be given to adopting a framework approach in any legislative proposals to maximise the utility of the toolkit available for national action. Such proposals should include consideration of amendment of the National Environment Protection Council Acts, as well as alternative legislative approaches.

ATTACHMENT—A TERMS OF REFERENCE FOR THE THIRD REVIEW

NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS 1994 (COMMONWEALTH, STATE AND TERRITORY)

INTRODUCTION

The *National Environment Protection Council Act 1994* (Cwth) and corresponding Acts in each state and territory (the Act) aim to ensure that, by means of the establishment and operation of the National Environment Protection Council:

- a. People enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia.
- b. Decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures.

The National Environment Protection Council must cause a review of the operation of the Act and the extent to which the object of the Act have been achieved. The National Environment Protection Council has previously reviewed the Act in 2001 (the McMichael Review) and 2006 (the Ramsey Review).

CONTEXT

Council of Australian Governments recent review of its Ministerial Council system resulted in a system focused on identifying and addressing strategic national priorities. Council of Australian Governments has established the Standing Council on Environment and Water to promote the protection of the environment and sustainable water management in order to enhance social, human health, and economic and environmental outcomes in a sustainable manner for current and future generations. This new Council is responsible for the National Environment Protection Council Act, and incorporates the National Environment Protection Council.

In June 2011, the National Environment Protection Council Service Corporation moved from Adelaide to a new office established within the premises of the Commonwealth Department of Sustainability, Environment, Water, Population and Communities. The transition of the National Environment Protection Council Service Corporation and the establishment of the new standing council have led to a comprehensive review of existing policies and procedures. The operation of the corporation has been reviewed by the Governance Working Group which reports to National Environment Protection Council Committee and the Standing Council on Environment and Water's Senior Officials Committee.

DRAFT TERMS OF REFERENCE

The review should examine and report according to the following specific terms of reference:

1. A review of the operation of the Act as required by section 64(1)(a).
2. A review of the extent to which the object set out in section 3 of the Act has been achieved, as required by section 64(1)(b).
3. The status and effectiveness of National Environment Protection Measures as a framework for achieving nationally consistent guidance and standards, including possible alternative approaches based on best practice models.
4. The review should recommend whether any amendments to the Act and/or the National Environment Protection Measure process should be progressed at this time.

The review will cover the period up to 30 March 2012. In respect of the effectiveness of current National Environment Protection Measures, and possible alternative approaches, the review will have regard to items currently on the work plan for the Standing Council on Environment and Water, including the development of the National Plan for Clean Air and the Council of Australian Governments' Chemical Reform agenda.

The review will be conducted by a sub-group of officials (the Deliverable 3 Working Group) overseen by the Seamless Environmental Regulation Thematic Oversight Group and the National Environment Protection Council Committee. The National Environment Protection Council Executive Officer will assist the review.

The review will be a desk top review by officials. No formal consultation with stakeholders will be sought during the review. Should Council wish to progress legislative change as a result of the review, further consultation including a Regulation Impact Statement may be required.

The report of the review should be completed by end of 2012, with the report to be tabled by early 2013.

ATTACHMENT—B NATIONAL ENVIRONMENT PROTECTION MEASURE ACTIVITY

National Environment Protection Measure	Made	Varied
Air Toxics	2004	2011 (minor)
Ambient Air	1998	2003
Assessment of Site Contamination	1999	Variation process under way (initiated in 2007)
Diesel Vehicle Emissions	2001	2009
Movement of Controlled Waste	1998	2004 (minor) 2010 (minor) Subsequent minor variation under way
National Pollutant Inventory	1998	2007
Used Packaging Materials	1999 Remade 2011	2004 (minor) 2005 2010 (minor)

ATTACHMENT—C MODEL NATIONAL ENVIRONMENT PROTECTION COUNCIL SECRETARIAT

Draft model for provision of secretariat services for Standing Council on Environment and Water/National Environment Protection Council

STRUCTURE

- The secretariat will be a business unit of the Commonwealth and located within the Department of Sustainability, Environment, Water, Population and Communities.
- The secretariat will be headed up by a senior executive officer with delegation to perform functions both financial and statutory as determined by the National Environment Protection Council Committee. These are currently specified in sections 36, 37 and 38 and Division 2 of the National Environment Protection Council Act.
- Remuneration, allowances and other matters associated with employment within the business unit will be determined by the Commonwealth.
- The structure and terms of employment of the unit will essentially reflect the current model—staff seconded primarily from the Commonwealth—but with the opportunity to second staff from other jurisdictions.

STATUTORY FUNCTIONS (DELEGATE)

- Currently the Act provides for the National Environment Protection Council to appoint an executive officer and to delegate functions to that officer (other than powers under sections 14, 20 and 63). As an efficiency measure this delegation's power would be transferred to the National Environment Protection Council Committee.
- Delegations would be to an identified position within the Commonwealth—the National Environment Protection Council Committee would agree the delegate (with a deputy). The position may be filled by a state or territory official.
- The delegate would be able to sign a certificate under section 62.
- The National Environment Protection Council Committee would be able to terminate the delegations for incompetence or any other reason.
- The delegate, in carrying out the functions of the National Environment Protection Council, must act in the best interests of the council and independent of the objects of the host jurisdiction. The delegate will, separate to operating as a delegate, be able to perform other duties for the host jurisdiction.

FINANCIAL MANAGEMENT

- The responsibility for financial management and reporting will rest with the Commonwealth.
- All jurisdictions, including the Commonwealth, will continue to contribute to the costs of the secretariat.
- Financial management will be fully integrated into the Commonwealth financial reporting system (within the Department of Sustainability, Environment, Water, Population and Communities) under the *Financial Management and Accountability Act 1997*.
- A special account will be established and managed by the Commonwealth. Under this account:
 - the Commonwealth is provided with the functions and powers of the service corporation under section 37
 - the account will be controlled by a delegate (on behalf of the National Environment Protection Council)
 - the funds would be expended according to the direction of the National Environment Protection Council Committee. The Commonwealth must spend funds within estimates agreed by the National Environment Protection Council Committee and will ultimately be accountable to the council for its financial management (section 57)
 - the special account will be used to provide assistance and support to the National Environment Protection Council and National Environment Protection Council Committee, and to provide assistance and support to any other ministerial council as directed by the National Environment Protection Council. Funds can be used to enter contracts, pay salaries, lease land or buildings, and provide grants to jurisdictions to deliver outcomes on behalf of the National Environment Protection Council
 - the special account will enable reimbursement of the Commonwealth for salary and operational costs related to carrying out functions of the National Environment Protection Council Act as directed by the National Environment Protection Council and the National Environment Protection Council Committee
 - as agreed by the National Environment Protection Council Committee, states and territories will be able to employ/appoint staff to support the council and be reimbursed for these costs
 - the account will be able to hold contributions from the Commonwealth, states and territories and other third parties (New Zealand, Australian Local Government Association, industry) and use those funds for procurements and salary
 - the account may start from 1 July 2013, with adequate provisions to allow transition of existing contracts, financial management systems, bank accounts into the new model
 - funds will be able to roll over between financial years

- the funds would be exempt from Commonwealth charges (such as efficiency dividends)
- the special account may receive an interest equivalent payment
- the Commonwealth will formally report on the operation of a special account via normal departmental annual reporting. Operational financial reporting will continue on a monthly basis
- Provision will exist to take into account and accommodate all the functions currently under Part 5 of the National Environment Protection Council Act, including any transitional arrangements to:
 - take account of existing/pending contracts regarding real and personal property; and any monies or other property held in trust in order to transfer these matters to the control of the Commonwealth if necessary
 - legitimise any ongoing obligations in relation to acts or things done in the name of, or on behalf of, the National Environment Protection Council Service Corporation
 - accommodate non-Public Service staff of the National Environment Protection Council Service Corporation, such as contractors/consultants
 - update any existing delegations currently held by the National Environment Protection Council Executive Officer.

