The Constitution and the Environment

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1. Introduction

This is an attempt to describe the present extent of the Commonwealth's constitutional power over the Australian environment. In one sense this might be thought a rather narrow and remote issue, compared with pressing economic and other questions that confront governments, developers and environmentalists in considering proposals that may have an impact on the environment. But there are several reasons for dealing with the constitutional issue. The first is simply that constitutional power has a habit of being exercised, as the *Environment Protection (Nuclear Codes) Act* 1978 (Cth), legislation of a Government committed to "co-operative federalism", shows.[1] Secondly, there is a certain distinction between the Australian Constitution as a legal document and the Constitution as it is popularly perceived. In recent years there has been a considerable gap between the two, a gap highlighted by decisions of the High Court since 1983. No doubt it is useful for constitutional lawyers from time to time to point out the differences between the real and the "imagined" Constitution, in the hope at least of bringing the existence of differences between them to the attention of those affected, and possibly even of narrowing the gap. And thirdly, there has been a debate at the political level about the adequacy of present federal powers over the environment. To reach any conclusion on that issue requires a clearer understanding of the present position than has sometimes been displayed.[2]

What follows, then, is a discussion of the implications for environmental law and management of the Commonwealth Constitution.[3] As will appear, these implications are considerable: public powers over the environment are now shared between the Commonwealth and the States to a degree which, without formal constitutional change, appears ineradicable. That in turn raises a question about environmental management. The "message" of environmental groups over the past two decades has been, above all, an emphasis on the

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1 See below, text to nn79-82 for discussion of the Act.

2 It should be noted that the Constitutional Commission Committee recommended against any amendment to enlarge federal power over the environment: *Final Report* (1988) vol 2, 757-67. That has not, however, had much influence on the debate.

3 One major environmental issue, and the only one for which separate provision was made in the Constitution (s101), is the regulation of interstate rivers. Partly because of s101, that issue raises its own distinct problems and will not be considered here.

wholeness of the environment, and on the need for coherent strategies to overcome problems of environmental impact or deterioration — in the words of Schedule 1 to the *Resource Assessment Commission Act* 1989, an "integrated approach to conservation. . . and development". Australia is further from unitary management of the environment than it ever was, and it seems clear that there can be no return to the time when that control was treated as residing (minor exceptions apart) in the States.

2. *Commonwealth Legislative Power Over Environmental Matters: Ambit and Exercise*[4]

As I have suggested, the starting point in relation to environmental management in the imaginary Australian Constitution is one of general, if not plenary State power substantially unfettered by Commonwealth power. This is also, and perhaps for that reason, the starting point in more refined analyses:

> Under the Australian Constitution the Commonwealth is given a number of specific legislative powers and the States are left with the unexpressed residue. Amongst the Commonwealth's powers there are none over industrial pollution, manufacturing or mining. The States are predominant in these areas.[5]

> Since there is no specific reference in the Constitution to the power of the Federal government to make laws with respect to the environment (it could hardly be expected that this matter would have been considered at the turn of the century), the States possess primary constitutional power in this area.[6]

To be fair, both writers go to qualify these initial statements to a considerable degree, but the initial assertion remains. Thus Opie concludes, after an examination of some relevant Commonwealth powers, that:

> The Commonwealth does have a considerable power to solve the problem [sc of industrial pollution] but it is not the uniform, direct, plenary power needed.[7]

From the standpoint of advocates of a constitutional referendum to give such "direct, plenary power", this conclusion may well be right. But looking at the

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4 See for example, Bailey, K H, "The Constitutional Legal Framework" in Sinden, J H, *Natural Resources of Australia* (1974) 58; Opie, H, "Commonwealth Power to Regulate Industrial Pollution" (1976) 10 *MULR* 577; Crommelin, M, "Resources Law and Public Policy" (1983) 15 *UWALR* 1; Bates, G, "The Tasmanian Dam Case and its Significance in Environmental Law" (1984) 1 *EPLJ* 325; Somarajah, M (ed), *The South West Dam Dispute: The Legal and Political Issues* (1983); Matthews, R (ed), *Federalism and the Environment* (1985); Drysdale, P and Shibata, H (eds), *Federalism and Resource Development: The Australian Case* (1985); Fisher, D E, *National Resources Law in Australia* (1987) 26-36; Forbes, J R S and Lang, A G, *Australian Mining and Petroleum Laws* (2nd edn, 1987) 32-54; Crommelin, M, "Commonwealth Involvement in Environment Policy: Past, Present and Future" (1987) 4 *EPLJ* 101; Tighe, P, "Environmental Values, Legalism and Judicial Rationality: The Tasmanian Dam Case and its Broader Political Significance" (1987) 4 *EPLJ* 134; Davis, B, "Federal-State Tensions in Australian Environmental Management: The world Heritage Issue" (1989) 6 *EPLJ* 66; Rothwell, D, "The Daintree Rainforest Decision and its Implications" (1990) 20 *Q Law Soc J* 19.

