ENVIRONMENTAL PROTECTION IN FEDERAL STATES
INTERJURISDICTIONAL COOPERATION IN CANADIAN AND AUSTRALIAN

Doreen Barrie

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Introduction

National boundaries have become so porous that traditional
distinctions between matters of local, national and international
significance have become blurred. Ecosystems do not respect national
boundaries. (World Commission on Environment and Development
(WCED) (Bruntland Report) 1987, 82)

This quotation captures the scale of environmental issues and underlines
the need for concerted measures to address them. Environmental problems
are multi-dimensional, requiring action which challenges traditional
divisions not only between political jurisdictions but among departments
within jurisdictions. As a federal system inserts one additional layer of
decision-makers into the equation, it adds another element to an already
complicated process. Yet this added complexity may present a challenge:
if one considers a federal system a microcosm of the international arena,
in that semi-sovereign units must co-exist, the way in which
environmental problems are addressed in a federal state may shed some
light on the prospect of international cooperation. In other words, if
federal states can get it right, one can be sanguine about success in the
international arena (Hunt 1990, 43).

What then, can we learn from the experience of two federal countries,
Canada and Australia, in the area of environmental protection? What
institutional characteristics adopted in the two lend themselves to wider
application? The goal of this study is to examine a case in each country

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In the process of researching and writing this study, many individuals in
Canada and Australia gave generously of their time to fill gaps in my
knowledge or to provide a sounding board for ideas. I am grateful to each
one. The debt to my 'Australian Lieutenant', Rosemarie Gill, is profound.
with environmental as well as interjurisdictional implications, to
determine how their federal nature affected the outcome.

The study proceeds as follows: the first task is to sketch in the
dimensions of the dilemma faced by jurisdictions, particularly those with
a federal form of government. Accordingly, the introductory section will
discuss sectoral and political fragmentation and their consequences. This
is followed by a discussion of the constitutional bases from which
national and sub-national governments in the two countries derive their
power to enact legislation on environmental questions. A discussion of
relevant judicial decisions regarding environmental powers will be
included in this section.

The focus will then shift to a pulp mill project in Canada in which an
environmental assessment highlighted the need for interjurisdictional
cooperation. Following this, the study will turn to a similar project in
Australia once again with interjurisdictional implications, and explore the
process through which interjurisdictional matters were dealt with.

The third part of the work will focus attention on an institution for
solving/managing shared resources to explore what can be learned from
such a body and whether it can serve as a role model for other countries.
The institution is the Murray–Darling Basin Commission and the writer
will argue that its structure may help resolve the difficulties posed by the
breadth of environmental issues.

Section I: Consequences of Fragmentation

The Bruntland Report identified two phenomena that need to be addressed
if we are to achieve sustainable development: sectoral fragmentation and
territorial/political fragmentation. The first involves institutions with
relatively narrow mandates and compartmentalised world views —
organisational forms that have much to recommend them but which are
not without drawbacks (WCED 1987, 354–7).

Within a government, individual departments are generally responsible
for a particular function or group of functions. Ironically, institutions
increase capability by reducing comprehensiveness (March & Olsen
1989, 17). Paehlke and Torgerson argue that despite conflicts, there is a
tendency for (public and private) bureaucracies 'to develop mutually
supportive relationships which shut other potential participants out of
the process' (1990, 13). From an organisational perspective, clear
demarcation lines must be drawn not only to ensure efficiency, but also
in the interests of accountability. The 'decomposition of tasks' is a
pivotal characteristic of bureaucracies 'whenever problems overwhelm the
information processing capabilities of a single individual (or small group
of individuals)' (Dryzek 1990, 97). However, in addition to splitting
problems into manageable pieces, decomposition splinters the wider
perspective. March and Olsen point out that many of the rules in
political institutions are essentially devices for partitioning politics into relatively independent domains. The division of labour thus suppresses links across boundaries and creates barriers between domains (1989, 26). This state of affairs is more serious because politics is uncoupled from administration, and various parts of administration are uncoupled from each other (1989, 17).

Within the executive branch, for instance, it is often the case that fisheries, forestry and water management are addressed through independent agencies. Thus, a forestry commission may not take account of the consequences of logging on local watersheds and wildlife; departments of tourism may be unaware of the effects of tourism on fragile ecosystems. The tendency to view matters in isolation, to focus narrowly on particular aspects of problems, militates against the need to address the interrelatedness of policies. In other words, there are structural impediments to broadening the perspectives of decision-makers — a problem which must be addressed before we can expect to see a change in the status quo.

The consequence of the second phenomenon identified in the Bruntland Report, territorial/political fragmentation, is that one jurisdiction can engage in activities whose cost is externalised; e.g. an upstream polluter may dispose of waste products so that a deterioration in water quality is experienced by users in another jurisdiction. These externalities are not taken into account by decision-makers because they can export their problems and are insulated from the costs of their actions (Kennett 1990, 32). This can happen between jurisdictions in a federal system or between sovereign states.

Territorial boundaries represent one of the greatest environmental challenges as air and water cannot be confined or protected from the actions of people elsewhere. If there is no central authority to penalise a party for infractions of one sort or another, there may be little incentive to behave in an environmentally responsible manner. One could thus argue that jurisdictions are caught in the classic prisoner's dilemma.  

They make decisions based on little or no information on the behaviour of others; they make choices based on what might be faulty assumptions.

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1 The prisoner's dilemma refers to a situation in which two accomplices to a crime are arrested and questioned separately. Either can confess, hoping for a lighter sentence, but if both do so, no deal can be made. If both refuse to confess, i.e. cooperating with each other instead of with the police, it is possible that they will be convicted on a lesser charge.

The Prisoner's Dilemma game was invented in the 1950s by Merrill Flood and Melvin Dresher (Axelrod 1984, 216). It has been widely used by researchers ever since. It should be pointed out that this study will be using the prisoner's dilemma in a most straightforward way, attempting to explain the dynamics of a situation in which parties have to make decisions under less than optimal conditions.
of the intentions of other parties; there may be incentives to be driven entirely by self-interest especially if parties have little trust in their counterparts in other jurisdictions.

Viewing decision-making on environmental questions through the prism of a prisoner's dilemma helps explain the reluctance of governments to act decisively on environmental questions despite public pressure to do so. It is curious that they do not exploit public concern on these matters to improve their electoral fortunes. The economics versus the environment dichotomy does not always hold as the failure of one group to address environmental degradation may threaten the livelihood of other segments of society.² Related to the economic argument is the question of scientific uncertainty.³ Given this uncertainty, authorities are understandably reluctant to ban substances or practices that might cause environmental harm in the absence of almost unequivocal evidence of the dangers. To act prematurely might entail financial costs. Harrison (1991) offers 'blame avoidance' as an explanation for the weak role played by the Canadian federal government in environmental protection. She argues that governments in a federal state do not automatically compete for jurisdiction, that if 'a policy offers net political costs, a government is unlikely to test the constitutional waters' (1991, 20). Harrison's point is well taken: there is no question that governments are hesitant to take on a task (even if it is solely within their jurisdiction) that may be politically and financially expensive and which may exact an electoral

2 Admittedly, there may be a time lag before the detrimental effects of the first group's actions become evident. It has recently (Calgary Herald, 22 February 1992) come to light that the livelihood of many farmers in Alberta may be jeopardised as a result of the drilling practices of oil companies. There is concern about seepage into ground water as a result of the methods used. Approximately 700 chemicals, some toxic, are used in the drilling process, and the drilling mud is buried near the well site. There are an estimated 200,000 wells scattered around the province and as the Herald puts it: 'government, oil patch and environmental interests are all beginning to acknowledge the harm that might result from the decades-long practice of interring the chemical junk produced in drilling operations' (22 February 1992, A8).

