

“BETWEEN A ROCK AND A HARD PLACE”: THE IMPOSITION OF A NATIONAL STRATEGY OF SUSTAINABLE DEVELOPMENT WITH RESOURCE SECURITY

by

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For the centralist conservationist, any possibility of creating a nationally imposed strategy over our natural resources, meeting standards of coherence and ecological soundness, may be received most favourably in the wake of a decade of poor environmental management by the states, the Commonwealth and private developers. The significant constitutional hurdles which such a strategy must overcome may be regarded as apparently insurmountable. However, utilisation of the extended limits of the constitutional ability of the Commonwealth, as reflected in several historic decisions of the High Court during the past decade to impose a Commonwealth-initiated national strategy of resource development, leads one to conclude that such a strategy may be both feasible and warranted.

The subtle, but significant, issue laying at the centre of such considerations is the distinction between a negative, or prohibitive, regulatory strategy and a positive strategy for adherence to certain environmental standards in resource development. It is a view propounded in this paper that, whatever the effectiveness of Commonwealth power in a negative land use role, the long-term cause of environment protection may be better served by a positive national strategy of resource development.

1. The Measure of “Effectiveness”

Any study of a nationally imposed strategy must be preceded by clarification of those aspects of resource development a national strategy must address in order to effectively achieve an objective of environment protection.

It should:

- (a) implement a program of control over the decision as to whether to exploit the resource itself. This is particularly so where it is the resource itself which is of special significance e.g. flora, fauna.
- (b) control the method of extraction of the resource to ensure that the environment is adequately protected. This is particularly so where it is the land which has special significance e.g. wilderness areas.
- (c) recognise equity in the matter of compensation of the states for the overriding by the Commonwealth of the benefits attached to the use of the resource. In the words of Crommelin:¹

Compensation, measured by the difference between the values to the state of the resource uses selected by the state and the Commonwealth, respectively, should therefore always be payable to the state. In other words, while the constitution may allow the Commonwealth (representing the people of Australia) to impose its preferences upon a state regarding management of that state's resources, equity demands that the Commonwealth (on behalf of the people of Australia) compensate the state for any resultant loss.²

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M. Crommelin *Commonwealth Involvement in Environment Policy: Past, Present and Future* (1987) EPLJ 101. *Ibid.* at 110.

- (d) effectively bind the Commonwealth to any agreement reached with developers pursuant to a national strategy, consenting to the mining of the resource.

A major administrative problem which must be addressed in the formulation of a national strategy is that the government cannot in any agreement made pursuant to guidelines set out in the strategy, fetter the discretion of a relevant officer to grant any necessary licence, consent or privilege³ (e.g. consent to the granting of an export licence or other required statutory consent) unless the agreement is enforceable by way of damages only,⁴ or has received statutory approval.⁵ Hence, statutory approval of each particular agreement would be required, being at least an impractical recourse. However, without the certainty of such recourse, a national strategy would fail to provide what is likely to be a significant parameter — a satisfactory level of investment confidence for the entrepreneur.

In times of economic crises, it is vital for government to provide security to mining companies to allay concerns that in any subsequent change of political heart, the government will not use its powers to prevent the development from going ahead. Despite the recent political furore over the banning of mining at Coronation Hill, the present government has shown awareness of the problems associated with "sovereign risk" by the following suggestions aimed partly at achieving this confidence:

- (i) stimulation of the logging industry through proposed Forestry Resource Security Legislation. The general object of the legislation is to offer security to the cautious entrepreneur with respect to forest resource projects over specified tracts of land. It is an integrated process involving agreement between Commonwealth/state/entrepreneur on the project after a survey has been carried out, assessing its environmental implications, followed by supporting Commonwealth/state legislation. The key to the scheme is that the Commonwealth is bound by this agreement not to use its available constitutional powers e.g. trade and commerce, external affairs, corporations power, to affect it.⁶
 - (ii) the proposal of a national strategy of ecologically sustainable development. The constitutional difficulties of implementing such a strategy are obvious and are addressed below.
- (e) there must exist community values and priorities which support a policy of ecologically sustainable development through a nationally enforced strategy. Without public support, the Commonwealth may not embark upon such a strategy which would be likely to force severe political confrontation with the states. Hence, the move for such a strategy must come from the people themselves. In the past decade, signs of such support have been apparent,⁷ and it may well be that the public would be in favour of a nationally imposed strategy for resource development.

