AUSTRALIAN ENVIRONMENTAL LAW

international influences

Over the second half of this century, protection of the environment has become a matter of global concern. National governments have realised that international co-operation is crucial in addressing environmental problems like Chernobyl or the depletion of the ozone layer. In this article **Donald R Rothwell** and **Ben Boer** survey the impact of international environmental law and policy in Australia.

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International environmental law has expanded considerably during the past 20 years; since the 1972 United Nations Stockholm Conference on the Human Environment, it has become one of the most dynamic areas of international law.

Australia has played an important role in its development. It has been active in the negotiation and implementation of a great many international initiatives dealing with the environment including through large multilateral fora such as the United Nations dealing with climate change and biological diversity, through an institution such as the Antarctic Treaty System dealing with Antarctic environmental protection, or through bilateral institutions and linkages with neighbours such as New Zealand and Papua New Guinea.

During the past 20 years, the capacity of the Commonwealth government to take an active role in the negotiation and implementation of these initiatives has been increased through the expanded interpretation given to the Commonwealth's 'external affairs' power in the Constitution.

Likewise, Australian courts have also begun to acknowledge the impact international environmental law is having upon Australian legislation as well as the common law. Finally, international environmental law is not only influencing the development of Australian environmental law but also environmental policy at a Federal and State level.

Impact of International Conventions

International environmental law is dominated by a great many international conventions. While these conventions are predominantly global in coverage, there are also a large number of regional conventions — Australia is a signatory to many of these which therefore apply over Australian territory.

Some of the longest standing international environmental conventions are those dealing with the marine environment. Australia has always sought to give domestic effect through legislation to a range of conventions dealing with marine pollution and the marine environment.

The Commonwealth sought to implement the terms of the *1954 International Convention for the Prevention of Pollution of the Sea by Oil* by way of the *Pollution of Waters by Oil Act 1960*, with the States and the Northern Territory subsequently adopting complementary legislation.

More recently, the *1973/78 International Convention for the Prevention of Pollution by Ships* (MARPOL) has also been subject to joint implementation by the Commonwealth and the States. In order to ensure that Australia meets its international obligations under MARPOL, the Commonwealth implementing legislation features a 'roll-back' provision, which ensures that the Commonwealth law applies

in all Australian waters until such time as the Australian States and Territories have enacted legislation implementing MARPOL.

Legislation has also been enacted to give effect to a range of other marine pollution conventions, including the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.* Four Australian States have enacted legislation dealing with dumping at sea. However, not all have been accepted by the Commonwealth Government as meeting Australia's international obligations under the convention.

Australia's international legal obligations concerning the protection and preservation of the marine environment have recently been supplemented by our ratification of both the 1982 *United Nations Convention on the Law of the Sea* and the 1986 *Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.* While there have been legislative responses to the *Noumea Convention,* the Commonwealth has yet to adopt a comprehensive response to the provisions of the *Law of the Sea Convention,* which confer considerable capacity upon Australia to protect the 200 nautical mile exclusive economic zone.

Australia has seen considerable legal and political controversy over the nomination and protection of various sites under the provisions of the *1972 Convention Concerning the Protection of the World Cultural and Natural Heritage* — the World Heritage Convention. The domestic implementation of the provisions of the Convention by the Commonwealth through the *World Heritage Properties Conservation Act 1983* has been the subject of significant litigation and public debate.

The most prominent of these arose in the 1983 *Tasmanian Dam Case* (1983) 158 CLR 1, which followed attempts by the Commonwealth to rely upon provisions of the *World Heritage Convention* to halt the construction of a dam in South-west Tasmania within an area protected by the Convention.

In other instances, controversy has arisen in relation to the nomination of World Heritage areas. In 1986 the Commonwealth Government's nomination of Stage 2 of Kakadu National Park in the Northern Territory was declared void because of a flaw in the consultative process between the Commonwealth Government and interested parties over the consequences of nomination, especially in regard to the interests of mining companies.