A dairy farmer in north eastern Alberta with 43 oil wells clustered around his farmyard has discovered that polluted ground water and sulphur gas emissions may be causing abortions, weight loss and declining production from his herd (22 February 1992, A2). To this example one can add numerous others in which the activities of one industry threaten the health of another or of the general population.

3 For example, Health and Welfare Canada's limits on exposure to the most toxic of dioxins 2,3,7,8-TCDD, is 1700 times higher than the acceptable limit in the United States. Yet scientists in both countries have based their recommendations on the same body of literature (Harrison 1990, 1).
price. Nevertheless, it is equally true that governments are sometimes trapped in a prisoner's dilemma.

As pointed out above, the danger for governments then, lies in pursuing an 'environmentally friendly' strategy at some economic cost, only to find that the laxity of other jurisdictions vitiates/neutralises its 'green' goals. For example, if the government of British Columbia was contemplating a ban on the use of pesticides by fruit growers in the province, would they not engage in a cost/benefit analysis? They would certainly consider what the decision would cost growers, consumers and the government itself. A relevant question would also be whether B.C. could shut its borders to the entry of fruit from other provinces or countries where pesticides are used. An even more central question would be whether it would be worth the effort since pesticide use on fruit in B.C. constitutes such a minuscule amount of pollution. These thorny questions bedevil decision-makers just as they bedevil individuals who conscientiously reduce, recycle and re-use while the profligacy of their neighbours seems to cancel out their actions.

The only way to remove some of these difficulties is by reducing the uncertainty under which decision-makers must operate. A mechanism for interjurisdictional cooperation and an integrated approach to policy on the environment offers the best hope for success. In other words, the interrelatedness of environmental questions must be reflected in the institutions that are designed to manage them. The oft-quoted statement in the Bruntland Report sums it up neatly: 'The issues will not change, institutions must' (WCED 1987, 9). Institutional forms in federal states, where decision points are multiplied, demand greater levels of cooperation.

**Policy-Making in a Federal State**

The most appealing feature of a federal form of government is its immense flexibility and its capacity to tolerate a variety of institutional arrangements. But federalism is a mixed blessing: the advantage for the general population is that it provides individuals and groups with multiple points of access to decision-makers. The flip side of increased access is that a federal form of government fragments interest groups. In Canada, groups formed at the provincial level to respond to provincial policies have weak communication links with similar groups in other provinces because this would be strategically wasteful. A federal structure thus fragments social forces and inhibits their mobilisation on a national basis (Simeon 1977, 301).

From the viewpoint of policy-makers, a federal system requires that they keep in mind the division of powers in addition to economic questions, political goals and electoral considerations when making decisions. Action may be precluded by the lack of legislative competence
in a particular field. However, if political will is lacking, the division of 
powers offers a convenient reason for non-action. It is possible for 
decision-makers to pass the buck to their counterparts at the other level 
of government. As one commentator has pointed out:

Sometimes the constitution is a convenient shield, held up by 
politicians to protect themselves against charges of inaction or 
ineffectiveness. More commonly it is invoked in an attempt to clear 
the field of other governments, the recitation of constitutional powers 
being like the trill of a songbird laying claim to desirable territory 
(Leslie 1987, 52).

In matters which are too new to have found expression in the original 
constitutional document, both levels of government may wish to lay 
claim to desirable territory. As Harrison (1991, 20) points out, the 
environment may not be 'desirable territory' but it does fall into the 
category of a contested field.

The Constitutional Setting — Broad Overview

In neither country does the constitution refer specifically to environ­
mental concerns nor does either document establish any specific basis for 
environmental powers. As the following section will demonstrate, 
state/provincial governments and the national government in Canada and 
Australia have all proclaimed legislation with respect to environmental 
management.

Canada

As owners of public property the provinces have a firm basis for 
legislating in the environmental field. The relevant heads of power (Lucas 
1989, 32) allocated to the Canadian provinces are:

s.92(5) Management and sales of public lands belonging to the 
province and of the timber and wood thereon
s.92(10) Local works and undertakings
s.92(13) Property and civil rights in the province
s.92(2) Direct Taxation within a province directed to the raising of 
revenue for provincial purposes
s.92(16) Generally all matters of a merely local or private nature in the 
provinces
s.92(15) The imposition of punishment by fine, penalty or 
imprisonment for enforcing any provincial law
s.109 All lands, mines, minerals and royalties belonging to the 
several provinces of Canada shall belong to the several 
provinces in which the same are situate or arise.
In a 1982 amendment, s.92(A), provincial ownership over natural resources, particularly non-renewable resources, was re-affirmed. This section can be added to the list of powers that may be employed by provincial governments to legislate on the environment.

The federal government can invoke its residual powers, the right to make laws for the 'peace, order and good government (POGG) of Canada', as well as any of the following specific powers (Lucas 1989, 32–3) to legislate on environmental matters:

- s.91(1A) The public debt and property
- s.91(2) The regulation of trade and commerce
- s.91(3) The raising of money by any mode or system of taxation
- s.91(10) Navigation and shipping
- s.91(12) Sea coast and inland fisheries
- s.91(24) Indians and lands reserved for the Indians
- s.91(27) The criminal law
- s.92(10)(a) Extra-provincial works and undertakings
- s.92(10)(c) Declaration of works as 'works for the general advantage of Canada'
- s.91(29) and the opening and concluding clauses of s.91 establishing the general or peace order and good government power.

There is little doubt that the provinces possess important sources of legislative authority over the environment within their borders. As owners of lands, mines and minerals in the public domain and of natural resources, they have extensive power to conserve and manage resources. Regulation of the economic activity that flows from the exploitation of resources provides provincial governments with effective tools to achieve environmental goals. Whether it involves timber harvesting practices or setting standards for sulphur emissions, the right of provincial governments to legislate in this area is unassailable. Nevertheless, as the provinces cannot control the entry of contaminants that originate outside their borders, there is a role for the federal government to play.

Ottawa's right to legislate on environmental matters is more tenuous. Specific powers that could support a more comprehensive role for the federal government in environmental protection include trade and commerce and criminal law. Indirect authority flows from fisheries, navigation and agriculture. Space does not permit a detailed discussion of the constraints on federal environmental powers but federal jurisdiction is circumscribed in that it must relate specifically to the subject matter in

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4 Such a discussion may be found in Northey (1991) or Tingley (1987).
question. There is debate over the extent of the federal role under POGG, the residual power, with some commentators arguing that the environment is a coherent subject that is inherently interjurisdictional and thus a matter for the national government, and others visualising only a limited role for Ottawa to play.

In a 1988 decision R. v. Crown Zellerbach, the Supreme Court indicated its willingness to recognise a role for the federal government under POGG. In this case, Crown Zellerbach, a logging company, was charged with dumping wood waste in B.C. coastal waters within the province without obtaining a permit under Ottawa's Ocean Dumping Control Act. The majority view was that ocean pollution constitutes a matter with a national dimension and a singleness and indivisibility necessary to attract federal regulation under POGG. This 'green light' has yet to be exploited by the federal government.