In this regard, it is of note that where the Commonwealth has successfully intruded upon the exercise of state rights of ownership, on each occasion the activities of the states involved were electorally unpopular and the Commonwealth may have perceived political advantage by its actions. It is doubtful whether the Commonwealth would seek to directly intrude into this area of traditional state rights where it would not achieve any political advantage, particularly as some past intrusion has resulted in significant compensation payouts.

3. per Mason J. *Ansett Transport Industries (Operations) Pty Ltd v. The Commonwealth* (1977) 139 CLR 54 at 76.

4. *Ibid.*

5. *Ibid.* at 77.

6. However, the proposed legislation offers grave difficulties. See generally Professor D. Fisher.

7. For example, it was the strong public opposition to the building of the reservoir on the Franklin River, (and the electoral connotations to that support) which prompted the Hawke Labor government to become involved in what was seen as a state matter.

2. The Constitutional Implications of the Implementation of a National Strategy of Resource Development

There is no question that the Commonwealth could enact a national strategy over resource development with the co-operation and agreement of the states. This could be achieved through a state referral of legislative power to the Commonwealth, or alternatively through a co-operative agreement by the Commonwealth and the states.

However, since this seems to be a political unreality, the proposed mechanism for the imposition of a national strategy must come to terms with the limitations placed upon the legislative ability of the Commonwealth to interfere, without state consent, with the state's regulation of resource development.⁸ Also relevant is the question of the ability of the Commonwealth to interfere with private rights of development of resources.

3. The Effectiveness of a Strategy Imposed at a National Level

A further matter which should be considered before going further, is whether it is appropriate in our current political and economic circumstances that the *Commonwealth* be the organ of government to impose the national strategy. In making this evaluation, a number of questions must be addressed:

(a) Is the Commonwealth the appropriate level of government for the enforcement of conservation strategies?

Commonwealth intervention in environmental matters has successfully preserved unique areas from exploitation, but it has not, to date, provided the basis for the implementation of a national strategy of conservation and protection. The crucial management powers remain with the states.

According to Crommelin,⁹ the reason for this reticence may be linked not so much to constitutional difficulties, but to the question as to whether it is the appropriate level of government for the devising and implementing of a national strategy. If it is not, and Crommelin suggests that this is the case¹⁰, then at best, the Commonwealth's now-affirmed powers stand as a sentinel to an effective articulation of joint governmental policy for land-use strategy, but not for the introduction of an imposed national strategy without state consent. Thus, the proponents of this view, far from favouring a Commonwealth initiated national strategy, would seek to limit the role of the Commonwealth to those occasions where the states are threatening to make an ecologically poor environmental decision and then only to force a joint Commonwealth-State decision. For example, it is said of the outcome of the Lemonthyme and Southern Forests litigation that the Tasmanian Government faced a situation in which it knew it must negotiate with the Commonwealth or risk a unilateral nomination of 80 per cent of the region and reduced compensation.¹¹

However, given the historic failures by the states to adequately address questions of the environment,¹² it is arguable that the environment has become such a critical issue that it requires a nationally enforced program over all aspects of resource development to

8. This paper does not discuss in detail the various legislative heads of power which may give constitutional validity to legislation implementing the strategy, an issue which has been thoroughly dealt with elsewhere. See J. Crawford *The Constitution and the Environment* (1991) 13 Sydney LR 11.

9. Crommelin, *supra* n.1 at 110.

10. *Ibid.* at 109-110.

11. Dr B.M. Tsamenyi, J. Bedding, L. Wall *Determining the World Heritage Values of the Lemonthyme and Southern Forests: Lessons from the Helsham Inquiry* (1989) EPLJ 79 at 90.

12. For example, the flooding of Lake Pedder, the building of the environmentally ugly road in the far North Queensland, the on-going saga of the Tasmanian woodchip industry, the attempted sand-mining of Fraser Island, the pollution of Sydney's beaches.

be implemented before environmental matters will be appropriately and adequately addressed by developers in the future.