5 Opie, id at 578.

6 Crommelin, above n4 at 1.

7 Opie, above n4 at 613.

Constitution as it is (and in the light of a number of important decisions since 1976) one may wonder whether the qualifications do not eat up the rule.

It is easy to understand how the perception of general State competence, to the exclusion of the Commonwealth, arose. So far as exploration and mining activities are concerned, the origins of legal regulation (and of the protection of the environment, to the extent that is was protected) lie in the law relating to mining tenements, and it is well settled that the radical or residual title in land, and in minerals located in land, within a State inheres in the Crown in right of the State. It was under colonial legislation that explorers and miners obtained, on the relevant financial and other conditions, permission to explore for and extract minerals. That radical title was unaffected by federation, and thus the States retain important fiscal rights with respect to mining and exploration within their borders. So far as mining is concerned, those rights can only be taken away under federal legislation (at least when such taking constitutes an "acquisition" of property by or on behalf of the Commonwealth) on the payment of "just terms".[8] So far as manufacturing or other forms of land use not involving extraction of minerals are concerned, the initial forms of regulation derived from colonial or State legislation, in particular local government zoning and similar powers. Again, this area was not envisaged as one for federal intervention.

However the Commonwealth Constitution was enacted with a formidable list of federal powers, a list which, given certain basic principles of interpretation, was likely to confer substantial federal authority with respect to environmental management. The reasons why this has not been always appreciated are, I think, two-fold: first, the basic principles of interpretation have not always been as well settled as they now are; secondly and perhaps more importantly, their application to problems of environmental management has tended to be postponed, in the absence of relevant challengeable federal legislation. In other words the non-use of federal powers may have tended to the assumption that they did not exist.[9] That assumption can now be seen to belong to the imaginary rather than the real Constitution, after more than a decade of extensive federal legislative activity in this field. But first it is necessary to say something about the underlying principles of interpretation which have been significant in bringing about this result.

(1) General Principles of Interpretation

Among the general principles of interpretation of the Commonwealth Constitution, three propositions are now established: their operation emerges very clearly, for example, from the *Tasmanian Dam* case.[10] In understanding these principles, it is important to understand also their relationship to the underlying structure of the Constitution. The fundamental point is that, with few exceptions, the Constitution creates no exclusive powers, either for the Commonwealth or the States. For present purposes the only relevant exclusive power is the Commonwealth's exclusive power to levy duties of

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8 Constitution, s51(xxxi).

9 On the relationship between the interpretation of the Constitution and the intentions of its founders see also Crawford, J, "The Legislative Power of the Commonwealth" in Craven, G, (ed), *Commentaries on the Convention Debates* (1986) 113.

10 (1983) 158 CLR 1.

customs and excise (section 90). In all other cases federal law prevails over State law in case of conflict. Moreover the Commonwealth's legislative power derives primarily from section 51 of the Constitution, which contains a lengthy list of legislative powers, many of them of very great significance. These powers are disjunctive and cumulative. Limitations on one are not, to be read into another (except in the case of the just terms guarantee in section 51(xxxi)). This structure may be contrasted for example, with the Canadian Constitution of 1867, which contains parallel lists of exclusive federal and provincial powers. This makes it necessary to allocate legislation which may appear to be about matters falling within both lists to one or the other on an exclusive basis. It is settled that no such operation is necessary in Australia; indeed, such an operation is logically impossible, in the absence of any list of State powers to be compared with the express enumerated list of Commonwealth powers.