That the federal government is very much involved in environmental protection is testified to by the fact that there are approximately 30 statutes relevant to environmental protection, involving 24 federal departments (Harrison 1991, 8). These include the Canadian Environmental Protection Act (CEPA) 1988, the strongest assertion of federal authority over the environment to date. It deals primarily with toxic substances,
taking a cradle-to-grave approach to regulation. The provinces were resistant to a larger federal role in environmental matters and opposed CEPA until the equivalency provisions were inserted. According to these provisions, CEPA regulations do not apply in any province where the federal minister and a provincial government agree in writing, that that province has 'equivalent' laws (Lucas 1989, 176). There is some discrepancy in the views of federal and provincial governments about the definition of the concept. The provinces favour equivalency of results, while Ottawa prefers specific commitments to administrative and judicial penalties (Hunt 1990, 22–3).

In the 1980s, environmental assessment became a key issue with controversy revolving around the status of Ottawa's Environmental Assessment and Review Process (EARP) Guidelines Order. So prominent has this been that Tingley considers the environmental law story of decade to be EARP litigation (1991, 146). Judicial decisions on the Guidelines established that the Guidelines Order is compulsory: there is no ministerial discretion to waive the federal assessment process.

The Guidelines Order came into existence in 1984 when Ottawa decided that it was necessary for federal departments to take environmental concerns into account when making decisions. Under the Guidelines, federal departments and agencies must screen proposals and if they have the potential to affect the environment in an adverse manner, the project must be 'EARPed'.

Until 1989, it was assumed that the Guidelines Order was merely discretionary and according to the interpretation of federal officials, that it was not binding in law (Tingley 1991, 147). There was a clear preference for cooperative measures between the federal government and relevant provincial governments. Referring to such accords Estrin observes that some of them 'can be viewed as providing little more than an excuse for Ottawa to close its eyes to inaction at the provincial level' (1987, 60).

8 CEPA, which is a consolidation of pre-existing federal environmental statutes, also amends and repeals six pieces of federal legislation to bring various aspects of air and water pollution into its scope. The amended statutes are the Access to Information Act and the Canada Water Act, the repealed statutes are the Clean Air Act, Department of the Environment Act s.6(2), Environmental Contaminants Act and the Ocean Dumping Control Act (Northey 1991, 133).
However, after the Canadian Wildlife case there was some uncertainty as to whether the Order was, in fact, mandatory.9

This uncertainty was resolved in the Supreme Court's decision on the Friends of the Oldman River Society v Canada (Minister of Transport) case handed down in January 1992. As in the Canadian Wildlife case, an environmental group had attempted to force Ottawa to comply with the EARP provisions and their efforts culminated in the appeal to the Supreme Court. Also at issue in the case was a constitutional question posed by the province of Alberta,10 namely, whether the Guidelines Order is so broad that it intrudes into areas of provincial jurisdiction, particularly Section 92A.11 The justices ruled that the Guidelines Order is mandatory rather than discretionary and that it is intra vires parliament. During the course of litigation the question of duplication arose, i.e. whether it was necessary for Ottawa to conduct an environmental assessment if the province had already done so. In the Federal Court of Appeal, Stone J.A. found the provincial process deficient on two counts: provincial legislation does not place the same emphasis on public participation and secondly, it does not require the same degree of independence of the review panel (quoted approvingly in Friends of the Oldman).

While the EARP litigation was working its way through the justice system, the federal government unveiled new environmental assessment legislation, Bill C-13, the Canadian Environmental Assessment Act. The Bill, which has since become law, will replace the Guidelines Order. There was criticism of an earlier version of the Bill on several grounds: summing up a long list of inadequacies Swanson (1990, 38–9) remarked...

9 In the Canadian Wildlife case (Canadian Wildlife Federation et al v. Minister of the Environment (1989), 3 CELR (N.S.) 287 (FCTD)) a large, national environmental organisation, asked the Court to quash the licence granted to builders of the Rafferty and Alameda Dams in Saskatchewan and to order the minister to comply with the EARP Guidelines Order. They were awarded both orders. There was a series of counter-moves which need not concern us. However, the upshot of these actions was that Environment Canada officials were understandably nervous about being dragged into court repeatedly and therefore began to play a more active role in provincial projects in which the federal government had even a minor interest. An Environment Canada official told the writer that they were conducting retroactive assessments in some instances (Interview in August 1991).

10 An indication of the importance of this question for other provinces is the fact that interventions were filed by six other provinces and the Northwest Territories.

11 As mentioned above, this section was added to the Constitution Act 1982. The thrust of the amendment was to reaffirm the provinces' ownership of natural resources, particularly non-renewable resources.
that the Environmental Law Centre, for whom she did the analysis, did not believe that 'hasty enactment of demonstrably deficient legislation' would benefit anyone in the long run.

In summary, it would be fair to say that in Canada both levels of government have proclaimed legislation whose intent is environmental protection. However, despite vigorous activity, scholars have concluded that overall, the goal of environmental protection has not been significantly advanced. 12 It should be pointed out that under the constitutional proposals unveiled by the federal government in September 1991, the status of the environment is very clouded.

Australia

The states possess an impressive arsenal of legislative powers to deploy on the environmental battleground. They possess legislative authority over all matters which have not been withdrawn from them or exclusively vested in the Commonwealth parliament (Gilbert 1986, 2). Use of natural resources, land use planning and conservation programs fall within the ambit of the states, with the Commonwealth government setting common standards, providing research assistance and finance for resource conservation activities (Davis 1991, 147). Commonwealth powers (Zines 1985, 14) which may be used to promote environmental goals, flow from:

s.51(i) trade and commerce with other countries and other states
s.51(xx) foreign corporations and trading and financial corporations formed within the limits of the Commonwealth
s.51(ii) taxation
s.51(xxix) external affairs
s.51(xxvi) the people of any race for whom it is deemed necessary to make special laws.

Additional sources of federal power (Fowler 1991, 23) can be supported by:

s.96 specific purpose grants to the states
ss.81–3 spending power 'for the purposes of the Commonwealth'.

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12 In a conversation with the writer in August 1991, a lawyer at the Environmental Law Centre in Edmonton argued that Ottawa and the provinces compete with each other in an attempt to appear 'green'. Politicians are quick to criticise their counterparts at the other level but 'it is like standing knee-deep in grass in your backyard and telling your neighbour that he should really cut his lawn'.
The Constitutional Commission (Australia 1988, 759) mentions two other possible sources of Commonwealth power, section 122, the territories power and the national implied power. The latter refers to acceptance by the High Court of the doctrine that the federal government may engage in 'enterprises and activities appropriate to a national government ... on behalf of the nation'. It also points out that the Commonwealth has relied on defence, fisheries and Commonwealth places to legislate on environmental matters. The Commission which considered granting to the Commonwealth government a general power with respect the environment, rejected this as too sweeping (1988, 766).

Commonwealth involvement with protection and conservation of the environment can be measured by the fact that there are over 50 federal Acts or regulations on the topic. These range from the Environment Protection (Impact of Proposals) Act 1974, to the Protection of Movable Cultural Heritage Act 1986. However, the Commonwealth's environmental policy rests mainly on four pieces of legislation enacted between 1974 and 1976, during Whitlam's term in office (Davis 1991, 148):

1. The Environment Protection (Impact of Proposals) Act 1974, under which matters which are likely to have a significant impact on the environment are taken into account in all plans and actions of federal agencies.

