

**Submission by the
National Environmental Law Association (NELA)**

**to the
Productivity Commission**

**on the
Draft Report on**

**Implementation of Ecologically Sustainable Development by
Commonwealth Departments and Agencies**

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National Environmental Law Association (NELA)
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A multidisciplinary association, NELA was incorporated in 1989 in response to the need of practitioners in law, environmental science, planning and other professions to obtain and exchange information on issues relevant to environmental law and policy. NELA has approximately 600 members in active divisions in Victoria, Tasmania, Western Australia, South Australia, New South Wales, Queensland and the Australian Capital Territory. It aims to promote the constructive development of environmental law at local, national and international levels by providing information through publications, conferences and seminars, and by representing the interests of the membership.

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Draft Report on Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies

NELA welcomes the Commission's draft report as a very useful contribution to debate on implementation of ESD in Australia and thanks the Commission for this opportunity to present its submission.

This submission responds particularly to the request for comments on proposals for a Voluntary Code of Conduct, a Commission for Sustainable Development, and a duty of care for ESD, (page 137 of the draft report).

Voluntary Code of Conduct

NELA does not consider that the Voluntary Code of Conduct approach for Commonwealth Departments and Agencies could offer significant advancement in governmental implementation of ESD. Codes of conduct tend to espouse broad principles and to be articulated in general terms. Government institutions already subscribe to the principles of ESD as articulated in governmental policies. Those policies are adopted through whole-of-government processes. Although a Voluntary Code of Conduct may have some educative value within governmental institutions, it could offer little significant advancement on the current status quo in ESD implementation.

A Voluntary Code of Conduct in general terms is consistent with and appears to perpetuate the current pattern of weak implementation of ESD. As noted by the Organisation for Economic Cooperation and Development (OECD) Environmental Performance Review of Australia in 1997, quantifiable targets and the creation of appropriate institutional mechanisms are needed to improve Australia's current system for implementation of the National Strategy for Ecologically Sustainable Development (NSES D).

The Productivity Commission's draft report describes the key characteristics of effective monitoring systems (Box 7.5). These include requirements that:

- performance is measured against clearly defined objectives and outcomes in all relevant social, economic and environmental areas (with the use of relevant tools and expertise where appropriate);
- and the
- Development of indicators which are measurable, representative and cost effective and practical as possible (although indicators should not only be developed for areas easy to measure).

A Voluntary Code of Conduct would not meet these key requirements. Voluntary action plans which contain quantifiable targets and concrete mechanisms for implementation would be an improvement on the Voluntary Code of Conduct

approach. Mandatory actions plans would be a further improvement still , as discussed below in relation to Departmental ESD Action Plans.

Duty of Care for ESD

NELA supports the adoption of a duty of care which would require that Commonwealth departments and agencies take all reasonable and practical steps to ensure that their activities adequately take ESD considerations into account. However, it considers the duty of care approach to be inadequate to meet the need for ESD implementation.

Specific standards for identifying 'reasonable and practical steps' which 'adequately take into account' the duty of care in any given case would be elusive. Challenge of any particular failure to exercise the duty would be difficult. The proposed standard of 'best practice policy making regimes' may be undefinable and, even if defined, could offer only procedural improvement, rather than more substantive outputs. This brings us back to the need to measure performance against clearly defined objectives and outcomes.

However, the proposed duty of care would extend beyond the educative role of a Voluntary Code of Conduct, simply because it is proposed to be a statutory duty. As noted on page 135 of the draft report, the effectiveness of a duty of care for ESD would depend upon the enforcement and compliance mechanism. NELA considers that a statutory duty backed by an enforcement and compliance mechanism involving a designated independent government body, such as a commission, would lead to better implementation of the duty than would a voluntary code.

The proposed ESD duty of care could be articulated in the current Environment Protection and Biodiversity Conservation Bill (EPBC Bill) Chapter 6. It could offer part of a generalised statutory basis for more specific ESD commitments. However, the difficulties inherent in identifying the specific content of an ESD duty of care indicate that it alone is an inadequate basis for significant improvements in ESD implementation by departments and agencies.

Departmental ESD Action Plans

In order to mainstream sustainable development across the activities of its departments and agencies, the Commonwealth government should require that departments and agencies each design and adopt specific ESD action plans.