SERVICES—SECRETARIAT

- Services to be provided are as follows:
 - secretariat services to the National Environment Protection Council, senior officials and other committees or working groups as directed
 - strategic and administrative support to the National Environment Protection Council for the making, variation and review of National Environment Protection Measures and the National Environment Protection Council Act
 - strategic and administrative support to the National Environment Protection Council and senior officials in the achievement of Council of Australian Governments' national priorities, including consultation processes as directed
 - supporting the National Environment Protection Council and senior officials through regular financial and governance reporting relating to council-approved activities
 - Maintaining the National Environment Protection Council website and the range of govdex sites used to communicate and support council business.

JURISDICTIONS

- Lead jurisdictions will provide secretariat support for the Thematic Oversight Group chairs, utilising govdex to continue managing Thematic Oversight Group correspondence (as is currently the practice).

REPORTING

- The delegate will report on financial performance of the special account pursuant to statutory departmental annual reporting.
- The council will continue to table its five-yearly reviews of the operation of the Act (under section 64).

ATTACHMENT—D EFFECTIVENESS OF INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES

AIR TOXICS NATIONAL ENVIRONMENT PROTECTION MEASURE

The National Environment Protection (Air Toxics) Measure (the Air Toxics National Environment Protection Measure) is a national environment protection protocol that aims to improve the information base regarding ambient air toxic pollutants within the environment in order to facilitate the development of standards. The Air Toxics National Environment Protection Measure was made in 2004 and subject to a minor variation in 2011.

The purpose of the Air Toxics National Environment Protection Measure is to provide a nationally consistent framework for the monitoring and reporting of air toxics and to provide information that will enable jurisdictions to establish national air quality standards which are protective of human health. The measure also enables jurisdictions to assess air quality in a consistent manner. However, as monitoring has not been done in a nationally consistent manner, data is not directly comparable.

The Air Toxics National Environment Protection Measure was designed as an interim measure to support the development of a national standard on air toxic pollutants. The mid-term review of the measure found that there has been significant progress towards improving the information base regarding ambient air toxics in the Australian environment.

The Air Toxics National Environment Protection Measure is due for review, including consideration of whether to develop national standards for air toxics. National standards for air toxics would more clearly support the object of the Act by ensuring that people enjoy the benefit of equivalent protection from air pollution.

The Air Toxics National Environment Protection Measure primarily supports the first object of the Act, providing equivalent protection from air pollution. The review team considers that the measure, which focuses on actions by government, has minimal impacts on the business community and national markets.

Consideration should be given to the costs and benefits of this National Environment Protection Measure and a review completed to determine whether it is required in current or amended form to meet future needs or whether formal revocation should be commenced under section 20 of the National Environment Protection Council Acts.

AMBIENT AIR QUALITY NATIONAL ENVIRONMENT PROTECTION MEASURE

The National Environment Protection (Ambient Air Quality) Measure (the Ambient Air Quality National Environment Protection Measure) includes a national environment protection goal, standard and protocol that aim to provide a framework and methods for monitoring and reporting on ambient air quality. The measure was made in 1998 and varied in 2003. The council released a review of the the Ambient Air Quality National Environment Protection Measure in 2011.

The Ambient Air Quality National Environment Protection Measure prescribes a policy goal and provides jurisdictions with a standard way of measuring and reporting against that goal. The 2011 review of the measure found that its implementation has led to a greater understanding of air quality in Australia which has, in turn, led to an improved understanding about the health impacts of air pollution on the community. There has been a marked reduction in emissions of some pollutants since the measure was made.

The 2011 review of the Ambient Air Quality National Environment Protection Measure (commenced in 2005) has highlighted growing challenges to air quality due to climate change and population growth and highlighted the ability to improve management of air quality in Australia. It may be that, because of these emerging pressures, the measure should be varied to continue its contribution to the object of the Act over time. This is an issue that is being considered in the development of a National Plan for Clean Air.

The goal of the Ambient Air Quality National Environment Protection Measure reflects the first part of the object of the National Environment Protection Council Act: to provide for ambient air quality that allows for the adequate protection of human health and well-being. The measure is considered successful and it is likely that it has supported the object of the Act to ensure equivalent protection from air pollution. The review team considers that the measure, focusing as it does on emissions at an air shed level, has minimal direct impacts on the business community and national markets. The measure is used by some jurisdictions to inform licensing decisions and thus does have an indirect influence on some businesses.

ASSESSMENT OF SITE CONTAMINATION NATIONAL ENVIRONMENT PROTECTION MEASURE

The National Environment Protection (Assessment of Site Contamination) Measure (the Assessment of Site Contamination National Environment Protection Measure) is a guideline that establishes a nationally consistent approach to the assessment of site contamination. It was made in 1999 and a variation process has been under way since 2007.

The Assessment of Site Contamination National Environment Protection Measure is limited in scope to the assessment of site contamination. It comprises an overarching framework for the assessment of site contamination and its relationship to the management of contaminated sites. It is supported by ten guidelines on five technical and administrative aspects of site assessment.

It should be noted that the measure is highly technical in nature, providing detailed guidance about the process of assessing site contamination and specific elements of this. The guidelines run to several thousand pages. An alternative approach would be to limit the length of the legal instrument and treat much of the more technical material as supporting documentation.

The goal of the Assessment of Site Contamination National Environment Protection Measure reflects the first part of the object of the National Environment Protection Council Act: to provide for the adequate protection of human health and well-being, where site contamination has occurred, through the development of an efficient and effective national approach to the assessment of site contamination. The measure also impacts on the second part of the object of the Act to the extent that businesses assessing contaminated sites often work in more than one jurisdiction. The measure is regularly described as a useful resource, and anecdotally there is a high level of interest in it from the business community (including frustration at the protracted nature of the current variation process).

While national standards for assessing contaminated sites are likely to support the first part of the object of the Act, the resulting management and/or remediation of the site (which is not covered by the National Environment Protection Measure) is critical to meeting the goal of providing protection from soil pollution. As a national framework for the assessment of site contamination, the measure is likely to support the second part of the object of the Act in that markets are not fragmented. However, the role of the National Environment Protection Measure in support of that object is likely to be affected by the differing regulatory and administrative frameworks for implementing it and for managing any contaminated sites. Notwithstanding this there is strong support from industry for the measure, particularly from businesses that operate across several jurisdictions.

DIESEL VEHICLE EMISSIONS NATIONAL ENVIRONMENT PROTECTION MEASURE

The National Environment Protection (Diesel Vehicle Emissions) Measure (the Diesel Vehicle Emissions National Environment Protection Measure) is a guideline that provides a framework for reducing exhaust emissions from in-service diesel vehicles. It was made in 2001 and varied in 2009.

The Diesel Vehicle Emissions National Environment Protection Measure provides strategies for use by jurisdictions to ensure that in-service diesel vehicles are adequately maintained. It provides guidance for developing programs for inspection and maintenance, fleet maintenance, smoky vehicles, and vehicle retrofit.

The 2007 review of the Diesel Vehicle Emissions National Environment Protection Measure found that activities implemented under the measure are beneficial in reducing diesel vehicle emissions but found it difficult to quantitatively assess the impacts of these activities. Further quantification of the extent of the contribution of the measure to providing equivalent protection would require quantitative diesel vehicle emissions data which is not currently available.