Though this decision was subsequently reversed on appeal, the potential for a World Heritage nomination to be contested in the courts because of a flaw in the nomination process within Australia prompted a change in government policy. Subsequent nominations for World Heritage listing have been assessed, where possible, following consultation with the relevant State Government and in one case, through a Commonwealth Commission of Inquiry regarding Tasmania's South West Wilderness. However, the Commonwealth retreated from initiating an inquiry in the case of the Queensland Wet Tropics World Heritage Area, and unilaterally put forward the nomination against the wishes of the Queensland Government. This act sparked a further High Court constitutional challenge.

Recently, the Commonwealth has sought to adopt a more cooperative approach with State Governments in the nomination and management of World Heritage sites. A number of Commonwealth and State management plans have been adopted for various World Heritage sites through the medium of the *1992 Intergovernmental Agreement on the Environment.* However, the recent controversy over a proposed resort development at Oyster Point, near Hinchinbrook and adjacent to World Heritage areas in Queensland has once again demonstrated the volatility which exists over the management and protection of World Heritage properties in Australia.

Impact on Courts — Federal

Australian courts have played an important role in interpreting Australia's responses to international environmental law. The High Court's 1983 decision in *Commonwealth v Tasmania* — Tasmanian Dam case — remains the most significant. This case arose following the successful nomination in 1982 by the Commonwealth government of an area in south-west Tasmania, known as the Western Tasmanian Wilderness National Parks, for inclusion on the World Heritage List.

The Commonwealth did not immediately move to protect the area, but preferred to allow continued management by Tasmania. However, not long thereafter, it was announced that the Tasmanian Hydro-Electric Commission, an instrumentality of the Tasmanian Government, planned to build a dam in an

area of the Franklin River which fell within the World Heritage site.

The Commonwealth Government responded by enacting the *World Heritage Properties Conservation Act 1983*, which was specifically designed to halt the construction of the dam. Tasmania challenged the constitutional validity of the Act before the High Court. However, by a 4/3 majority the Court ruled that the Act was a valid exercise of the Commonwealth Government's power over external affairs under s 51(xxix) of the Australian Constitution.

Not only is this High Court decision pivotal with respect to understanding the operation of the external affairs power, but it is also the most significant High Court decision regarding the ability of the Commonwealth to implement treaties dealing with international environmental law. Any understanding of the Commonwealth government's power to implement international environmental law in Australia rests with this decision. Its impact upon domestic environmental law is therefore considerable.

Two further cases have been decided by the High Court dealing with sites subject to World Heritage nominations.

In 1987, the Commonwealth government enacted the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* for the purpose of establishing a Commission of Inquiry into the World Heritage values of the Lemonthyme and Southern Forests. The Commission was established as a result of concern over logging in the forests, and uncertainty over whether the areas were eligible for protection under the *World Heritage Convention*. The Act also provided for an interim protection regime for the forests while the inquiry was being conducted.

Tasmania challenged the constitutional validity of the legislation before the High Court, arguing there was no obligation under the *World Heritage Convention* to establish the Commission of Inquiry or to implement the interim protection measures. However in its judgment in *Richardson v Forestry Commission (Tasmania)* (1988) 164 CLR 261, the High Court unanimously held that the establishment of the Commission was justifiable, as it represented one means of identifying properties suitable for protection under the Convention.

By a 5/2 majority, the Court also held that the interim protection of the proposed World Heritage site was valid. The Court emphasised that the interim protection measures could be 'supported as action which can reasonably be considered appropriate and adapted to the attainment of the object of the Convention, namely the protection of the heritage'.

In *Queensland v Commonwealth* (1989) 167 CLR 232, the High Court was asked to rule on a further constitutional dispute following the World Heritage listing of the 'Wet Tropics of Queensland'. The Queensland Government challenged this action when it sought a declaration that Commonwealth protection of the area under the World Heritage Properties Conservation Act was invalid.

The High Court dismissed the Queensland claim, holding that the listing of the area by the World Heritage Committee was conclusive evidence of Australia's international obligation to protect the area under the *World Heritage Convention* and that the actions of the World Heritage Committee were not subject to judicial review. It therefore followed that World Heritage listing was conclusive evidence of Australia's international duty to protect and conserve that property.