2. The Australian Heritage Commission Act 1975. This statute ensures that sites and structures constituting important elements of the built, cultural and natural environment are identified, registered and protected at the federal level. The sites and structures must have enduring national significance.

3. The Australian National Parks and Wildlife Conservation Act 1975, which concerns the establishment and management of parks and reserves in federal territories. This legislation also provides for the protection of other nature conservation sites and meeting international treaty obligations.

4. The Great Barrier Reef Marine Park Act 1975, which establishes and provides for the management of a major national park encompassing the Greater Reef off Queensland.

A more recent statute, the World Heritage Properties Conservation Act 1983, provides for obligations incurred under international treaties. Armed with this quiverful of legislation and its constitutional powers over trade and commerce, corporations and external affairs, the Commonwealth government has been able to advance its environmental goals.

13 The list was compiled by the Environmental Law Commission quoted in Australia: Final Report of the Constitutional Commission 1983, 767.
In the 1976 Murphyores v. The Commonwealth (136 CLR 1) case, Canberra was able to prevent mineral sand mining on Fraser Island after an environmental impact assessment under the Environment Protection (Impact of Proposals) Act. The federal government invoked its power to prohibit exports under section 51(i) and even though the plaintiffs challenged Canberra's right to take into account anything other than trading policy under customs regulations, the Court rejected their contention (Zines 1985, 14). The Court referred to an earlier case (Herald and Weekly Times v. The Commonwealth (1956) 115 CLR 418) in which it was held that 'if the Commonwealth could prohibit absolutely, it might prohibit on conditions, even though the conditions related to activities that the Commonwealth could not directly control or regulate'. Zines argues that it is likely that the Commonwealth government could not have invoked the commerce power had there been a domestic, intra-state market for the minerals (1985, 14–15).

A combination of the 1983 legislation governing World Heritage sites,14 passed under the external affairs power, and the corporations power, section 51(xx) was sufficient to prevent construction of the Franklin Dam.15 The External Affairs power and the Races power have supported a strong environmental role for the Commonwealth.16

Arguably the Commonwealth government has taken a firmer line on environmental questions than its Canadian counterpart, having stopped the Franklin Dam and sand mining on Fraser Island. However, such actions are far from the norm. Historically, Canberra's approach to environmental issues, like that of Ottawa, has been one of consultation, cooperation and consensus-building with the states. In both countries consultative mechanisms exist to deal with overlapping jurisdiction. In Canada, the Canadian Council of Resource and Environment ministers coordinates environment policies. This body, composed of ministers

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14 The relevant section (s.10) prohibited a corporation from engaging in certain types of activities including excavation works, killing or cutting down of trees, constructing roads or using explosives 'for the purposes of its trading activities' on 'identified property' (Zines 1985, 18).

15 According to Zines, the implications of the Franklin Dam case would appear to be that the Commonwealth government may control, on environmental grounds, all manufacturing, production or extractive processes conducted by corporations, governed by section 51(xx) (1985, 18).

16 For a discussion of these and other powers that have been invoked in support of the Commonwealth's attempts to protect the environment, see Zines (1985) and Fowler (1991). Fowler points out that the external affairs power has been relied upon to justify federal legislation on marine pollution, protection of the ozone layer and trade in hazardous wastes. He argues that it is likely to be invoked more in the future with regard to treaty making, and international activity on global warming, deforestation, acid rain and ozone depletion (1991, 27).
responsible mainly for Resource and Environment portfolios is designed to facilitate cooperation and coordination between federal and provincial governments. However, although it seeks consensus, its recommendations and conclusions are not binding on member governments (Pearce et al. 1985, 168). The Australian equivalent would be the Australian and New Zealand Environmental Council, a federal–state Ministerial Council (which includes representation from New Zealand) and the Council of Conservation Ministers (Fowler 1991, 11). As Fowler expresses it:

the federal government now has the capacity to meet its own responsibilities with respect to environment protection, in whatever manner these may be defined. The failure to do so must be explained by political rather than constitutional or legal considerations.

(1991, 28–29)

The situation then appears to be similar to that in Canada where it has been argued that it is the 'political constitution' (Lucas 1986) which dictates whether the legal powers will in fact be exercised. Whatever the precise motivation for tentative federal steps to effect environmental protection, this brief discussion underscores the consequences that flow from divided jurisdiction in the two countries.

With this very abbreviated background, it is now time to turn to the two projects that have been selected, projects which demonstrate the 'political constitution' in action.

Section II: The Two Cases

Canada: The Alberta–Pacific Pulp Mill

The project, which is situated in Alberta, is a pulp mill and it epitomises the problems inherent in environmental protection in a federal state. The status of environmental assessments in Alberta prior to the Al–Pac project must be sketched in as it provides the backdrop against which the intergovernmental drama took place.

As mentioned above, the Canadian government has not played a leadership role in environmental matters preferring policy-making to be consensual and cooperative rather than adversarial. As an earlier section has shown, environmental groups dissatisfied with Ottawa's perception of its role have resorted to the courts to compel federal action. Their efforts appear to have borne fruit because the threat of litigation has led to retroactive environmental assessments. The number of proposals subject to public review under EARP increased dramatically as a result of judicial decisions. In 1989–90 alone, 22 projects were referred to public review.\(^\text{17}\)

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\(^{17}\) This compares with 33 in the period 1972 to 1989 (Ross 1991, 3)
In addition 'the federal government has reluctantly allowed itself to become implicated in the assessment of projects which have traditionally been viewed as being primarily within the constitutional jurisdiction of the provinces' (Ross 1991, 3).

In keeping with the preference for cooperation, Ottawa and the Alberta government entered into an agreement in 1986, concerning environmental assessments. The thrust of the three-year agreement was that whichever jurisdiction had primary constitutional responsibility over a project would apply its environmental assessment procedures. The other party's interests and concerns would be taken into account during the assessment. From the standpoint of the two parties, the arrangement worked well, but the agreement was not renewed as a consequence of the uncertainty surrounding the Guidelines Order.

Pressure from the company, which was anxious to avoid two successive EAs, eventuated in a joint review with public hearings. The provincial government was not convinced of the need for a joint panel to review the project. Members of the panel were appointed jointly by the two governments (Edwards 1991, 36). Ottawa's interest in the project stems primarily from the interjurisdictional consequences: effluent from the mill will be discharged into a river (the Athabasca River) which is part of the Mackenzie River Basin, and which flows into the North West Territories. Six jurisdictions have authority over some portions or aspects of the Basin: three provinces, two territories and the federal government. The federal government has further interests through its powers over fisheries, native peoples and navigable waters. The Athabasca also flows through a National Park.

The Al-Pac pulp mill will use a bleached kraft process (BKP). It is stated to be the biggest in the world and to use state-of-the-art technology.

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18 This document entitled Agreement Concerning Environmental Impact Assessment of Project in Alberta with Implications for Canada and Alberta (Edwards 1990, 36) is but one of a number of intergovernmental agreements. Special agreements have been signed with seven provinces on protection and enhancement of the environment; there are 23 other agreements dealing primarily with water (Pearce, et al. 1985, 164-6).