As the Diesel Vehicle Emissions National Environment Protection Measure, and in particular the detailed guidance provided, is designed to address a problem from a limited part of the diesel fleet (namely those vehicles made before the introduction of Australian Design Rule standards between 1996 and 2006), the contribution to improving air quality is likely to decrease as older vehicles are retired over the coming years.

The Diesel Vehicle Emissions National Environment Protection Measure aims to support the object of the National Environment Protection Council Act by protecting people from air pollution from older diesel vehicles. The measure also impacts on the second part of the object of the Act to the extent that businesses operating diesel vehicles often work across jurisdictions.

Consideration should be given to the costs and benefits of this National Environment Protection Measure, particularly in the context of the National Plan for Clean Air and the proposed introduction of the National Heavy Vehicle Regulator. Consideration is given to reviewing the measure to determine whether it is required in current or amended form to meet future needs or whether formal revocation of the measure should be commenced under section 20 of the National Environment Protection Council Act.

MOVEMENT OF CONTROLLED WASTE NATIONAL ENVIRONMENT PROTECTION MEASURE

The National Environment Protection (Movement of Controlled Waste between States and Territories) Measure (the Movement of Controlled Waste National Environment Protection Measure) is a goal and guideline that aims to ensure that controlled wastes to be moved across borders are identified, transported and handled in ways that minimise the potential for adverse impacts to the environment and human health. It provides a national framework for developing and integrating state and territory systems for the management of the movement of controlled wastes between states and territories. The Movement of Controlled Waste National Environment Protection Measure was made in 1998 and subject to minor variation in 2004 and 2010. A third minor variation has been initiated to address drafting errors in the 2010 minor variation.

This National Environment Protection Measure helps Australia implement international treaty obligations with respect to movement of controlled waste. Consideration needs to be given to ensuring that this obligation continues to be met.

The Movement of Controlled Waste National Environment Protection Measure supports the first part of the object of the National Environment Protection Council Act by ensuring that controlled wastes reach licensed or approved facilities for treatment, recycling, or storage and/or disposal and therefore minimises the potential for pollution associated with the Movement of Controlled Waste Measure.

The Movement of Controlled Waste National Environment Protection Measure has improved the uniformity of approaches to movement of controlled waste between jurisdictions, and this is likely to have a positive impact on the second part of the object of the Act, with businesses able to use a consistent template and common standards for transporting these wastes. The National Environment Protection Measure facilitates mutual recognition of relevant licences or permits issued by a jurisdiction.

NATIONAL POLLUTANT INVENTORY NATIONAL ENVIRONMENT PROTECTION MEASURE

The National Environment Protection (National Pollutant Inventory) Measure (the National Pollutant Inventory) is a database that provides information on the types and amount of certain chemical emissions to the air, land and water. It establishes the database and provides for jurisdictions to require industrial facilities, such as power plants and steel works, to estimate and report annually on their emissions. Emissions from smaller industrial facilities, such as petrol stations and dry cleaners, and emissions from household and other everyday activities, are estimated by the governments of each state and territory. The National Pollutant Inventory was made in 1998 and varied in 2001 (a minor variation) and 2008.

The National Pollutant Inventory supports the first object of the National Environment Protection Council Act by providing data to support policy formulation and decision making for environmental planning and management and by providing information to consumers and business. The availability of this information may affect consumer decisions or business behaviour. The national reporting, including guidance, is likely to support the second part of the object in relation to business. The review team considers it likely that the National Pollutant Inventory contributes to the object of the National Environment Protection Council Act.

USED PACKAGING MATERIALS NATIONAL ENVIRONMENT PROTECTION MEASURE

The National Environment Protection (Used Packaging Materials) Measure (the Used Packaging National Environment Protection Measure) provides for the recovery and re-use of packaging materials and data collection by brand owners, and for the collection of relevant information from brand owners and local government by jurisdictions. It underpins the voluntary strategies in the Australian Packaging Covenant, an industry self-regulatory instrument that aims to ensure that those involved in the packaging chain contribute to reducing packaging waste.

The Used Packaging National Environment Protection Measure was made in 1999 and subject to minor variations in 2005 and 2010. In 2011 it was remade to address administrative issues identified with the registration of the 2005 and 2010 minor variations.

The Used Packaging National Environment Protection Measure supports the object of the National Environment Protection Council Act by encouraging the recovery and re-use of packaging materials and thereby reducing pollution. While state, territory and local governments have primary responsibility for delivering appropriate waste management, avoidance, minimisation and resource recovery mechanisms (including for used packaging), the National Environment Protection Measure supports the second part of the object of the Act, as the measure and the covenant currently represent the only mechanism with national coverage that involves the entire packaging supply and recovery chain.

The Used Packaging Materials National Environment Protection Measure underpins compliance action by jurisdictions and therefore supports the Australian Packaging Covenant.

ATTACHMENT—E REPORTING FOR INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES

AIR TOXICS NATIONAL ENVIRONMENT PROTECTION MEASURE

The goal of the Air Toxics National Environment Protection Measure is to improve the information base regarding air toxics pollutants. It requires that each jurisdiction submit a report to the National Environment Protection Council with the purpose of informing the public of progress in the assessment and subsequent monitoring of air toxics at selected sites. Some jurisdictions have presented their reports for this National Environment Protection Measure as part of the jurisdictional report on implementation and effectiveness of the measure. The Air Toxics National Environment Protection Measure report and National Environment Protection Council annual reporting requirements do not cover the same reporting year and are due at different times but information is submitted in accordance with the National Environment Protection Measure annual reporting cycle.

Most jurisdictions have agreed that the Air Toxics National Environment Protection Measure has been effective in providing an impetus to investigate available data and in identifying locations most likely to experience significant population exposure to elevated levels of air toxics. Without comparable data, it is difficult to have a comprehensive national picture of the state of air toxics. However, to date the data collected under this National Environment Protection Measure has not been used to develop national standards for air toxic pollutants. As previously noted, consideration should be given to reviewing the measure to determine whether it is required in its current or amended form to meet future needs (such as including national standards for selected air toxics) or whether revocation should be considered.

AMBIENT AIR QUALITY NATIONAL ENVIRONMENT PROTECTION MEASURE

The Ambient Air Quality National Environment Protection Measure sets the standards and the monitoring protocol for jurisdictions to assess achievement of those standards. It requires that each jurisdiction submit a monitoring plan and annual report to the National Environment Protection Council evaluating progress in achieving air quality standards and compliance with the measure. The jurisdictional reports on air quality monitoring are published on the web and summarised as part of the jurisdiction's annual report on implementation and effectiveness of the National Environment Protection Measure. The National Environment Protection Measure report and National Environment Protection Council annual reporting requirements do not cover the same reporting year and are due at different times but information is submitted in accordance with the National Environment Protection Measure annual reporting cycle.

The National Environment Protection Measure has provided a nationally consistent framework for the monitoring and reporting of air quality and nationally consistent benchmarks against which to assess air quality. All jurisdictions have reported detailed monitoring data for relevant air sheds.

Information from National Environment Protection Measure reporting on ambient air quality has been used by jurisdictions in formulating strategies to address air quality. In particular, it has enabled comparison between jurisdictions, and information is being used to inform the development of the National Plan for Clean Air.

The review of the National Environment Protection Measure and the development of the National Plan for Clean Air are highlighting limitations in the public accessibility of reporting on air quality under the National Environment Protection Measure, and in the compliance-based approach to reporting. Alternative forms of reporting that are more accessible and useful to the community and policy makers should be considered. In addition, reporting on exposure and air quality changes over time is also important given the opportunities for reduced health care burden associated with improving air quality and reducing exposure.