(b) The implications of compensation payments in the current economic climate

The compensation arrangements which flowed from the outcome of the Lemonthyme and Southern Forests litigation have attracted critical comment. It has been said that the agreement was incredibly generous to the Tasmanian Government:

The Commonwealth has agreed not only to compensate those suffering loss as a result of any cessation of operations in the nominated area on environmental grounds, but also to compensate for any future losses sustained by the Tasmanian Government which may arise out of refusal of permission to exploit the World Heritage area because of adverse environmental effects.¹³

It is reported that as a result of the *Tasmanian Dam Case*, the Federal Treasury and Department of Finance contacted the Prime Minister and Minister for Environment, expressing concern about the level of compensation involved, urging the Commonwealth to avoid conservation controversies with the states, because of budgetary implications.¹⁴

However, the most severe criticisms stemmed from the fact that the Commonwealth did not police the payout of the compensation and

much of the money was expended on sporting complexes in North and North-West Tasmania, in electorates of several Members of the Gray Liberal Government, including that of the Premier himself.¹⁵

It is obvious therefore, that a national strategy must adequately address the question of compensation payouts, both with respect to the amount of compensation warranted and whether this amount is feasible in our economic conditions, and also in ensuring appropriate implementation of the compensation.

(c) The implications for "federalism"

A strong view of the outcome of the environmental litigation is that the actions of the Commonwealth government in protecting environmental concerns has altered the status of the federation. For example, the notion of federal balance was relied upon in the minority opinions in the *Tasmanian Dam Case*,¹⁶ shoring up their Honours' view that the external affairs power did not authorise the Commonwealth's legislation to preserve the South-West Tasmanian World Heritage Area because it tended to destroy that federal balance.

With respect, that view is not tenable. If it is thereby implied that the fact of High Court litigation is evidence of federation under stress, then the implication should be rejected. There is a long history of litigation between the states and the Commonwealth with respect to the bounds of Commonwealth constitutional power. Either that history has always imposed stress on the federation, which is not suggested here, or such litigation is not evidence of stress on the federation.

(d) Is the legal system the appropriate vehicle for imposing environmental restraints upon resource development?

It must be remembered that the law lacks flexibility and does not meet the need for speedy, effective resolution of land use issues. Perhaps what is really needed is a system

13. Tsamenyi et al, *supra* n.11 at 90.

14. B. David 'Federal-State Tensions in Australian Environmental Management: The World Heritage Issue' (1989) EPLJ 66 at 70.

15. *Ibid.*

16. (1983) 159 CLR 1.

of financial incentives rather than a system of regulation? However, such a question is outside the scope of this paper.

4. The Legislative Framework for a National Strategy

Scrutiny of the outer parameters of the Commonwealth's express powers¹⁷ suggest the following possibilities for the development of a national strategy over resource development:

(a) The assertion of legislative control over the resource itself

This assertion may include an actual claim of ownership of the resource, or the implementation of a management strategy over the development of that resource, leaving ownership rights unchanged.

The assertion of ownership rights

At common law, all land vests in the Crown.¹⁸ Since a great deal of land remains in the ownership of the Crown, the Crown is therefore in a strong position to control overall land usage. For example, where the Crown is owner of the land it can control the rights of access granted to that land. It retains residual power of control over that land and may therefore regulate in the public interest any interference with the natural resource existing upon that land.

Hence, where the natural resource is situated on land owned by the Commonwealth it may assert rights of ownership over the resource itself.¹⁹ It does not have any restrictions on its power to regulate the development of the resource²⁰ and thus may impose a national strategy over those resources. The territories power²¹ thus allows the Commonwealth to legislate over the resource-enriched Northern Territory. The *Northern Territory Self-Government Act 1978* (Cth) imposes restrictions upon Commonwealth legislative power which are of "a conventional or political character only".²² Consequently, they do not affect the Commonwealth's general legislative power over the Northern Territory under this head of power.

However, in Australia, the federal complication must be taken into account when one considers the concept of control of resource development by ownership, since the "Crown" is the Crown in right of the *state* where the land concerned is within the territorial boundaries of the state. State title to land was not altered by federation, with the result that the states retained the right and title to minerals existing upon state land.²³ Consequently, the power to legislate over rights of access to natural resources existing within the territorial boundaries of the states has been generally perceived as being within the residual constitutional powers given to the states under s.107 Commonwealth Constitution. Those rights may only be taken away by the Commonwealth by exercise of its "acquisition" power and payment of "just" compensation.²⁴

17. See generally J. Crawford *supra* n.8.

18. *Williams v. A.G. for New South Wales* (1913) 16 CLR 404 at 439.