Against this background, three basic principles of interpretation are now established (despite the views of a minority of the High Court in particular cases or in particular contexts).[11] The first is that, subject to certain exceptions, the heads of power in section 51 of the Constitution are to be interpreted separately and disjunctively, without any particular attempt being made to avoid overlap between them. The only consequence of overlap is that a law falling within more than one description of federal power is doubly valid. That is not a consequence to be avoided.[12]

Secondly, the powers conferred by section 51 are to be construed liberally in accordance with their terms, and without any assumption that particular matters were intended to be excluded from federal authority or "reserved" to the States.[13] The alternative view, known as the "reserved powers" doctrine or the doctrine of "implied prohibitions" (on the basis that the Commonwealth was impliedly prohibited from interfering with certain areas intended to be reserved to the States, in particular intra-State trade), was adopted by some members of the High Court during the first seventeen years, but was overthrown in the *Engineers Case* in 1920.[14] There has been no attempt at a general resuscitation of the earlier doctrine. Moreover, not only is each grant of power to be interpreted liberally, but the grant of power carries with it an implication that all powers necessary to carry the granted power into effect are also granted. There is thus a wide "incidental" or "instrumental" power with respect to the granted subject matters.

The third proposition flows from the first two. There is no requirement that Commonwealth legislation be exclusively about one of the granted heads of power. Indeed, there is no requirement that in terms of its intent or practical effect, the legislation be primarily, predominantly or even substantially concerned with the granted head of power. The point is obvious under the taxation power (section 51(ii)); governments use taxation for all sorts of purposes other than revenue raising, both in encouraging and discouraging particular activities. Even if a particular taxing law was so effective in

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11 Especially in the context of the family law powers: for example, *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227.

12 Cf *Russell v Russell* (1976) 134 CLR 495.

13 Cf *R v Coldham, Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

14 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

discouraging an activity that no tax was ever raised, that would not invalidate it.[15] In other words, the fact that there is no specific Commonwealth power over the environment, or over mining or natural resources, in no way prevents the Commonwealth from legislating with respect to those matters, provided the law is also, in a formal sense, a law "with respect to" one of the granted heads of power. And a law will be with respect to one of the granted heads of power if its legal operation is on such a head of power, whatever its practical effect. The point can be illustrated by *Murphyores Incorporated Pty Ltd v The Commonwealth.*[16] Murphyores and its co-venturers applied for the consent of the Commonwealth Minister for Minerals and Energy to export zircon and rutile concentrates processed from mineral sands to be mined by them on Fraser Island in Queensland. (That mining was to take place under Queensland law, and after the appropriate payment of royalties to the Government of Queensland.) The Minister directed that an inquiry be held under the *Environmental Protection (Impact of Proposals) Act* 1974 (Cth), which had just come into operation. The effect of the Act is to provide machinery for assessing the environment impact of mining or development projects with which the Commonwealth is in some way associated. In short, the Minister was likely to refuse export permits for the minerals if the process of mining was such as to cause undue environmental damage to Fraser Island. Murphyores argued that it was unconstitutional for the Minister to take into account environmental considerations relating to the mining operations themselves, in applying a provision relating to export permits. The law prohibiting exports from Australia was a law about trade and commerce with other countries (Constitution, section 51(i)), not about mining or the environmental impact of mining.

The argument was unanimously rejected by the High Court. A law with respect to export permits is a law about overseas trade, notwithstanding that its effect is to prevent mining within a State in accordance with the law of that State. In *Murphyores* the Court was concerned only with practical effects. There was nothing in any federal law to prevent the plaintiffs mining and processing the minerals in Queensland, and selling them there. But it will rarely be commercially viable to mine or process natural resources for use within a single State. Almost inevitably, some interstate or overseas component will exist, and in most cases it will be the overwhelming one, as was the case with Fraser Island.

The basic point was made by Mason J (with whom in substance the rest of the Court agreed). He said:

> The power to legislate with respect to trade and commerce with other countries. . . necessarily comprehends the power to select and identify the persons who engage in, and the goods which may become the subject of, that activity. . . It is then for Parliament in its wisdom or for the person to whom Parliament delegates the power to decide who may export and what goods may be exported. The means and the criteria by which this choice is to be made are for Parliament to decide. There is nothing in the subject matter of the constitutional power which justifies the implication

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15 *Osborne v Commonwealth* (1911) 12 CLR 321; *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 688 (Brennan J).

16 (1976) 136 CLR 1.