ASSESSMENT OF SITE CONTAMINATION NATIONAL ENVIRONMENT PROTECTION MEASURE

The Assessment of Site Contamination National Environment Protection Measure does not set reporting requirements beyond the need to report annually on the implementation and effectiveness of the measure. All jurisdictions reported a high level of compliance with the guidelines. Reporting and provision of data is not central to the goal of this National Environment Protection Measure and therefore it is appropriate that the measure does not entail detailed reporting. The review team notes that further data on how the National Environment Protection Measure has contributed to the objects of the Act or achieved its goals would be valuable.

Reporting on this National Environment Protection Measure focuses on actions taken by jurisdictions to implement the measure, including use of the incorporated guidance. Reporting does not include key performance indicators or information on, for example, the overall contamination status of land. The focus of the measure is on how to assess individual sites, rather than on overall environmental condition.

DIESEL VEHICLE EMISSIONS NATIONAL ENVIRONMENT PROTECTION MEASURE

Under the Diesel Vehicle Emissions National Environment Protection Measure, jurisdictions report on the need for management and the actions taken to manage emissions from the in-service diesel fleet. Jurisdictions have provided this information in jurisdictional annual reports on implementation and effectiveness of the National Environment Protection Measure. The time frames for both the National Environment Protection Measure and annual reporting requirements are the same. Both reporting years end on 30 June with reports due to the National Environment Protection Council on 30 September.

Jurisdictional reporting data provides an understanding of actions taken and in some cases provides trend data (such as on reports on smoky vehicles). The review team considers that reporting on this National Environment Protection Measure could be improved by incorporating an outcome focus—for example by assessing the air quality impacts of the actions taken. Separate systems for reporting smoky diesel vehicles compared to smoky non-diesel vehicles would provide more meaningful data on the level of diesel vehicle emissions.

In addition, many implementation activities associated with this National Environment Protection Measure are also included in the Ambient Air Quality National Environment Protection Measure. Rather than repeat this information, jurisdictions could provide reference to the Ambient Air Quality National Environment Protection Measure.

MOVEMENT OF CONTROLLED WASTE NATIONAL ENVIRONMENT PROTECTION MEASURE

Under the Movement of Controlled Waste National Environment Protection Measure jurisdictions report on movement of controlled waste into each jurisdiction, indicating jurisdiction of origin, waste code and quantity of waste and the level of discrepancies (such as non-arrival of a consignment) as a percentage of total authorised controlled waste movements. This information is intended to inform the National Environment Protection Council's assessment of the effectiveness of the National Environment Protection Measure and is likely to support that aim. The National Environment Protection Council has represented the annual movement of controlled waste in graphs which allow a comparison of annual activity under this National Environment Protection Measure. Information exchange between jurisdictions ensures consistent application of the measure, and the data reporting required provides valuable trend data.

NATIONAL POLLUTANT INVENTORY

Reporting is central to the National Pollutant Inventory, with industrial facilities and jurisdictions estimating emissions of defined pollutants and presenting that information on the National Pollutant Inventory database. The 2005 review of the National Pollutant Inventory found 'that the [National Pollutant Inventory] has delivered benefits to, and met the needs of a range of groups and provided information for a wide variety of purposes'.

In addition to the database, the National Environment Protection Council must include a summary of information collected for the purposes of the National Pollutant Inventory in its annual report to parliaments. The annual report is also the avenue for naming those that have breached their reporting requirements. The 2010–11 annual report contains details on the number of facilities reporting on the National Environment Protection Measure, the use of the database and implementation issues raised by jurisdictions.

The annual reporting information does not add value over that achieved by the National Pollutant Inventory database and there is no value in the current system of annual individual jurisdictional reports.

USED PACKAGING MATERIALS NATIONAL ENVIRONMENT PROTECTION MEASURE

The Used Packaging Materials National Environment Protection Measure requires each jurisdiction to provide information collected from brand owners, local government and surveys. The National Environment Protection Council has presented the local government data for 2011–12 on its website rather than in the annual report.

In addition to National Environment Protection Measure reporting by jurisdictions, the Australian Packaging Covenant requires evaluation and reporting annually on achievements against covenant goals, overarching targets and key performance indicators. There must be reporting on issues affecting the covenant, performance of covenant signatories and overall management of the covenant. The reports are presented to the Standing Council on Environment and Water.

The primary purpose of the Used Packaging Materials National Environment Protection Measure is to create the regulatory underpinning as part of the co-regulatory approach for the Australian Packaging Covenant. Reporting under the covenant is used by the Australian Packaging Covenant Council to guide covenant programs and actions.

Information collected under the National Environment Protection Measure in relation to recycling services by local government and brand owner surveys is used by jurisdictions to guide compliance activities and by the Australian Packaging Covenant Council in assessing overall performance and decisions about programs. Nationally consistent waste and recycling data is not available, so it is difficult to accurately compare performance between states. The methodologies used by each jurisdiction to compile figures for waste diverted from landfill to recycling are different. However, the information collected is needed to understand the overall performance in relation to packaging. The challenge is to ensure streamlining with other data collection.

ATTACHMENT—F HISTORY OF VARIATIONS

AIR TOXICS NATIONAL ENVIRONMENT PROTECTION MEASURE (2011 MINOR VARIATION)

Information provided by jurisdictions through the mid-term review identified several areas of the National Environment Protection Measure that needed minor changes to improve the implementation of the measure and assist in meeting the measure's purpose.

The review found that monitoring methods required in the National Environment Protection Measure were not generally being used as they were too resource intensive. However, other internationally recognised methods were being used which provided data valuable to the measure's overall goal of collecting sufficient data regarding air toxics in Australia to enable further decisions to be made. The minor variation should enable these, and the data collected, to be used in achieving the overall outcome of the National Environment Protection Measure and increase our knowledge of air toxics in Australia.

AMBIENT AIR QUALITY NATIONAL ENVIRONMENT PROTECTION MEASURE (2003 VARIATION)

The Ambient Air Quality National Environment Protection Measure was varied to include advisory reporting standards for particles as PM2.5. The 2011 review of the measure (commenced in 2005) has highlighted growing challenges to air quality due to climate change and population growth and highlighted the ability to improve management of air quality in Australia. Any future variation of the National Environment Protection Measure will be considered in the development of a National Plan for Clean Air.

ASSESSMENT OF SITE CONTAMINATION NATIONAL ENVIRONMENT PROTECTION MEASURE (2007 VARIATION PROCESS UNDER WAY)

In 2007 the National Environment Protection Council agreed to initiate a variation of the Assessment of Site Contamination National Environment Protection Measure. The proposed variation will ensure that the measure remains the premier document for the assessment of site contamination in Australia by drawing on the latest methodologies for assessing human and ecological risk from site contamination, and updating guidance on site assessment methods in line with technological changes in Australia and overseas. The National Environment Protection Council is expected to consider the variation shortly.

DIESEL VEHICLE EMISSIONS NATIONAL ENVIRONMENT PROTECTION MEASURE (2009 VARIATION)

The Diesel Vehicle Emissions National Environment Protection Measure was reviewed in 2007 and, overall, was found to provide a sound framework for programs to reduce emissions from diesel vehicles. However, the review also found scope for improving and updating the schedules to the National Environment Protection Measure. The measure was subsequently varied to update the schedules, and in particular to:

- incorporate reference to new technology
- reflect knowledge gained through experience in implementing the National Environment Protection Measure and its guidelines
- improve the effectiveness of the National Environment Protection Measure.