19. For example, uranium under the *Atomic Energy Act 1953* (Cth) s.35.

20. In some instances, the Commonwealth has been able to rely upon its territory power to control the development of natural resources located within its territories, e.g. the *Atomic Energy Act 1953* (Cth) and the Agreement between the Commonwealth, Peko-Wallsend Operations Ltd., Electrolytic Zinc Co. of Australasia Ltd dated 9th January 1979 as to the development of the Ranger uranium mining project.

21. S.122 *Commonwealth of Australia Constitution Act 1901* (Cth) (hereinafter referred to as "Commonwealth Constitution")

22. Per J. Crawford *supra* n.8 at 15.

23. For instance, each of the states have passed a *Lands Act* regulating the development and usage of Crown land, e.g. *Land Act 1962-1989* (Qld).

24. s.51(xxxi) - Commonwealth Constitution

Hence, where the resource exists within the boundaries of the states, the Commonwealth has no ownership rights over the resource upon which to base its national strategy and in fact must interfere with rights of ownership in order to regulate the development of those resources.

The imposition of a management regime over the resource

It is not usual for the Commonwealth to control land usage by direct regulation. Legislation will more commonly provide for a management regime over the resource itself without attempting to affect any ownership claim over the property.

In practical terms, such a strategy to be effective in terms of environment control would need to control not only the decision as to whether to exploit the resource, but also the method of its extraction.

The Commonwealth does not have the constitutional competence to impose a management regime over all resources existing within the boundaries of the states without the agreement of the state concerned, and the subsequent passing of complementary legislation. However, it is well accepted that the Commonwealth may legislate upon a head of power, such as trade and commerce,²⁵ external affairs,²⁶ defence,²⁷ to achieve "a consequential and indirect effect on matters standing outside that power"²⁸ i.e. where the purpose of the legislation is environmental protection.

So for example, the Commonwealth may assert control over the development of the resource where:

- (i) the resource has strategic value²⁹ under the defence power;
- (ii) the resource has world cultural significance,³⁰ under the external affairs power;
- (iii) the resource has tourism value³¹ under the trade and commerce power;
- (iv) the resource only has economic value if it may be exported, and Commonwealth consent is required pursuant to the trade and commerce power.³²

However, even though the Commonwealth may be able to impose a national strategy over particular resources, many natural resources, such as petroleum and other minerals, do not possess any key elements linking them to any head of power. Any attempt by the Commonwealth to link the strategy to a claim of ownership rights over these natural resources would be unconstitutional. These rights, in the main, belong to the states.³³

Further, although the course of litigation has clearly affirmed the effectiveness of the export licensing power, at least in the context of a prohibitive strategy, if a sand-minerals market or wood-chip processing market developed within Australia, then the export licensing power would be irrelevant.

25. *Murphyores Inc. Pty Ltd v. Commonwealth* (1976) 136 CLR 1.

26. *The Commonwealth v. Tasmania* (1983) 158 CLR 1.

27. Under the *Atomic Energy Act 1953* (Cth) prior to the 1987 amendment.

28. *Per Mason J. Murphyores Inc. Pty Ltd v. Commonwealth* (1976) 136 CLR 1 at 22.

29. For example, *Atomic Energy Act 1953* (Cth) prior to the 1987 amendment.

30. And the Commonwealth is obligated under the terms of an international treaty to protect it e.g. *Wildlife Protection (Regulation of Exports etc) Act 1982* (Cth) under Convention on International Trade in Endangered Species of Wild Flora and Fauna.

31. Such as the *National Parks and Wildlife Conservation Act 1975* (Cth).

32. Such as in *Murphyores Inc. Pty Ltd & Ors v. The Commonwealth and Ors* (1975-1976) 136 CLR 1.

33. In many cases the Commonwealth has avoided a constitutional challenge by reaching a joint Commonwealth-state arrangement regarding the management of the resource, e.g., co-operation occurs between the Commonwealth and the states in an administrative sense under the management of the Australian Forestry Council; the reciprocal *Softwood Forestry Agreements Acts* between the states and the Commonwealth regarding the planting of softwood timber. The most effective joint arrangements between the Commonwealth and the states concern the management of the coastal waters, continental shelf and the seabed, an area outside the scope of this paper.