19 It should be noted that the province had rarely conducted a public review of projects unrelated to energy. The Energy Resources Conservation Board, a permanent body that regulates the energy industry, has conducted public EIA's on energy-related projects. Alberta's Department of the Environment had hitherto reviewed many projects internally (Edwards 1991, 50).

20 In Canada the designation 'national' park refers only to those parks that are the property of the federal government. Many of them are within provincial boundaries.
technology. It will be able to produce 1500 air-dried tons per day of hardwood pulp or 1250 air-dried tons per day of softwood pulp (Edwards 1990, 12). Although it will be one of the cleanest in the world, because of its location it raised serious environmental concerns. There are already three kraft pulp mills on the Peace-Athabasca River system, and two (including Al-Pac) more are under construction. There are three CTMP mills in existence and 2 more under construction. Two existing mills are upstream of Al-Pac mill (Alberta 1990, 27). The mandate of the Review Board included an investigation of the potential impact of the project on water quality in the North West Territories, on fisheries, navigable waters and Wood Buffalo National Park (Alberta 1990, 5). An investigation of the cumulative effects of this project on the river system was a major concern of the panel. Pulp mill effluents place demands on the dissolved oxygen in the water, oxygen that is essential for the survival of fish and other aquatic life. Rivers with low flows are more vulnerable to this biological oxygen demand (BOD) so in the winter months (between three and five months of the year), when ice cover prevents the atmosphere from replenishing the river's supply of oxygen, the situation is cause for concern (Alberta 1990, 33). Effluent from any pulp mill is problematic but that from BKP mills is of the greatest concern; they use a chlorine bleaching process which produces two of the most toxic types of organochlorines, dioxins and furans. The technology to measure these substances was developed as recently as the mid-1980s so our knowledge about the hazards posed by them is very recent. The toxicity of organochlorines is believed to increase when oxygen levels are lower. Even at undetectable levels in the water, these substances have been concentrated in organisms with serious consequences higher up in the food chain (Alberta 1990, 23–4).

Health and Welfare Canada's permissible limits for the presence of these compounds in fish are based on consumption rates by average Canadians. The rates of consumption of fish by aboriginal peoples in the

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21 The initial process proposed by Al–Pac was based on the best available technology. However, shortly after the hearings the company submitted a revised proposal which it claimed, would produce lower organochlorine levels than any other BKP process in Canada if not the world. The claim has been greeted with some scepticism because a similar claim was made in its impact statement and during the hearings (Edwards 1991, 23).

22 A major omission from the mandate was timber harvesting practices in the entire area from which the company would obtain its wood supply. The area in question covers approximately 100,000 square kilometres (Edwards 1991, 12). The panel had to confine itself to looking at the impact of these practices on Indian Reserve lands (Alberta 1990, 42).
lower Athabasca, Slave and Mackenzie Rivers systems may be ten times higher, they were thus understandably concerned (Alberta 1990, 23).

The government of the North West Territories' (NWT) submission to the Review Panel epitomises the concerns of downstream users dependent on the goodwill of upstream neighbours. Being downstream from B.C., Alberta and Saskatchewan, the NWT is subject to residual damage resulting from developments, neglect, accidents, poor water quality and weakness in water quality regulations. The brief pointed out that Northerners could never be adequately compensated for the costs they have to bear in terms of human health as well as the health of the economy. The NWT government then expressed the need for a basin-wide approach to the use of water resources:

From a jurisdictional perspective, one thing is clear. Existing governance mechanisms were not designed with a view to managing the Basin Ecosystem, or even its waters, as a single interacting system. We now know enough to understand that this ecosystem and the resource base it contains will continue to be eroded, probably at an accelerating rate, unless steps are taken to harmonise the institutional mechanisms with the Basin's ecological realities. (NWT 1989, 3)

The urgent need to recognise the interrelatedness of such matters, so eloquently articulated in the NWT submission, poses a problem for decision-makers accustomed to confining their perspective to territorial boundaries.

As mentioned above, the Alberta government had been reluctant to conduct a joint federal-provincial review as it was deemed to be a provincial matter. Jurisdictional issues, especially with respect to natural resources, have particular salience in Alberta. Bitter memories of intergovernmental battles over petroleum resources during the energy crisis persist in the province. Consequently, any real or imagined federal attempt to interfere in the province's management of resources is deeply resented. As oil and gas which are pillars of the Alberta economy, are depleting resources, successive Alberta governments have sought ways to diversify the economy. Pulp mill development is one of the province's latest strategies to diversify the economy away from oil and gas. The prospect of other projects being subjected to similar environmental assessments is of grave concern to Alberta as well as to other provincial governments.

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23 When the prairie provinces (Manitoba, Saskatchewan and Alberta) attained provincehood, the federal government retained ownership of their natural resources. It was not until 1930 that ownership was turned over to these provinces. This has caused a great deal of resentment on the prairies.
Despite the Review Board's recommendation that the project not be approved until extensive river studies were completed (Alberta 1990, 89), the mill is presently under construction.24

As mentioned above, the federal government is not anxious to become embroiled in environmental disputes with the provinces preferring cooperation to confrontation, but the actions of environmental groups have compelled Ottawa to risk antagonising provincial governments. These groups are going to remain vigilant for any evidence of federal foot-dragging on issues that touch on areas of national jurisdiction.

The Al-Pac project demonstrates how a federal system make an impact on environmental protection. While it would not be fair to say that the Alberta government is not concerned about environmental matters, the question of jurisdiction came through as a primary concern.25 If the principle that the provinces have the right to direct the pace and type of economic development within their borders is breached, the consequences for federal-provincial interaction would be extremely serious. That is why the Supreme Court's decision on the Oldman Dam was anxiously awaited by all concerned.

We are now ready to examine the Australian example which was selected because it too has interjurisdictional implications.

**Australia: The Australian Newsprint Mill**

The Australian Newsprint mill (ANM) is an existing facility which produces 195,000 tonnes of newsprint annually at Albury.26 The company planned to install a $3 million brightening (bleaching) process as the quality of newsprint produced lags behind that of its competitors. ANM uses a thermo-mechanical pulp process in which steam-heated wood chips are refined to produce pulp. Unlike BKP mills, the process

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24 The Alberta government accepted the Board's recommendation, but as mentioned previously, when the company came back with a proposal to utilise a new process, the project was approved. Until the summer of 1991 river studies had not been commenced (Interview with official from Environment Canada, August 1991).

25 The province was the first jurisdiction in North America to set up a Department of the Environment in 1971. It was also the first province in which empty wine bottles could be returned for a cash refund.

The government has overhauled its legislation and in the Spring 1992 session of the legislature new legislation, entitled the *Environmental Protection and Enhancement Act*, was passed. For the first time Albertans were consulted in the formulation and preparation of such environmental legislation (Tingley et al 1990, 3).