MOVEMENT OF CONTROLLED WASTE NATIONAL ENVIRONMENT PROTECTION MEASURE (2004 AND 2010 MINOR VARIATIONS)

In 2004 the Movement of Controlled Waste National Environment Protection Measure was subject to minor variation to take account of recycling programs and extended producer responsibility programs which have interstate or national components, and products subject to recall approved by the Australian Pesticides and Veterinary Medicines Authority, Food Standards Australia New Zealand or the Therapeutic Goods Administration.

Submissions received from stakeholders consulted during the 2009 review of the National Environment Protection Measure indicated that some further minor variations were needed to remove clauses that are no longer required, to provide greater clarity to the schedules and certainty to industry when completing documentation, and to reduce the regulatory burden where requirements do not achieve any significant environmental benefit. Some stakeholders also made submissions indicating that the National Environment Protection Measure needed some clarification as to the types of policies and legislation that should be considered by jurisdictions when making decisions about the movement of waste. The measure was subject to minor variation to address these issues.

NATIONAL POLLUTANT INVENTORY NATIONAL ENVIRONMENT PROTECTION MEASURE (2007 VARIATION)

The National Environment Protection Council varied the National Pollutant Inventory in 2007 to require reporting of National Pollutant Inventory substances in waste transferred for treatment, containment or final disposal. New substances were also added to the National Pollutant Inventory substances list. Other amendments included:

- changes to reporting time frames
- removal of the exclusion clause for aquaculture
- removal of reporting on greenhouse gas emissions (removed by a minor variation in 2008)
- threshold changes for mercury, PM10 and, if included in the National Pollutant Inventory, PM2.5.

USED PACKAGING MATERIALS NATIONAL ENVIRONMENT PROTECTION MEASURE (2004–05 AND 2010–11 VARIATIONS)

The National Environment Protection Council varied the Used Packaging Materials National Environment Protection Measure in 2004–05 and in 2010–11 to extend the measure to underpin the second and third national/Australian packaging covenants. Variations to the measure were minor in each case. In late 2010 administrative issues were identified with the registration of the previous minor variations. To remove uncertainty about the standing of the previous variations, the National Environment Protection Measure was remade in 2011.

ATTACHMENT—G EUROPEAN UNION MODELS FOR ENVIRONMENTAL PROTECTION

THE EUROPEAN UNION MODEL—DIRECTIVES

The European Union is not dissimilar to Australia in that it too is a federation of member states. As such, there are similar issues with the consistent adoption of laws across member states in both jurisdictions.

European Union directives establish overarching outcomes or goals in various policy areas that must be achieved. There is no prescription as to how the outcome must be achieved, with member states able to determine the best way to do so. There is wide discretion with regard to enforcement mechanisms, including sanctions for non-compliance.

Directives, unlike National Environment Protection Measures, can be directed at either individual members or the collective. Directives are used to bring member state laws into alignment and are commonly used for the purpose of implementing single market standards across the European Union.

FACTORS OF SUCCESS

Directives are action focused and include an implementation date that must be complied with. Member states may implement required measures within their own legal system prior to this date, allowing for flexibility in implementation.

Directives are supported by strong compliance measures that compel member states to act. The European Commission is responsible for ensuring directives are implemented appropriately and on time. Failure by member states to implement a directive effectively and by the implementation date is dealt with initially by the commission, which has powers to address non-compliance. The initial step for the commission is to seek voluntary compliance. Where necessary, the commission may refer the matter to the Court of Justice of the European Union and commence legal proceedings. If the court finds the member state has failed to implement a directive it may require that state to undertake necessary measures to comply with the directive. The court may also impose significant financial penalties on member states.

In April 2012 the European Commission referred Bulgaria, Hungary, Poland and Slovakia to the European Union Court of Justice for failing to meet the December 2010 deadline to transpose the European Union's Waste Framework Directive into national law. The court was asked to impose penalty payments ranging between 15,220€ per day (Bulgaria) and 67,314€ per day (Poland). Approximately 20 per cent of cases where directives have not been implemented appropriately in the allocated time relate to the environment.

SUPPORTING STRUCTURES

Implementation plans are developed as part of the impact assessments for proposed new directives. These plans provide support by mapping implementation issues at a preliminary stage. They identify all main risks for implementing a new directive and develop appropriate risk management responses ensuring implementation is considered from the commencement of policy development.

Correlation tables are another complementary tool to the directive setting process. They are developed by member states to demonstrate how each element of a directive has been transposed into local law. They provide an easily assessable overview of the implementation of the directive for the European Commission, which can also then be used by those regulated to determine relevant local provisions across borders and is also accessible to the general public.

Transparency is important in the directive-setting process. In addition to the transparency provided by the structures discussed above there is open disclosure on the European Commission website of summary information on all proceedings against member states for failing to meet directive requirements. This transparency is a visible driver of compliance among member states.

Cooperation between member states is an important accompanying measure to the directives system. The European Union has in place advisory committees not dissimilar to the senior officials committee structure under ministerial councils in Australia. It also has less formal networks such as the European Union Network for the Implementation and Enforcement of Environmental Law, which is very similar in operation to the Australasian Environmental Law Enforcement and Regulators network in Australia but also includes a significant policy element.

ATTACHMENT—H APPROACHES TO ENVIRONMENT PROTECTION⁶

Approach	Purpose	Examples	Advantages	Disadvantages
Non-statutory approaches				
<u>Agreements and memoranda of understanding</u> as a basis for state/territory implementation	Memoranda of understanding and agreements to implement consistent regulatory requirements and standards at a jurisdictional level		Simple, flexible	Processes are not defined Regulatory development and impact statement processes need to be replicated in each jurisdiction

⁶ A more detailed summary of mechanisms for implementing national approaches can be found in Productivity Commission 2009, *Chemicals and Plastics Regulation: Lessons for National Approaches to Regulation*, Supplement to Research Report, Melbourne.

Approach	<p><u>Guidelines</u></p> <p>National guidelines or similar documents published under the auspices of Standing Council on Environment and Water</p>	Purpose	<p>Define consistent national guidance and information to assist jurisdictions, business and the community</p> <p>Can define a broadly consistent approach while allowing for significant flexibility and discretion in application</p>	Examples	<p>Australian Water Quality Guidelines for Fresh and Marine Waters</p>	Advantages	<p>Flexibility in implementation at a jurisdictional or local level</p> <p>Potentially quicker to develop subject to requirements for regulatory impacts statements (noting that detailed technical development and review can take considerable time)</p> <p>Can be used as an initial step where information is not yet sufficiently developed to support a legally binding approach</p>	Disadvantages	<p>Where guidelines are being used to establish requirements (pseudo regulation) they are increasingly subject to regulatory impact statement processes</p> <p>Reduced standing/status, which reduces stakeholder confidence and clarity. This is particularly relevant where guidelines are used to underpin regulatory decision making at a jurisdictional level</p> <p>Less clear commitment to implement from jurisdictions</p>

Approach	Purpose	Examples	Advantages	Disadvantages
<p><u>Australian Standards</u></p> <p>Standards established through Standards Australia processes and published by Standards Australia.</p> <p>Established through a defined stakeholder process</p>	<p>Defining agreed protocols, standards, methods etc. Typically technical in nature</p> <p>Direct legal standing not required (although may be referenced in legislation)</p>	<p>Australian Standard on sampling of soils</p> <p>Australian Standard on wood heaters</p>	<p>Well-recognised brand and process</p> <p>Development shared with key stakeholders, providing opportunity for strong engagement</p> <p>Voluntary—uptake is led by industry/public rather than government</p>	<p>Not legally enforceable unless picked up in a legislative scheme</p> <p>Can be time consuming to develop</p> <p>Costly and not freely available to stakeholders (copyright/ownership issues)</p> <p>No impact on in-service products (e.g. existing wood heaters)</p> <p>Time consuming due to need for extensive stakeholder engagement/agreement</p>