In view of the above mentioned limitations, any attempt by the Commonwealth at imposing a national strategy over Australian natural resources, would be ineffective.

(b) The imposition of a management strategy over areas of significant environmental concern

Although the Commonwealth has no constitutional competence over the usage of state land and cannot legislate directly to impose conditions relating to its use, in the 1970's, the Commonwealth initiated³⁴ environmental protection of land existing within state boundaries by way of a new concept — the declaration of areas with unique natural attractions as heritage areas, with consequential assertion of control of activities on that land. However, the Commonwealth may only declare such areas where the purposes behind the declaration fall within one of its specific powers e.g. external affairs, race, trade and commerce.

Consequently, the Commonwealth has been able to intrude upon the regulation of land-use within the territorial boundaries of a state where that land has fallen within one of the following categories:

(i) The Commonwealth has legislated over areas of "aesthetic, historic, scientific or social significance"³⁵ providing that such areas may be listed³⁶ upon a register of the national estate.³⁷ Once listed, development within those areas is prohibited without Commonwealth consent under the *World Heritage Properties Conservation Act 1983* (Cth),³⁸ an Act which implements the Convention for the Protection of World Cultural and National Heritage and thus relies in part upon the external affairs power. The Commonwealth's aim is to preserve the special attributes of those areas such as wilderness, and prevent destruction through exploitation of resources.

(ii) The *National Parks and Wildlife Conservation Act 1975* (Cth) allows the Commonwealth to establish and manage parks and reserves in the territories, Australian coastal waters and the continental shelf.³⁹ Although the Act relies principally upon the trade and commerce power,⁴⁰ it is purportedly partly based upon the inherent nationhood power.⁴¹ The possibility of acquiring land in a state for these purposes is clearly contemplated in s.6(2) which provides that land may not be so acquired without the consent of the state if it is land already reserved for conservation purposes, or is an area having special significance in relation to Aborigines. By implication therefore, it seems that the Commonwealth could, under this Act, compulsorily acquire land which did not form part of a conservation area. However, in such a case, a relevant question would be whether the Commonwealth would have to pay compensation under s.51(xxxi) of the Constitution. If the Commonwealth merely prohibits activities without permission, this action does not amount to an "acquisition".⁴² However, in order to establish a park on state land, the Commonwealth would have to acquire legal rights and as such would be caught by the provisions of s.51(xxxi).

34. As a response to the report of the Committee of Inquiry on the National Estate.

35. *Australian Heritage Commission Act 1975* (Cth) s.4(1).

36. The responsibility of the Australian Heritage Commission.

37. *Australian Heritage Commission Act 1975* (Cth) s.22(1).

38. S.9.

39. S.6.

40. Since it has the purpose of encouraging tourism between the states and Australia and overseas markets. See s.6(1)(f).

41. S.6 allows the Commonwealth to establish such parks as are appropriate having regard to its status as a national government.

42. *The Commonwealth v. Tasmania* (1983) 158 CLR 1.

To date, the Commonwealth has not moved to compulsorily acquire land for this purpose. It has avoided a constitutional challenge to this legislation by entering into joint Commonwealth and State agreements regarding the establishment of reserves in the States.⁴³ Consequently, no ruling on the constitutional validity of the Act has been given by the High Court.

There have however, been questions raised by the High Court⁴⁴ as to the existence of an implied power given to the Commonwealth derived from its character as a national government to regulate land-use, although it is difficult to see any consensus between the judgments. Gibbs C.J. thought that:

the implied powers of the Parliament as a national Parliament, do not extend to allow it to prevent a state from making or permitting such lawful use of its land as it chooses⁴⁵.

Deane J. also considered that an "implied nationhood power does exist"⁴⁶ but although it had not yet been explored, it would not extend to authorising "drastic restrictions" on the lawful use by the states of land within its boundaries.⁴⁷ Wilson J,⁴⁸ and Dawson J.⁴⁹ however, doubted that such a power existed as a coercive legislative power. The remaining judges did not consider the existence of such a power.