26 The technical information regarding the mill has been taken from ANM's Environmental Impact Statement dated March 1990.
used by the company does not produce the organochlorines that are so toxic. As one of the chemicals used in the brightening process is caustic soda (sodium hydroxide), the waste water will contain increased concentrations of sodium. The amount of salt discharged by the plant into the River Murray will increase to 1,775 tonnes annually (up from 745 tonnes per annum) as a result of the brightening process.27

As the mill is a 'designated development' under New South Wales planning legislation, the company had to attach an Environmental Impact Statement (EIS) to its development application. During preparation of the EIS, there were consultations with government authorities, community and environmental groups. Under the legislation, an EIS must be on public view for a minimum of 30 days during which time the public can inspect it and comment in writing to the relevant authority. In addition, the proposal was investigated by a Commission of Inquiry to which people were invited to make submissions at public hearings. Local governments also have an opportunity to respond to an EIS. The Commission recommended that the mill expansion proceed but that in-river discharge be phased out in five years. Approval of the mill by the New South Wales (NSW) Minister for Planning and Energy was contingent on a number of conditions. These included payment of double the fee to the Department of Water Resources for salt discharged into the river and a commitment to investigate and report on alternative waste water disposal options (Riverine Herald, 22 July 1991). The extra charge is intended to cover salt interception schemes that will be required to remove the salt.

Prior to final approval being obtained, ANM announced that the company intended to add a de-inking plant so that newspapers could be recycled at Albury (ANM Press Release, June 1991). The expansion would follow approval of the brightening process.

The Australian Newsprint facility is located in New South Wales so approval was given by the state government. As the River Murray separates NSW and Victoria and then flows into South Australia, other states have an interest in projects that are located along its reaches. The Murray also provides drinking water for over one million people, so water quality is of more than academic interest.

A Commission of Inquiry precludes any right to appeal against the decision and there was a great deal of criticism from shire councils downstream. A spokesman for the Berrigan Shire said that:

27 While salinity appears to be the main problem at the Albury mill, some critics have argued that heavy metals will also be discharged. In a letter to the editor of the Financial Review an official of the Australian Conservation Foundation stated that local shire councils were opposed to further pollutant discharge into the river (5 May 1991).
The Albury City Council and ANM may see the Murray River as little more than an open sewer once it has passed their river banks, but it is the lifeblood of communities scattered along its length and they are reliant on decent water for their irrigation and domestic use (Sunraysia Daily, 1 August 1991).

The South Australian Minister for the Environment stated earlier that it was her responsibility to ensure that all upstream users of the river 'are similarly committed to improving the quality of the water in the Murray' (Canberra Times, 29 June 1991). While the fate of the ANM project was being discussed, a federal member was asked what the Commonwealth government intended to do about the case. He pointed out that it was not a federal issue, rather it was a state matter (The Guardian, 3 July 1991). Some critics of the mill expansion called for a special meeting of the Ministerial Council of Murray–Darling Basin Commission (MDBC). Although a special meeting was not held, the matter was considered at a regular meeting of the Ministerial Council and according to the CEO of the MDBC, the Commission got what it wanted (Interview with the writer in Canberra).28 What is the role of the MDBC and what are its functions on projects such as the ANM mill?

Section III: The Murray–Darling Basin Commission

The Murray–Darling Basin Agreement which set up the Commission was signed in October 1987, was the culmination of two years of meetings between politicians and bureaucrats from three state governments (NSW, Victoria and South Australia) and the Commonwealth (Kellow 1991, 129). The Agreement represents the latest in a series of attempts to address problems encountered by common users of the River Murray. The Basin covers an area of 1,063,000 square kilometres and accounts for half of Australia's agricultural production (Blackmore 1991, 1). Approximately two million people depend on its resources for their livelihood (MDBC 1990, 7). Conflicts over the river pre-date federation: South Australia's interest was initially to preserve the navigability of the river, Victoria wanted the right to extract water for irrigation and NSW did not want any curbs on its freedom of action (Clark 1982, 3).29

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28 The term 'Murray–Darling Basin Commission' should refer only to the Commission, i.e. the body which brings together Commissioners from each government. However, in literature put out by the institution, it is used in a generic sense, to refer to the whole entity. The terms 'MDBC' or, the Commission will be used in a similar manner in this study. If a comment refers specifically to the Ministerial Council or the Commissioners this will be mentioned.

29 Two sections in the Constitution ss.98 and 100, were inserted specifically to permit the Commonwealth government to settle interstate conflict
The River Murray Waters Agreement which was finally signed in 1914 was concerned primarily with sharing of water between the states, a works program (construction of locks and dams) and the setting up of the River Murray Commission. The 1914 Agreement was also geographically restrictive, dealing only with the main stem of the Murray (Clark 1982, 4). More recently there has been widespread concern at the extent of land degradation, deteriorating water quality, rising groundwater and loss of native flora and fauna throughout the Basin (Blackmore 1991, 8). The response to worsening problems culminated in the signing of the 1987 Agreement. As the name suggests, it is a recognition that many of the problems are interjurisdictional as well as interrelated and that it is imperative to develop a strategy that uses a basin-wide approach. The new Agreement signals a shift in emphasis from what might be described as a mainly engineering approach to problems of sharing and salinity, to a much wider one concerned with a Natural Resources Management Strategy for the entire catchment area (Blackmore 1991, 2).

The fact that the Agreement is undergoing further revision testifies to the dynamic nature of the issues that must be tackled. A brief look at the structure and functions will help explain an institution that is evolving to keep up with changing needs and shifting priorities.

The 'basin-wide mini-parliament for natural resources' as the Chief Executive of the Secretariat described it, includes representatives from four states and the Commonwealth government. Negotiations have been going on to open the way for participation by Queensland and the Australian Capital Territory (Crabb 1991, 8).

The Ministerial Council which is at the peak of the structure contains three ministers from each participating government holding portfolios for land, water and the environment. The role of the Council is to address policy issues requiring common action by member governments (MDBC 1990, iii). Below the Council is the Commission, composed of two commissioners from each government, representing the functional areas mentioned above. A Secretariat, with a staff of 34 (in November 1991), serves the Council and the Commissioners; it draws on the expertise of member governments in addition to using independent consultants. There

(Crommelin 1985, 24). The first extends parliament's powers over trade and commerce to navigation, shipping and state railways. The second does not permit the Commonwealth to abridge the rights of states and their citizens 'to reasonable use of the waters of rivers for conservation or irrigation'. Crommelin observes that the Commonwealth chose not to take unilateral action, but whether this was for political reasons or was prompted by perceived constitutional infirmity is not clear (1985, 24).

30 As there are three functional areas but only two Commissioners, this requires interdepartmental cooperation.
is also a Community Advisory Committee (CAC) which provides advice to the Council on community views regarding land, water and the environment. State contingents of CACs are appointed by each state government. The CAC also acts as a conduit of information between Council and the community (MDBC 1990, 17-18). It plays an educational role as well, as it attempts to develop awareness in the community of the holistic nature of the Basin (Crabb 1991, 11).

As mentioned above, that the present Agreement is undergoing revision reflects the steadily growing realisation not only that biophysical problems are severe, but also that institutional structures have not kept pace with the need for concerted action (Crabb 1991). The MDBC is grappling with urgent problems on an ongoing basis. Matters that must be dealt with have gone beyond water supply problems and increasing salinity. Other pollution problems plaguing the Basin are eutrophication (over-enrichment of waters with nutrients), toxic algal growth and others stemming from various types of arable and livestock farming (Crabb 1991, 3). The role of the institution overseeing the Basin has expanded to include new responsibilities. Do these include environmental assessments? An examination of the Commission's input into the ANM proposal will shed light on this matter.