Approach	Purpose	Examples	Advantages	Disadvantages
<p>Statutory approach with jurisdictional implementation</p> <p><u>National Environment Protection Measures</u></p> <p>National standard, goal, protocol or guideline established under the National Environment Protection Council Acts, with implementation through jurisdictional arrangements</p>	<p>Establishing consistent national approaches, requirements, controls, standards or guidelines with implementation through jurisdictional regulatory schemes</p> <p>This provides statutory basis and defined processes and flexibility in implementation, which can provide advantages where minor variations in implementation do not undermine the policy intent</p> <p>Utilising existing jurisdictional regulatory schemes and institutions is an efficient approach, and avoids stakeholders needing to understand whole new systems</p>	<p>Ambient Air Quality National Environment Protection Measure</p> <p>National Pollutant Inventory National Environment Protection Measure</p>	<p>Federal arrangement with ownership from all jurisdictions</p> <p>Utilises existing state and territory arrangements to legally implement the National Environment Protection Measure—a potentially efficient process that integrates national requirements with existing jurisdictional systems</p> <p>Framework well established, providing defined processes that are well understood by stakeholders</p> <p>Streamlined processes for adoption at a jurisdictional level</p> <p>Statutory instruments reinforcing the status/standing of standards and requirements established</p> <p>Provides flexibility at the jurisdictional level to reflect local issues in implementation</p> <p>Jurisdictional commitment to implementation stronger than for guidelines</p>	<p>Cost and time associated with existing processes</p> <p>Limitations in the scope of matters for which a National Environment Protection Measure could be established</p> <p>Flexibility in implementation militates against uniformity in requirements that may be desirable for some issues (For example product standards)</p> <p>Model legislation that establishes the National Environment Protection Measures framework is costly and time consuming to vary</p>

Approach	Purpose	Examples	Advantages	Disadvantages
Uniform legislative approach				
<p><u>Commonwealth legislation</u></p> <p>Commonwealth legislation, together with necessary subordinate instruments, to establish standards and requirements</p> <p>Can be issue specific or framework in nature</p>	<p>Establishing legally binding national requirements, controls or standards where the policy intent can be delivered within the scope of Commonwealth powers (For example corporations, import/export, taxes and excises)</p>	<p>Commonwealth product stewardship legislation</p>	<p>Uniformity of requirements</p> <p>Provides clarity and single point of reference in relation to the requirements</p>	<p>Limited to Commonwealth constitutional powers, e.g. may not be able to regulate non-corporations (note that constitutional power limitations can be addressed through referral of powers, although this is very rare)</p> <p>Costs and time associated with development of primary and supporting legislation</p>

Approach	Purpose	Examples	Advantages	Disadvantages
<p><u>Cooperative state/territory legislation</u></p> <p>State/territory legislation, together with necessary subordinate instruments, to establish standards and requirements</p> <p>Includes options of model legislation and template legislation or incorporation by reference</p> <p>Can be issue specific or framework in nature</p>	<p>Establishing legally binding, uniform national requirements, controls or standards where the policy intent requires state/territory powers and can be delivered within the scope of those powers</p>	<p>National Heavy Vehicle Regulator</p>	<p>Uniformity of requirements</p>	<p>Costs associated with development of legislation in each participating jurisdiction</p> <p>Unable to address matters that are constitutionally limited to the Commonwealth, e.g. control of imports</p> <p>Achieving consistent interpretation/implementation of compliance activity can be challenging</p>

Approach	Purpose	Examples	Advantages	Disadvantages
<p><u>Cooperative state/territory–Commonwealth legislation</u></p> <p>Combination of state/territory and Commonwealth legislation, together with necessary subordinate instruments, to establish standards and requirements</p> <p>Includes options of model legislation and template legislation or incorporation by reference</p> <p>Can be issue specific or framework in nature</p>	<p>Establishing legally binding, uniform national requirements, controls or standards where the policy intent requires state/territory powers and Commonwealth powers (For example need to establish obligations for corporations and non-corporations)</p>	<p>Water Efficiency Labelling Scheme</p>	<p>Uniformity of requirements</p> <p>Capacity to establish comprehensive requirements</p>	<p>Significant costs associated with development of legislation in each participating jurisdiction</p> <p>Achieving consistent interpretation/implementation of compliance activity can be challenging</p>

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National Environment Protection Council Response
to the Report of the Third Review of the
National Environment Protection Council Acts
(Commonwealth, State and Territory)
April 2013

NEPC



CONTENTS

Introduction	1
First Term Of Reference: A Review of the Operation of the National Environment Protection Council Act as Required by Section 64(1)(a): the Operation of this Act and the Act of each other Participating Jurisdiction that Corresponds to this Act	3
Recommendation 3.7 Council of Australian Governments' Reforms	3
Recommendation 5.2 Efficiency of National Environment Protection Measure Processes and Streamlining Consultation Processes	3
Recommendation 5.4 Making, Amending and Revoking National Environment Protection Measures	4
Recommendation 6.1 The National Environment Protection Council Annual Report	5
Recommendation 6.3 Reporting on Individual National Environment Protection Measures	5
Recommendation 7.1 Efficiency of the National Environment Protection Council	6
Second Term of Reference: A Review of the Extent to which the Object Set Out in Section 3 of the Act has been Achieved, as Required by Section 64(1)(b): The Extent to which the Object Set out in Section 3 of Each Such Act has been Achieved	8
Recommendation 4 Effectiveness of the National Environment Protection Measures System	8
Recommendation 4.1 Objects of the National Environment Protection Council Acts	8
Recommendation 4.5 Implementation of the National Environment Protection Measures	8
Recommendation 5.1 Nature and Form of National Environment Protection Measures	9
Third Term of Reference: The Status and Effectiveness of National Environment Protection Measures as a Framework for Achieving Nationally Consistent Guidance and Standards, Including Possible Alternative Approaches Based on Best Practice Models	10
Recommendation 4.4 Broadening The Scope of the Toolkit for National Action	10
Fourth Term of Reference: The Review Should Recommend Whether Any Amendments to the National Environment Protection Council Act and/or the National Environment Protection Measures Process Should be Progressed at this Time	11
Recommendation 4.4 Broadening the Scope of the Toolkit for National Action	11

INTRODUCTION

This is the National Environment Protection Council's response to the *Report of the Third Review of the National Environment Protection Council Acts (Commonwealth, state and territory)*. The review was initiated by the National Environment Protection Council to give effect to the requirement under section 64 of the Commonwealth *National Environment Protection Council Act 1994* (and mirrored in the National Environment Protection Council Acts of all states and territories) for five yearly reviews of the operation of the Acts and the extent to which the objects of the National Environment Protection Council Acts have been achieved.

TERMS OF REFERENCE

The National Environment Protection Council determined that the review should examine and report according to the following specific terms of reference:

1. A review of the operation of the Act as required by section 64(1)(a).
2. A review of the extent to which the object set out in section 3 of the Act has been achieved, as required by section 64(1)(b).
3. The status and effectiveness of National Environment Protection Measures as a framework for achieving nationally consistent guidance and standards, including possible alternative approaches based on best practice models.
4. The review should recommend whether any amendments to the Act and/or the National Environment Protection Measure process should be progressed at this time.

The review covered the period up to 30 March 2012. It considered the effectiveness of current National Environment Protection Measures, and possible alternative approaches, giving regard to items currently on the work plan for the Standing Council on Environment and Water, including the development of the National Plan for Clean Air and the Council of Australian Governments' Chemical Reform agenda.