The successful implementation of a national strategy of resource development must include the ability to regulate resource exploitation in all areas, and not just areas of special significance. Of course, the Commonwealth does not have a general constitutional ability to assert management control over all areas. Such assertion must be linked to a head of Commonwealth constitutional power.

The power to be most obviously relied upon is the external affairs power. However, in order to be able to assert control over the area pursuant to this head of power, there must be in existence an international treaty which gives constitutional validity over that assertion. To date, there is no external treaty which Australia has signed which is of sufficient general effect to give the Commonwealth a legislative ability to impose a national strategy over resource development, as opposed to a strategy limited to areas sought to be protected by international convention.

It has been argued that the *Tasmanian Dam* decision has made it easier for the Federal Government to move to protect any facet of the Australian environment from harmful state activities.⁵⁰ It is technically possible that any area of significant universal value such as wilderness areas, rainforests, outstanding land formations may be fairly easily listed on the World Heritage List. However, World Heritage listing is not the only circumstance in which such Federal intervention might occur. It is possible that other areas satisfying the requirements of other international treaties signed by Australia may also attract Commonwealth regulation.⁵¹

Of course, future international treaty obligations may trigger Commonwealth power

43. For example, in 1977 the Commonwealth proposed to acquire land at Towra Point, New South Wales in order to establish a nature reserve. However, when it became apparent that New South Wales would mount a constitutional challenge to the Act, the Commonwealth instead reached subsequent agreement between it and the Commonwealth over the exchange of Commonwealth and State lands, which exchange included Towra Point.

44. *The Commonwealth v. Tasmania* (1983) 158 CLR 1.

45. *Ibid.* at 109.

46. *Ibid.* at 252.

47. *Ibid.* at 253.

48. *Ibid.* at 203-204.

49. *Ibid.* at 322.

50. G. Bates 'The Tasmanian Dam Case and its significance in Environmental Law' (1984) EPIJ 325 at 341.

51. Such as the Convention on Wetlands of International Importance adopted 2nd February 1971.

irrespective of World Heritage listing. For example, it is not inconceivable that there may be a future global warming treaty, or similar, which would provide the basis for broad new Commonwealth scope into waste management and other land uses. However, until that occurs, the Commonwealth cannot use the external affairs power to impose such a national strategy.

(c) The imposition of a management strategy by regulating the commercial activities of corporations

It is suggested that a strategy utilising in combination the following powers may allow the Commonwealth to successfully implement national control over resource development:

- (i) Taxation power
- (ii) Corporations power
- (iii) Trade and Commerce power

Taxation power

The taxation power is one of the most important economic tools that the Commonwealth has to influence either the production of resources, or steps taken in that production to eliminate or decrease environment damage. It is within the constitutional power of the Commonwealth to impose taxes with the object of encouraging responsible use of the environment. The purpose behind the creation of the tax is not relevant to the constitutionality of the legislation.⁵² The only constitutional restriction is that the Commonwealth cannot discriminate between states or parts of states.⁵³

The Commonwealth has the ability under the taxation power to offer financial taxation incentives to developers engaging in environmentally sound practices. It has already used the taxation power to impose favourable or unfavourable taxation liabilities upon developers of resources, as well as to encourage the usage of good environment protection techniques. Announcements in the 1990 Commonwealth Budget papers that full tax deductibility will be allowed for capital costs incurred on restoration of land degradation and related measures are a continuing signal of the Commonwealth's preparedness to use the taxation powers for environmental ends. For many years, the Commonwealth's taxation regime has provided incentives for water conservation for primary producers, and the land degradation measures mark a transition in policy emphasis from a concern for the economic subsistence of primary producers to a longer-term economic concern for the land which is the essential resource of such primary industry.

Other taxation measures have a direct relationship with environment policy. Taxation concessions were introduced in the 1990 Budget for mine-site rehabilitation. Moreover, the March 1991 Industry Statement by the Prime Minister included an announcement that future expenditures on environmental impact studies will be tax deductible.

The Commonwealth is presently considering a substantial submission from the Taxation Institute of Australia on the extension of taxation incentives for environmental objectives.⁵⁴ Under this power the Commonwealth may limit these taxation incentives to **corporations** engaging in resource development.⁵⁵ This would provide a financial incentive for developers to incorporate.