Impact on the Courts — State

The influence of international environmental law can also be seen in litigation that has taken place before State courts. In the 1993 case of *Leatch v The National Parks and Wildlife Service* (1993) 81 LGERA 270, Justice Stein of the New South Wales Land and Environment Court referred to the precautionary principle, as embodied in the 1992 *Convention on Biological Diversity*, in the context of deciding whether to overturn a licence to 'take or kill' endangered fauna.

While the Convention was not formally binding upon the operations of the New South Wales' administered National Parks and Wildlife Service, Justice Stein indicated that the court would be prepared to take note of international environmental law developments when interpreting New South Wales statues.

More recently in the 1995 decision of *Greenpeace Australia v Redbank Power Company and Singleton Council* (1995) 86 LGERA 143, Justice Pearlman, Chief Judge of the New South Wales Land and Environment Court, was asked to take into account principles found in the 1992 *Framework Convention on Climate Change* when considering a permit granted by a local authority for the establishment

and operation of a coal-fired power station in the Hunter Valley.

While the judge was not prepared to find that the Convention operated so as to prohibit any energy development that would emit greenhouse gasses, it was accepted that the provisions of the Convention and the obligations it created for Australia were issues which the Court had to take into account in its overall assessment of the project.

Impact on policy

International environmental law has also had an impact upon the development of Australian environmental policy. This is most clearly demonstrated through Australia's responses to the outcomes of the 1992 United Nations Conference on Environment and Development — UNCED (or the Rio Conference). Australia was an active participant in both global and regional consultations prior to UNCED. A range of consultations were also held throughout Australia prior to the conference to determine what goals and objectives Australians sought from the conference.

While UNCED has had a significant influence on Australian policy at national, State and local government level, the most direct influences have derived from the importance placed in the *Rio Declaration on Environment and Development* and *Agenda 21* on sustainable development. In addition, ratification of both the *United Nations Framework Convention on Climate Change* and the *Convention on Biological Diversity*, conventions which were both adopted at UNCED, has served to further highlight the need for increased implementation of concepts of sustainability.

The influence of these instruments is most clearly seen in the development of the 1992 *Intergovernmental Agreement on the Environment*, signed by the Commonwealth, the States, the Territories and the Local Government Association of Australia which is now included as a schedule to the National Environment Protection Council legislation enacted by the Commonwealth and the States and Territories.

The Agreement includes 'Principles of Environmental Policy', which are intended to 'inform policy making and program implementation'. The principles reflect closely the *Rio Declaration* and various provisions of both the Climate Change and Biological Diversity Conventions. These principles have been incorporated into various pieces of domestic legislation.

In 1992, Australia completed a *National Strategy on Ecologically Sustainable Development*. This Strategy has been accepted by the Commonwealth, State and Territory governments as a response to the need to implement a coordinated national approach to ecologically sustainable development in Australia.

A further initiative, partly in response to Australias ratification and the entry into force of the *Convention on Biological Diversity*, was the adoption in 1996 of a *National Strategy on the Conservation of Australia's Biological Diversity*. This Strategy also embodies principles of ecologically sustainable development.

Notwithstanding these policy developments, there has been little substantive legislative response by the Commonwealth government to UNCED. In particular, it should be noted that Australia has not enacted any new legislative initiatives to give effect to either the *Framework Convention on Climate Change* or the *Convention on Biological Diversity*.

Conclusion

International environmental law has gradually begun to have a very influential impact upon environmental law in Australia. At first through international environmental conventions, and then more recently through its impact on Australian courts and the development of Australian environmental policy, international environmental law is now an integral element of environmental law in Australia.

This is a remarkable development given that much international environmental law is still only in its infancy. However, like the development of human rights standards during the United Nations era, international environmental law has been a post-World War II international legal phenomenon and its principles are beginning to filter through many traditional areas of international law. These principles are increasingly impacting upon existing domestic environmental law and policy. The result is that Australian environmental law, an area of law which essential grew from domestic law bases, is increasingly being influenced and shaped by international environmental law.