The review was a desk top review conducted by a sub-group of officials (the Deliverable 3 Working Group) overseen by the Seamless Environmental Regulation Thematic Oversight Group and the National Environment Protection Council Committee. The National Environment Protection Council Executive Officer assisted in the review. No formal consultation with stakeholders was sought.

The report of the review was completed and forwarded to Standing Council on Environment and Water at the end of 2012.

WINDING UP THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION

The review considered the efficiency of the council and secretariat operations. When formally initiating the review of the National Environment Protection Council Acts, National Environment Protection Council also supported the Commonwealth expediting amendment to the Commonwealth *National Environment Protection Council Act 1994* to bring the functions of the National Environment Protection Council Service Corporation into the Commonwealth financial framework. This followed extensive review of the operation and budget for the corporation before, and following, its move from Adelaide to the Department of Sustainability, Environment, Water, Population and Communities offices in Canberra. It is expected that the National Environment Protection Council Act will be amended by Commonwealth Finance Framework legislation in the first half of 2013 to abolish the National Environment Protection Council Service Corporation and bring the operations within the ambit of the *Financial Management and Accountability Act 1997*.

FIRST TERM OF REFERENCE: A REVIEW OF THE OPERATION OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACT AS REQUIRED BY SECTION 64(1)(A): THE OPERATION OF THIS ACT AND THE ACT OF EACH OTHER PARTICIPATING JURISDICTION THAT CORRESPONDS TO THIS ACT

RECOMMENDATION 3.7 COUNCIL OF AUSTRALIAN GOVERNMENTS' REFORMS

- Consider amendments that give effect to adopting the Council of Australian Governments' decision to remove any reference to the National Environment Protection Council in the Act and replace it with references to Ministers with responsibility for environment protection.
- The Acts should retain a process for developing National Environment Protection Measures and potentially other future national decisions.

Response

The National Environment Protection Council agrees in principle with the recommendations. Given that the Act will retain provision for a statutory decision-making body, consideration will be given as to how best to refer to this body while providing for future changes to Council of Australian Governments' Ministerial Councils.

The National Environment Protection Council agrees [with this recommendation and] that the Acts should retain a process for developing National Environment Protection Measures and potentially other future national decisions. Also, the Act will retain the provision that decisions around making National Environment Protection Measures require the support of at least two-thirds of the members.

RECOMMENDATION 5.2 EFFICIENCY OF NATIONAL ENVIRONMENT PROTECTION MEASURE PROCESSES AND STREAMLINING CONSULTATION PROCESSES

- The National Environment Protection Council Act should be amended to remove prescriptions around public consultation, and development of impact statements, while retaining the requirement for consultation. Further:
 - the nature and extent of consultation should be determined by the National Environment Protection Council, Council of Australian Government specified consultation processes, relevant legislation such as the Commonwealth Legislative Instruments Act 2003 and any other requirements for consultation as may be in effect from time to time

- the National Environment Protection Council should retain the ability to introduce any additional consultation mechanisms and impact statements that it sees fit
- consideration should be given to a streamlined National Environment Protection Measure revocation process or a specific sunset period.

Response

The National Environment Protection Council agrees with this recommendation. The Council supports public consultation in the making of statutory instruments. The embedding of detailed provisions for consultation can lead, over time, to duplication and inconsistency with other more widely used process specifying consultation requirements that are updated on a regular basis.

See below for other recommendations and responses relating to streamlining and revocation of National Environment Protection Measures.

RECOMMENDATION 5.4 MAKING, AMENDING AND REVOKING NATIONAL ENVIRONMENT PROTECTION MEASURES

- When making or reviewing a National Environment Protection Measure, National Environment Protection Council should consider including:
 - a sunset clause for National Environment Protection Measures that by their nature have a limited operational life
 - a requirement for review within a specified period where the nature of the National Environment Protection Measure is such that, subject to assessment of its effectiveness and efficiency, the National Environment Protection Measure should be ongoing. In this case the National Environment Protection Measure should specify that it will be reviewed within ten years
 - review of National Environment Protection Measures should focus on policy and implementation as well as the detailed scientific methodology— with the aim of determining the ongoing need for each National Environment Protection Measure and moving towards a better and more responsive framework
 - National Environment Protection Measures should be revoked if no longer necessary and the National Environment Protection Council Act should be amended to allow for a streamlined process to revoke National Environment Protection Measures, making provision for flexibility on the method of public consultation.
 - consideration should be given to the ongoing costs and benefits of the Air Toxics National Environment Protection Measure and the Diesel Vehicle Emissions National Environment Protection Measure and the National Environment Protection Council should be advised on the desirability and timing of review and variation of the National Environment Protection Measures or formal revocation of these National Environment Protection Measures under Section 20 of the National Environment Protection Act.

Response

The National Environment Protection Council agrees with the above recommendations. The National Environment Protection Council agrees that future National Environment Protection Measures should include a sunset clause or, where the intent is that a National Environment Protection Measure is ongoing, a clause requiring regular review. Consideration will be given to a streamlined revocation process—particularly for subordinate instruments should technical/process elements of National Environment Protection Measures be moved to subordinate instruments in the future.

Consideration will be given to determining if the Air Toxics and Diesel Vehicle National Environment Protection Measures are still required to meet future needs or if revocation should be considered.

RECOMMENDATION 6.1 THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ANNUAL REPORT

- The requirement for preparation and tabling in Parliament in every jurisdiction of an annual report on implementation of National Environment Protection Measures should be replaced by departmental/agency annual reporting.

Response

The National Environment Protection Council agrees with the recommendation. Reporting processes should be streamlined, eliminate duplication, provide adequate information on each National Environment Protection Measure, and reports should be readily available to Parliaments, the public and the business community as necessary.

In relation to annual reporting processes, a different approach will be adopted, where each jurisdiction provides a single report annually on implementation of National Environment Protection Measures. Each report will address the specific reporting requirements as set out in National Environment Protection Measures. Reports need not be in parliaments. Jurisdictions may choose to report on relevant departmental websites.

Financial reporting on the special account proposed to replace the National Environment Protection Council Service Corporation account will be on an annual basis in the Department of Sustainability, Environment, Water, Population and Communities annual report.

RECOMMENDATION 6.3 REPORTING ON INDIVIDUAL NATIONAL ENVIRONMENT PROTECTION MEASURES

- National Environment Protection Measures should explicitly address the need for reporting with the aim of ensuring relevant information is made available in readily accessible forms, particularly by utilising the web, for the purpose of informing the community and business sectors and for use by government in policy and decision making.

- Future reviews of National Environment Protection Measures should carefully consider the reporting requirements specific to each National Environment Protection Measure to ensure that effort is focused on producing useable, valuable and targeted information in a cost-effective manner.
- Consideration should be given to developing/refining key performance indicators for National Environment Protection Measure implementation and effectiveness.
- Jurisdictions should continue to report annually on data arising out of National Environment Protection Measures; however this could be done separately via jurisdictional websites or similar means, rather than in the form of tabled annual reports.
- Reporting on the effectiveness of National Environment Protection Measures should be conducted as part of a National Environment Protection Measure review process (Refer to Part 5).

Response

The National Environment Protection Council agrees with the recommendations. Reporting will be principally web based to facilitate access by the widest range of stakeholders. Each National Environment Protection Measure will include measurable performance indicators. Reporting on individual National Environment Protection Measures will be as specified in the National Environment Protection Measure—but no less than every five years.

RECOMMENDATION 7.1 EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL

- The National Environment Protection Council should have more flexibility in determining its operating and meeting procedures.
- The Act should enable the National Environment Protection Council, and the Committees of the council, to meet and make decisions out of session including by electronic means, by email, fax, phone or video.