52. *MacCormick v. Federal Commissioner for Taxation* (1984) 158 CLR 622.

53. S.51(ii) Commonwealth Constitution; s.99 Commonwealth Constitution.

54. "Taxation and the Environment", (1990) Taxation Institute of Australia.

55. Precedent is established by section 73B of the *Income Tax Assessment Act*, 1936 (Cth) which provides for concessional treatment for expenditure on research and development activities only by an "eligible company" defined as "... a body corporate incorporated under a law of the Commonwealth or of a State or Territory".

Corporations power

It is suggested that the corporations power has the most potential for long-term positive management of the environment, since under this power the Commonwealth has the legislative ability to regulate both trading activities as well as activities carried out for the purpose of trading, even if those activities are not of a trading nature.⁵⁶ Decisions by corporations as to whether to extract a particular resource, the method of extraction, and the subsequent trade of the resource would all come within the legislative competence of this power. Thus, it is possible under this power that the Commonwealth may require corporations to obtain Commonwealth consent to the development of the resource before proceeding.

Bates⁵⁷ has commented that the corporations power has significant potential in this context:

Since the Dam Case, [however,] the Federal Government, faced with a similar situation, can directly ban the mining of any substances being carried on by trading, financial or foreign corporations. . . It is difficult to conceive of any mining, manufacturing or construction activity being undertaken by a trading corporation which would not be subject to direct Commonwealth control.⁵⁸

However, the promise of the corporations power, held out by the *Tasmanian Dam Case*, has not achieved the result which may have been expected by the conservation interests. In respect of the Lemonthyme and Southern Forests dispute, it has been suggested that the Commonwealth Government was shown unwilling to test the corporations power, where its use would have enabled the Commonwealth to take action on logging for domestic markets as well as woodchip export operations, and avoid being restricted to World Heritage areas.⁵⁹ Perhaps the reason for this reticence by the Commonwealth is that such use of the corporations power would have extensive political repercussions because of its potential for greatly expanded Commonwealth involvement in what have traditionally been regarded as State matters.⁶⁰ For example, a general theme through several commentaries on the topic is that Commonwealth Government involvement in environmental issues within the states may be counter-productive by increasing state determination to proceed with environmentally damaging activities.

However, notwithstanding political implications, provided that the corporation is already in existence⁶¹ it is the view of the writer that the Commonwealth may legislate nationally to require all trading, financial and foreign corporations in natural resource development, to seek the consent of a relevant Commonwealth minister before engaging in such development.

The giving of that consent may be linked to a requirement that a broad-based environment impact survey be carried out by a prescribed authority prior to the Minister addressing the question of his or her consent. The Commonwealth has already been successful in the past in using the requirement of Commonwealth consent to impose an EIS upon the developer.⁶² There is little doubt that the Commonwealth could enact a statute

56. *The Commonwealth v. Tasmania* (1983) 158 CLR 1.

57. G. Bates *supra* n.55.

58. *Ibid.* at 341.

59. J. Formby 'Environmental Impact Assessment: Where has it gone wrong? EIA and the Tasmanian Woodchip Controversy' (1987) EPLJ 191 at 198.

60. This is the view suggested by J. Formby *ibid.*

61. *State of New South Wales v. The Commonwealth of Australia*; *State of South Australia v. The Commonwealth of Australia*; *State of Western Australia v. The Commonwealth of Australia* (1989-1990) 169 CLR 482.

62. *Murphyores Inc. Pty Ltd & Ors v. The Commonwealth and Ors* (1975-1976) 136 CLR 1.

setting out broad based key factors which must be considered in an environment impact survey before the Minister may give consent since under s.52(ii) Constitution the Commonwealth has exclusive control over its public service.

The trade and commerce power

Furthermore, the trade and commerce power offers added constitutional validity to the imposition of the environment impact survey where the development involves interstate or overseas trade and commerce. The High Court has already ruled that such a provision is within the constitutional power of the Commonwealth.⁶³

s.92 Commonwealth Constitution

One final matter which must be addressed is the issue of the prohibition contained in s.92 of the Constitution. Provided that the imposition of environmental standards upon developers do not have a protectionist or discriminatory effect,⁶⁴ the strategy cannot be challenged under s.92.