ESD action plans are a vital element of the Canadian model for mainstreaming sustainable development and creating a Commissioner for the Environment. There, the formulation and adoption of ESD action plans (called 'sustainable development strategies') is required of departments and agencies. 'Sustainable development strategies' receive brief mention in the draft report (Box 8.2 first dot point) but deserve further attention.

In relation to their application in the Australian federal context, NELA considers that formulation and implementation of ESD action plans should be a statutory requirement, as in Canada. One avenue for the introduction of a statutory requirements is under the current Environment Protection and Biodiversity Conservation Bill (EPBC Bill) Chapter 6 in a new Part. Alternatively, a free-standing Act could be passed.

The ESD action plans would be formulated by each Commonwealth department or agency to meet its self-selected objectives and targets, be applicable for a period of 3 years and revised by each department or agency every 3 years. NELA considers that guidelines for design of departmental and agency ESD action plans should require that they involve auditable objectives, annual performance targets and continuous improvement requirements applicable to both policy formulation processes and internal resources management.

Implementation of ESD action plans would be the responsibility of each department and agency and would be monitored by the independent commission through annual audits.

Audits of Environmental Performance Commitments

At federal levels, monitoring of department and agency ESD action plans should be undertaken within an institutional framework responsible for broader performance monitoring of Commonwealth ESD commitments.

NELA is of the view that the various Commonwealth ESD commitments audited should include those in published policies, legislation, treaties and inter-Governmental agreements, as well as departmental or agency ESD action plans. Audit should proceed using methodologies based on current 'efficiency', or 'value for money' or 'performance quality' assessments. A published schedule setting out a multi-year cycle of audits of environmental performance should be undertaken. Departmental and agency ESD action plans should be audited annually.

If ESD performance auditing is to be put on a formal footing, a range of machinery questions arise for consideration. These include who is to do the auditing and how the audit reports are to be dealt with.

Commissioner for ESD

At its 1998 annual general meeting, NELA resolved that it supports the establishment of a Commonwealth Commissioner for the environment. A Commissioner should be supported by adequate administrative capacity to independently monitor ESD implementation. There are many specific functions which could be discharged by a Commissioner to increase accountability for ESD administration. They include auditing of implementation of ESD commitments, investigation of complaints in ESD administration, and overseeing State of the Environment Report (SOER) preparation and identifying long term problems in ESD management.

Currently all of these functions are addressed to various extents through different arms of federal governmental machinery. The Australian National Audit Office (ANAO) engages in some auditing activities pertinent to ESD implementation, the Commonwealth Ombudsman may address complaints concerning ESD maladministration and Environment Australia is responsible for preparation of the SOER and ESD management. So why alter the existing arrangements?

1. Particularly concerning ESD implementation monitoring, NELA considers that there is substantial room for improvement in the current arrangements in ESD implementation. This view is confirmed in the 1997 OECD Environmental Performance Review of Australia and the finding in the Productivity Commission's draft report that 'monitoring of government activities do not appear to be undertaken routinely by departments and agencies' (page 65). ANAO auditing of federal ESD commitments is very limited, does not appear to be part of a systematic program, has little public awareness or parliamentary profile and has limited effect in terms of ESD implementation follow-up.

As proposed above, a published schedule setting out a multi-year cycle of audits of environmental performance is necessary. A distinctive public profile for ESD implementation auditing would promote departmental and agency responses to audits. Therefore, specific issue audits and an annual report of ESD audits should be published, including on the Internet, and tabled in the Australian Senate to be considered annually by the Senate Environment, Recreation, Communications and the Arts References Committee. A publicly identifiable, statutory office for the conduct of ESD audits should be established. This could be achieved by amendment of the Auditor-General Act 1997 Part VI, to create a senior officer of the Auditor-General responsible specifically for ESD auditing. Alternatively, a statutory office separate from the ANAO could be established.

2. In relation to improvements in the current mechanism for addressing complaints concerning ESD maladministration, the office of the Commonwealth Ombudsman is currently available. However, the office is under-resourced and unable to address all private complaints brought before it. While the full potential load of ESD related complaints is not clear, the Commonwealth Ombudsman would be unable to address ESD fact-finding inquiries involving the expertise or the scale of those undertaken by the New Zealand Commissioner for the Environment. The role played by the New Zealand functionary appears a positive one that could serve equally well in Australia. It would require the establishment of a separate office from the Commonwealth Ombudsman.