Response

The National Environment Protection Council agrees with the recommendation. When the Act is amended, appointment processes and membership provisions will be governed by standard Council of Australian Governments' Ministerial Council appointment processes. Chairing arrangements, arrangements for deputies and procedures for convening and running meetings will also follow standard Council of Australian Governments' Ministerial Council processes and be left to the National Environment Protection Council to determine. Procedures for appointment to and running of the National Environment Protection Council Committee will be left to the National Environment Protection Council.

However, where decisions relate to the making or amending of National Environment Protection Measures, the current provision of a two-thirds majority will be retained.

EFFICIENCY OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL SERVICE CORPORATION (7.3)

The review notes that the National Environment Protection Council has moved to abolish the National Environment Protection Council Service Corporation and replace it with a flexible and fit-for-purpose secretariat within the financial framework of a host jurisdiction.

Subject to the decision to abolish the National Environment Protection Council Service Corporation, financial reporting on National Environment Protection Measure expenditure will be via annual reporting by the host jurisdiction on a special account established for the purpose of, inter alia, establishing and managing National Environment Protection Measures and to cover the operating costs of the secretariat.

SECOND TERM OF REFERENCE: A REVIEW OF THE EXTENT TO WHICH THE OBJECT SET OUT IN SECTION 3 OF THE ACT HAS BEEN ACHIEVED, AS REQUIRED BY SECTION 64(1)(B): THE EXTENT TO WHICH THE OBJECT SET OUT IN SECTION 3 OF EACH SUCH ACT HAS BEEN ACHIEVED

RECOMMENDATION 4 EFFECTIVENESS OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES SYSTEM

- National Environment Protection Measures are an important tool for national action for environmental protection and should be retained.

Response

The National Environment Protection Council Service agrees with the recommendation.

RECOMMENDATION 4.1 OBJECTS OF THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACTS

- Consideration should be given to amending the Act to more directly state the purpose of the Act—rather than have the object of the Act dependent on the establishment of the National Environment Protection Council.
- The objects of the Act should be amended to:
 - recognise the purpose of protection of the Australian community and the environment from harm
 - better reflect the Council of Australian Governments’ objectives of a seamless and harmonised national economy.

Response

The National Environment Protection Council agrees with the recommendation. The focus of the Act should no longer be on the establishment and operation of the National Environment Protection Council but on the establishment of and objectives for National Environment Protection Measures. Authority for establishment of National Environment Protection Measures or other related instruments should still rest with the Ministerial Council.

RECOMMENDATION 4.5 IMPLEMENTATION OF THE NATIONAL ENVIRONMENT PROTECTION MEASURES

- The National Environment Protection Council should determine the most appropriate approach to support consistent implementation of each National Environment Protection Measure—focusing on areas where consistent

implementation can strengthen environmental outcomes and reduce business costs.

- Where greater consistency in implementation is of benefit, particularly when inconsistent implementation has a negative impact on business, it is recommended that jurisdictions:
 - work together to pursue opportunities to improve and harmonise implementation of National Environment Protection Measures including improved regulatory practice
 - ensure timely translation of National Environment Protection Measure requirements into jurisdictional instruments.

Response

The National Environment Protection Council agrees with the recommendations. Consideration will be given to the establishment of a cross-jurisdictional group (for example heads of environment protection agencies) to work collaboratively to promote the consistency of implementation frameworks. Each National Environment Protection Measure should specify the broad approach to implementation (uniform, consistent, or harmonised) to provide clarity, allow appropriate implementation and enable clear reporting against objectives.

Depending on the specific issues addressed by each National Environment Protection Measure, there may be areas where uniformity of approach is a priority.

RECOMMENDATION 5.1 NATURE AND FORM OF NATIONAL ENVIRONMENT PROTECTION MEASURES

- A contemporary model for National Environment Protection Measures should be developed that focuses on outcomes and allows for flexibility to enable rapid update as new information becomes available.
- Any new model should ensure National Environment Protection Measures contain a clear outcome statement with goals, key performance indicators, standards and/or high-level protocols.
- Technical monitoring and reporting processes should be included in separate subordinate instruments that can be readily amended or updated when required, while still providing certainty for business. Formal regulation impact statements or Office of Best Practice Regulation mechanisms may not be required where there is no significant business impact.

Response

The National Environment Protection Council agrees with the recommendations. For every National Environment Protection Measure, the object to be achieved, the desired outcome sought, the key performance indicators, reporting requirements and review/evaluation mechanisms should be specified. Detailed processes or complex methodologies will be investigated for incorporation into other instruments. A risk-based approach to developing and varying National Environment Protection Measures should be adopted to optimise the balance between National Environment Protection Measures that are sufficiently detailed to provide guidance to stakeholders and yet enable rapid/cost-effective amendment to respond to changed circumstances and knowledge.

THIRD TERM OF REFERENCE: THE STATUS AND EFFECTIVENESS OF NATIONAL ENVIRONMENT PROTECTION MEASURES AS A FRAMEWORK FOR ACHIEVING NATIONALLY CONSISTENT GUIDANCE AND STANDARDS, INCLUDING POSSIBLE ALTERNATIVE APPROACHES BASED ON BEST PRACTICE MODELS

RECOMMENDATION 4.4 BROADENING THE SCOPE OF THE TOOLKIT FOR NATIONAL ACTION

- The scope of the National Environment Protection Council Acts should be amended to allow the National Environment Protection Council to make a National Environment Protection Measure on any environmental protection matter as determined unanimously by the National Environment Protection Council.
- Any proposal to amend the National Environment Protection Council Acts should investigate broadening the scope of the National Environment Protection Council Act and establishing a framework for national decisions implemented through jurisdictions and enable the setting of environmental performance standards for products and equipment. The preferred approach should be determined following detailed consideration of the specific needs of any scheme.

Response

The National Environment Protection Council agrees with the recommendations. A framework approach will be considered to maximise the future use and application of broadly applicable legislation. Expanding the National Environment Protection Council Act will enable it to provide a framework for a range of legislative initiatives including not only National Environment Protection Measures but also legislation establishing binding standards for products, for example. This would mitigate the proliferation of a suite of single-purpose acts. It would also complement existing frameworks for national action on environmental matters, such as the Commonwealth *Product Stewardship Act 2011*.

FOURTH TERM OF REFERENCE: THE REVIEW SHOULD RECOMMEND WHETHER ANY AMENDMENTS TO THE NATIONAL ENVIRONMENT PROTECTION COUNCIL ACT AND/OR THE NATIONAL ENVIRONMENT PROTECTION MEASURES PROCESS SHOULD BE PROGRESSED AT THIS TIME

Any significant amendments to the National Environment Protection Council Act are best progressed in conjunction with other related reform measures.

RECOMMENDATION 4.4 BROADENING THE SCOPE OF THE TOOLKIT FOR NATIONAL ACTION

- As the Standing Council on Environment and Water considers the National Plan for Clean Air, the Council of Australian Governments' Chemicals Reforms Program and other priorities, consideration should be given to adopting a framework approach in any legislative proposals to maximise the utility of the toolkit available for national action. Such proposals should include consideration of amendment of the National Environment Protection Council Acts, as well as alternative legislative approaches.

Response

Given competing priorities for development of enabling or amending legislation, rather than moving immediately to undertake amendments to the National Environment Protection Council Act, this could be done at the time that government may move to implement new legislation or amend existing legislation relating to implementing its priorities for action—such as any legislative changes which may emerge from consideration of the National Plan for Clean Air or the Council of Australian Governments' Chemicals Reform Program.

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