(d) The imposition of a national strategy linked with the grants system

Under s.96 of the Commonwealth Constitution, the Commonwealth may make a financial assistance grant to the states imposing conditions upon the grant as it sees fit.⁶⁵ This ability allows the Commonwealth to regulate the planning and management of resource development even though those activities are outside its express powers.⁶⁶ Again, there is little doubt that the Commonwealth would be able to implement a national strategy upon the states by reliance upon s.96. For example, the Commonwealth has the ability to impose the requirement of an EIS upon the states prior to funding certain programs.

However, the usage of s.96 would offer significant limitations:

- (i) it would not be effective in controlling development projects by private concerns since it only operates over the states.
- (ii) it would involve financial payments by the Commonwealth — an impractical alternative in today's economic climate.

Conclusion

Perhaps the real answer to the question of Commonwealth legislative ability to impose a national strategy over resource development lies in its reliance to a greater or lesser extent on all of the above powers. For example, it is possible that its usage of the corporations power as suggested, may be further supported by the external affairs power in its application to the states where heritage areas are concerned, as well as the trade and commerce power where interstate and/or overseas trade is involved. So too may it introduce a national grants system to offer financial incentives relating to environment protection where the state is the developer of the resource, as opposed to a private corporation. The Commonwealth has already relied collectively upon various powers in its legislation⁶⁷ and achieved the result that

63. *Ibid.*

64. *Cole v. Whitfield* (1988) 82 ALR 633 as applied in *Castlemaine Tooheys Ltd v. South Australia* (1990) 90ALR 371 where it was held that although legislation may validly seek to apply environmental restrictions and/or standards, it must not discriminate in that legislation against trade between states in a protectionist way.

65. *Victoria v. Commonwealth* (1957) 99 CLR 575.

66. For example, the Bureau of Mineral Resources is charged with the function of encouraging mineral development by making available grants and subsidies. The Forestry and Timber Bureau under the *Forestry and Timber Bureau Act* 1930 (Cth) has also been set up with the function of giving advice upon request of s.4(a)(gb); and promoting research rf s.4(c)(d)(e).

67. *World Heritage Properties Conservation Act* 1983 (Cth) which relied upon the external affairs power, the corporations power and the "race power".

the ambit of the legislation is correspondingly wider than had it relied upon one power only.⁶⁸

The Constitution does not contain any limitation that legislation concern a particular head of power. Consequently, the fact that there is no specific head of power in the Constitution upon which the Commonwealth may rely to control resource development does not prevent it from using a mixture of available powers to give validity to legislation controlling resource development, with the only condition being that the legal interpretation of the legislation must bring it within one of the heads of power, irrespective of its practical operation.⁶⁹

However, irrespective of the strategy chosen, it is most important in practical terms that the legislation provides for an adequate mechanism for resource protection. Perhaps then the final words with respect to effectiveness of Commonwealth powers, and the implications of litigation are best drawn from comments by Davis:⁷⁰

Legal action is one thing and administrative implementation another. While considerable thought was probably exercised within Federal legal circles, as to which statutory or constitutional powers might be employed for interventionist ends, very little consideration appears to have been given to longer term administrative measures and financial implications flowing from any victory in the courts. The mechanisms subsequently adopted not only appear hasty and ill-conceived, but have been almost entirely different, case to case. Following the *Tasmanian Dam Case* an elaborate bureaucratic hierarchy was devised, which has achieved relatively little in the several years of its existence; in the Daintree case a financial incentive was attempted, but did not placate the Queensland Government which remains hostile to any Commonwealth role; in the Kakadu case there has been an unsuccessful attempt to appease both mining and conservation interests, while engaging in multi-stage decision-making, each stage following a different route; while in the forestry debate, failures of discourse have led to a legalistic inquiry that has solved little. In essence, ad-hocary has prevailed, with Federal Cabinet decisions reflecting a belated reaction to the push and pull of events in the States and Territories.⁷¹

68. A fact which is borne out in the judgments of the *Tasmanian Dams Case*.

69. A good illustration of this point was given by Mason J. in *Murphyores Incorporated Pty Ltd v. The Commonwealth* (1976) 13 CLR 1 at 19.

70. Davis, *supra* n.14.

71. *Ibid.* at 76.