Neither the Ministerial Council nor the Commissioners had a formal role to play in approval of the ANM project. It was an existing facility and as such, was required to seek approval from the NSW government. However, since officials from the relevant portfolios sit on the Commission, as do ministers on the Ministerial Council, the Council was kept abreast of developments on the ANM expansion. The MDBC made a submission to the Commission of Inquiry on the ANM application (The Guardian, 5 July 1991). Although there were calls among others, from South Australia's Environment and Planning Minister, for a special meeting of the Ministerial Council, such a meeting did not take place. ANM did however, appear before the Ministerial Council at a Meeting in August 1991. The Council was

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31 There is also provision for the establishment of groups of individuals with shared problems, Communities of Common Concern (CCC). These CCCs identify and manage problems encountered in their particular locality such as land degradation or conservation requirements. They are intended to be the building blocks of basin-wide community involvement 'to achieve the objectives of sustainable resource management' (MDBC 1990, 13).

32 An official with the NSW State Pollution Control Commission stated that they had a good working relationship with Murray-Darling Basin staff. He said that staff in his department have learned to compromise and to work with their counterparts in other jurisdictions. (Telephone interview with the writer, November 1991).
satisfied with the commitment to explore off-river discharge of effluent.\(^{33}\)

From the foregoing it would appear that the Commission watched from the sidelines on the ANM project, but as the next section will argue, things may change in the future.

What lessons can we learn from the MDBC? Would it be a good role model for the Mackenzie Basin?\(^{34}\)

It should be pointed out that the situation in the Murray–Darling Basin is quite different from that in its Canadian counterpart, yet there is a similarity. While the biophysical aspects differ: the one heavily-used, fairly dry, relatively populated and the other a boreal environment, sparsely populated and remote, both basins are ecologically fragile. Problems in the Australian basin have shaped the MDBC, forcing decision-makers to take remedial action. This air of urgency is absent in the Mackenzie Basin.\(^{35}\) Although there is an organisation in existence, the Mackenzie River Basin Committee (MRBC), it functions mainly as a liaison between governments.

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\(^{33}\) In an interview (November 1991) with an official at the Secretariat, the writer was told that pressure was brought to bear on NSW representatives on the Ministerial Council and as a result, the mill will have zero-discharge into the river within five years. Statements from company representatives suggest that ANM will first explore the technical and economic feasibility of off-river discharge \(\textit{(The Guardian, 5 July 1991).}\)

\(^{34}\) Barton has suggested that the Prairies Provinces Water Board may provide a role model for the Mackenzie (1984). The limited role that body plays, is perhaps one of its greatest strengths as it does not pose a threat to participating governments (1984, 59). The ambit of the MDBC has become much wider.

\(^{35}\) This is not to suggest that there is no cause for concern. During the Al-Pac hearings many submissions pointed to the impact of pulp mill development on northern rivers. However, the most pressing concern appears to be the lack of baseline information on fish and fish habitat in the entire Peace–Athabasca system. Consequently, it is not possible to evaluate the impact of chlorinated organic compounds, dissolved oxygen levels and nutrients on aquatic life and water quality generally (Canada 1989, 31–33). This paucity of data prompted the Review Panel to recommended that scientific studies be carried out prior to construction of the mill. As the basin overlaps political boundaries there is a potential for disputes to arise between jurisdictions.

A federal inquiry into water policy recommended that Ottawa should settle disputes about the use of inter-jurisdictional water if the parties cannot reach agreement. Referring to the Mackenzie River Basin, the advisory committee noted the failure of the provinces and territories to enter a voluntary agreement. They also pointed out that 'upstream projects, both completed and proposed, are causing much anxiety and frustration in downstream jurisdictions' (Canada 1985, 72–3).
The Committee was formed in the early 1970s to provide the various jurisdictions with a means of exchanging information on studies and research as well as on proposed developments which might affect water resources in the basin. Over a three-year period, a study was undertaken 'to increase knowledge and understanding of the water resources of the basin' (Mackenzie River Basin Committee 1991, 1–2). The report was published in 1981 and a major recommendation was that agreements be drafted on trans-boundary water management issues and that a permanent board be established to implement provisions of these agreements.

Since 1983, work has been underway on drafting bilateral agreements between adjacent jurisdictions. By 1986 it became apparent that a Master Agreement was necessary to provide the framework for the bilaterals and the need for a structure to administer the terms of the Agreement was also identified. The Master Agreement has not yet been finalised; a Workshop on the ninth draft was held in Calgary in June 1992. The institution being contemplated in the Mackenzie Basin will play a more modest role than its Australian counterpart. Nevertheless, it would be instructive for the Canadians to look carefully at the Australian model.

While there is no surrender of sovereignty to the Murray–Darling Basin Commission, as ministers and commissioners must go back to their respective governments for final approval, there is no doubt that the MDDBC is poised to play an expanded role. Its very existence testifies to the need to rethink traditional modes of decision-making. The 1989–90 Annual Report contains thirty-five pages devoted to major decisions made during the year, as well as ongoing activities (MDBC 1990a). These cover a variety of matters ranging from vegetation management to a salinity and drainage strategy, and from research to recreational activities. This suggests that the MDDBC is going to be a permanent feature on the political landscape.

Although water quality is a matter that is central to the Commission's activities, it did not seem to have played a major role on the ANM project. Hence the reader may well ask why it is touted as a solution to interjurisdictional problems.

The first point that must be noted is that NSW commissioners and ministers on the Council discussed the project with their counterparts in other jurisdictions. It is therefore possible that some concerns were addressed prior to approvals being given. Nevertheless, even if one considers the Commission to have 'failed' the test, there is reason to be sanguine about its future role.

36 The information on the Mackenzie River Basin Committee appearing in the next few paragraphs was obtained from the Proceedings of a Workshop in Yellowknife, NWT, on the Master Agreement. The Workshop was sponsored by the MRBC and was held 8–10 December 1991.
As mentioned above, the main focus of the Commission's predecessors shifted gradually from apportionment of water to water quality. However the latter was restricted primarily to salinity. As the quality of water is affected by the health of the land through which it flows, investigating water quality issues immediately expands the universe of pertinent facts. Not surprisingly, while salinity remains a major problem, the MDBC is now concerned with 'an integrated approach to natural resources management' (Blackmore 1991, 8). In order to carry out this task the Commission is building a constituency at the community level, drawing on the grassroots not only to identify natural resource issues, but also to develop and implement local plans. More significant perhaps is the goal of promoting the adoption of improved management practices (Blackmore 1991, 10). Communities have a vested interest in maintaining the integrity of the basin as they derive their livelihood from it. A better understanding of how individual action fits into the larger picture is a firm foundation on which cooperation may be built. This enables individuals to see the big picture and how their actions affect it.37

The MCDMC whose functions are now multi-faceted is well-equipped to play a much greater role, to exercise its latent power and ability. It is clear that pressure from voters would be a powerful incentive for politicians to act. Through its educational activities the MDBC may be laying the foundation for popular pressure to address issues on a basin-wide basis. No other institution is more prepared to take this action than the Commission. As March and Olsen express it, 'a solution that is persistently available will find an occasion' (1989, 94). It is because the MDBC is slowly consolidating its position that it will likely be more effective on environmental questions in the future. But what of its wider applicability? What other features bear imitation?