The difficulty of combining audit functions and expert fact-finding functions in the one office is evidenced in the limited role of the Canadian Commissioner for Environment and Sustainable Development concerning ESD maladministration complaints. The Canadian Commissioner merely monitors the responses of departments and agencies to petitions and reports on these responses to the federal parliament. This is largely a performance auditing role as there is no investigation of the substance of the petitions. In contrast, the objective fact-finding role played by the New Zealand Commissioner for the Environment is a much more substantive one which could not be effectively undertaken through exercise of an audit function. The

divergences between these functions affects how they might be institutionally combined, as discussed below.

3. Concerning SOER, Environment Australia is responsible for managing preparation of the national SOER. However, longer term ESD management issues and responses are currently articulated by various organisations - scientific and community concerns, parliamentary and governmental committees - and in an ad hoc way. Although SOER and longer term ESD management issues and responses are notionally linked, that connection is yet to be fully realised through federal government machinery. A Commissioner for ESD responsible for providing guidance to Environment Australia in the preparation of the SOER (although Environment Australia would continue to manage the preparation process) would be well placed to relate SOER design and outcomes to ongoing programmatic input into long-term ESD management issues. This machinery would be a useful step towards implementation of Draft Recommendation 7.5 of the draft report, which provides that 'The Commonwealth Government, in cooperation with State and Territory Governments, should develop a framework to facilitate performance measurement and enable comparisons of the effectiveness and efficiency of Commonwealth, State and territory policies and programs in ESD related areas such as the environment and natural resource management.'

Institutional Arrangements

Inquiry functions and SOER and long term ESD management functions all involve ESD fact finding and policy analysis expertise. The functions complement each other easily enough to suggest that they be combined in one office. In light of these comments, three institutional models for improved governmental implementation of ESD might be considered. They are listed in order of preference.

- First, an Environment Commissioner (with combined inquiry and SOER-related functions) and a separate office of Environmental Auditor might be created. The ESD Commissioner would be a statutory body independent of existing departments and agencies. The ESD Auditor would also be a statutory body, but attached to the ANAO. This model is consistent with contemporary corporate practice, whereby environmental auditors operate independently of management.
- Second, a single institution with all three audit, inquiry and SOER-related functions might be created. In this model, the ESD Commission might house outposted senior officials of the ANAO, as well as ESD expertise for the purposes of inquiry and SOER functions. In this model, the perceived integrity of the audit function could appear to be compromised by the hands-on role of inquiry and long term ESD issues management and response functions.
- Third, some functions could be omitted altogether and a commissioner discharging only audit, or only inquiry and SOER-related, functions might be created. In this case, NELA considers that the federal ESD monitoring and auditing function would need to take priority. It is clear that the need for national ESD implementation monitoring and accountability is dire.

In each model, the ESD Commissioner or Auditor should be given a secure statutory mandate and term of office and made independent of ministerial direction. The Commissioner could be referred to in the EPBC Bill (Chapter 6, Administration, in a new Part prior to Part 19, Organisations), in the Auditor-General Act 1997 or established under free-standing legislation.

Australian Council for Sustainable Development

As noted at page 136 of the draft report, working parties associated with Australia's NSESD were disbanded in 1992 although over 150 similar bodies (National Councils for Sustainable Development (NCSDs)) exist in other countries. In November 1991, the Australian ESD process produced nine sectoral and two inter-sectoral reports containing a multitude of recommendations for consideration by Australian federal, state and territory governments. It was remarkably successful in that the vast majority of recommendations were decided by consensus, bridging environmental and industry perspectives. Disbanding the Australian working groups in 1992 brought to an end the ongoing process of ESD policy formulation transparently involving major stakeholders on equal footing and seeking to reconcile their interests.

NELA considers that Australia needs a NCSD to continue the work of integrating environmental and industry values in policy formulation. It is important to note that the Australian ESD process was driven from the Department of Prime Minister and Cabinet (PM&C) and was, therefore, a whole-of-government process reflecting the authority of the leader of the federal government. It was not perceived as captive to sectoral interests. Similarly an Australian NCSD should be administered through PM&C.

An Australian NCSD would perform a very different role from a Commissioner for ESD and is no substitute for a Commissioner. Its work would provide inputs to that of Environment Australia and the Commissioner.