Before dealing with these questions however, a brief word must be said about some of the drawbacks of Ministerial Councils and other intergovernmental organisations. The most serious concern revolves around questions of accountability, secrecy and lack of public participation. Mechanisms for intergovernmental cooperation distort relationships between governments and legislatures and between

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37 Despite the very laudable attempts to encourage input from the community, the MDBC does not provide for formal input from the 237 local government authorities in the Basin. These bodies make decisions on land use planning and zoning. They possess land and water management powers and their actions have a direct impact on the environment (Deane & Osborn 1991, 39). As the 'Cinderella' level of government is largely ignored by Commonwealth and state governments, it is possible for national and state goals to be frustrated by the 'tyranny of small decisions'.
governments and the public (Crommelin 1985, 37). Due to fragmentary material on their operation, Crommelin argues that it is difficult to gauge the effectiveness of Ministerial Councils nor does one know at what cost coordination of policies is purchased (1985, 36).

The lack of accountability and secrecy have been noted by others. Saunders points out that intergovernmental bodies 'owe a collective duty to no single jurisdiction and are not readily amenable to external review' (1985, 28). Similar concerns have been raised about the First Ministers Conference in Canada (Cairns 1979; Smiley 1980) particularly in the wake of the failed Meech Lake Constitutional Accord. On environmental questions too there is criticism of cooperative mechanisms developed between governments. Referring to joint federal-provincial environmental assessment reviews (such as the Al-Pac review), Ross (1991, 29) points out that joint reviews have taken the form of ad hoc, informal arrangements between federal and provincial governments, and argues that the lack of legislative guidelines are a disadvantage.

While it is not the intention to play down the seriousness of the objections to cooperative arrangements, given that governments must work within the framework of their legislative powers, informal, even imaginative ways must be found to overcome constitutional hurdles. Saunders' comments that many of the problems can be readily overcome by regular reporting to legislatures and publicising resolutions of Ministerial Councils. Nevertheless, even these measures will not entirely eliminate the fact that intergovernmental affairs are more shielded from accountability than other governmental activities (1985, 28–9).

Providing solutions to these thorny questions is beyond the scope of this research, especially as the benefits of some of these informal arrangements are applauded even by critics. The best one can do is attempt to ensure that on balance, the advantages outweigh the drawbacks. Environmental problems will compel us to design more intergovernmental institutions in the future. Being aware of some of the pitfalls of such bodies will ensure that attention will be paid to overcoming them in the years ahead. As an intergovernmental organisation, the MDBC is prone to some of the problems identified above, but it does have much to recommend it.

At the outset, reference was made to two barriers to sustainable development identified in the Bruntland Report: sectoral and territorial fragmentation. It will be recalled that the decomposition of tasks within jurisdictions and the lack of communication between them fractures the wider perspective that is essential to solve common problems. Reference was also made earlier to the fact that due to fragmentation, decision-makers are trapped in a type of prisoner's dilemma.

What this study has tried to demonstrate is that an interjurisdictional body like the Murray–Darling Basin Commission can alleviate some of the difficulties faced by policy-makers. Unlike actors trapped in a
prisoner's dilemma, participants are not hampered by a lack of information nor are they deprived of the opportunity to communicate.

The strength of the Commission flows from a number of sources. Most important is the fact that it brings together high-level decision-makers from different jurisdictions and exposes them to a wider canvas. It alerts participants to the importance of looking at environmental questions on a basin-wide basis instead of on a piece-meal basis. In addition ministers and high-level bureaucrats are able to keep abreast of matters of common concerns. The opportunity to share information, to air concerns and to coordinate actions are all facilitated. Polluter must face pollutee and it is here that moral suasion can work. The prospect of being confronted with the consequences of one's actions may be sufficient to make one think twice before embarking upon a particular course of action. The fact that individuals can get to know each other means it is possible to develop relationships of trust.38

Apart from emphasising the interrelatedness of matters which are split between numerous authorities, an interjurisdictional body also serves to reduce the uncertainty that exists between jurisdictions, uncertainty that flourishes when one has to guess what others might do or not do.

Axelrod argues that cooperation is facilitated if one 'enlarges the shadow of the future'. He contends that '[mutual cooperation can be stable if the future is sufficiently important relative to the present' (1984, 126). This obtains when parties to an agreement can expect to meet again in the future. The prospect of repeated interactions removes the incentive to 'defect' (renge on a commitment) as one might be tempted to do if there is no possibility of retaliation (1984, 126–7). Belonging to an organisation that meets regularly and has a stable membership nourishes cooperation.

In addition, to these interjurisdictional benefits, there may be positive changes within jurisdictions. One unexpected outcome of the MDBC's existence has been greater cooperation between government departments. Since membership is limited to three ministers and two commissioners from each government, this requires departments to consult each other, perhaps for the first time. The result is improved intragovernmental communication39 and consequently, some of the disadvantages of sectoral fragmentation are revealed if not overcome.

38 There is, of course, the possibility that face-to-face interactions may lead to cooptation, to a selling-out of the constituency one represents.

39 This point was made by an official of the Secretariat. He pointed out that individuals in unrepresented departments had to liaise with their representatives on the Commission to present their views. This increased communication promoted a greater understanding and appreciation of how separate actions dovetailed.
The structures designed to manage the problems of the Murray–Darling Basin are appealing for the reasons already mentioned. But there are additional features which may be attractive to other jurisdictions. To mention only a couple: financing of salt mitigation schemes are shared equally by all four governments, regardless whether they are creators of the problem or its victims. Similarly, financing of catchment schemes for water is shared. The second feature which appears to be very useful is the scheme for establishing quotas for saline deposits in the system, EC units, which can be traded with other states. This variation of 'tradeable permits' is much easier to monitor as the participants are few in number. As the parties are governments rather than private individuals or corporations it is likely that the temptation to 'cheat' is reduced as the penalties would be so severe.

Conclusion

Federal states fall somewhere between a single, unitary state and a group of sovereign nations. Divided sovereignty poses a particular challenge for anyone attempting to solve environmental problems. As we are faced with mounting evidence of environmental degradation on a global scale, the need to cooperate becomes more urgent.

To design interjurisdictional institutions that are effective, we have to give a good deal of thought to how we can elicit cooperation from participants. Such a body must inspire confidence without posing a threat to member governments. Barton's (1984, 59) comment on the Prairie Provinces Water Board is instructive: he contended that the relative weakness of the Board may be its greatest strength as participants do not feel threatened. Yet it would be pointless to erect an elaborate structure that is too weak. Despite some weaknesses, the Murray–Darling Basin Commission appears to be a good starting point in our quest for new institutions to manage shared resources and resolve interjurisdictional conflict. While there is a danger of collusion behind closed doors, there is also an opportunity for many of the 'prisoner's dilemma' problems to be addressed. Decision-making based on complete information and the removal of the uncertainty with respect to the intentions of the other party would be a definite plus. In addition, the benefits of adopting an ecosystem or basin-wide approach would reduce the fragmentation that dogs so many environmental questions.

40 These features would be of great interest to other jurisdictions but it is beyond the scope of this work to do more than merely mention them.

41 The salinity of a solution is measured by testing the electrical conductivity of the solution.

42 While individuals and corporations may be fined heavily, governments could lose an election.
Just as political jurisdictions need to cooperate in solving environmental problems, the study of environmental questions will necessitate the crossing of academic boundaries. Like politicians and bureaucrats forced to widen their horizons, academics might find collaboration with colleagues in other disciplines a challenging but ultimately fruitful exercise.

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