> of any limitation in Parliament's power of selection. It does not follow, for example, that because the subject of the power is trade and commerce, selection of the exporter or of the goods to be exported must be made by reference to considerations of trading policy.[17]

It follows that Parliament may regulate, by means of permissions or prohibitions, the environmental impact of any activity for which it can legislate, even if the point of application of the legislation occurs at a time subsequent to the mining, processing or other activity.

Against the background of these established principles, it is proposed to discuss the federal powers most relevant to environmental regulation. In this discussion reference will be made to relevant federal legislation passed over the past 15 years. As will be seen, a number of these Acts adopts an "adventurous" drafting or constitutional strategy. Nonetheless the High Court, applying the principles referred to above, has almost without exception upheld the challenged federal legislation.[18]

(2) *Legislation with Respect to Commonwealth Territories: Constitution, Section 122*

It is easiest to start with the constitutionally least contentious power, the plenary legislative authority with respect to federal territories. This extends to legislation "for" the territory which has extra-territorial operation or effect.[19] Thus the Commonwealth can regulate environmental impacts upon dams or catchment areas supplying water to the Australian Capital Territory, even though these are located outside the Territory.[20] And clearly it can regulate, conserve and manage the living and non-living natural resources of federal territories, both internal and external.[21]

Although mis-statements on the point sometimes appear, the self-governing territories (Norfolk Island, the Northern Territory and the Australian Capital Territory) are constitutionally in no different position than any other Commonwealth territory. Thus the *Northern Territory Self-Government Act* 1978 (Cth), though it confers on the Northern Territory considerable powers of self-government, does not and could not detract from the Commonwealth's general legislative authority. There is no intermediate stage between a territory under section 122 and a State (whether a State within the federation or an independent State). Restrictions on the Commonwealth legislating for the Northern Territory, including matters relating to the environment of the Territory, are of a conventional or political character only.[22]

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17 (1976) 136 CLR 1, 19.

18 The exception is the *PMA* case, *Victoria v Commonwealth* (1975) 135 CLR 337, invalidating the *Petroleum and Minerals Authority Act* 1974 on "manner and form" grounds only. The substantive constitutional validity of that Act was not reached.

19 Cf *Minister for Justice (WA) (ex rel ANAC) v Commonwealth* (1976) 138 CLR 492.

20 For example, *Canberra Water Supply (Googong Dam) Act* 1974 s4(1). The acquisition of property for such purposes in a State would presumably have to be on "just terms", despite *Tau v Commonwealth* (1969) 119 CLR 564.

21 For example, *Antarctic Treaty (Environment Protection) Act* 1980; *Antarctic Marine Living Resources Conservation Act* 1981; *Biological Control Act* 1984.

22 For federal environmental legislation applying to self-governing territories, see for example, the *Environment Protection (Alligator River Region) Act* 1978 (Cth).

(3) *The Use of Federal Financial Powers*

The second category, of considerable importance in practice, involves the various federal financial powers. These include the taxation power (section 51(ii)), the power to make grants to the States (section 96) and the power to expend money "for the purposes of the Commonwealth" (sections 81-3). So far as duties of customs and excise are concerned, Commonwealth power is exclusive (section 90).

The Commonwealth's power to tax activities of any kind in Australia is (with the exception of taxes on State property under section 114) plenary. The only constitutional requirement is that the tax should not discriminate between States or parts of States (section 99). Thus it would be no objection that an Australia-wide tax in fact had a greater impact upon one State than another because the activity in question was carried on mainly or exclusively in that State. And, as we have seen, the power extends to selecting transactions or activities as a subject of taxation for reasons which have nothing to do with revenue raising.[23] Thus the Commonwealth could tax environmentally harmful activities at high rates of taxation, or could allow deductions for activities carried out in an environmentally sound way.

The Commonwealth can grant money to the States under section 96 of the Constitution either absolutely or on conditions. Through the grants power the Commonwealth can exercise an influence over the planning and management of projects, for example public works projects, with significant environmental implications. There are numerous examples of such legislation.[24]

The position with respect to federal expenditure other than through grants to the States is a little less clear, although on any view the federal spending power is a very wide one. It has not finally been decided whether the Commonwealth can spend its money (pursuant to appropriation by the Parliament) on any projects or activities whatever, or whether it is limited to objects, projects or activities over which the Parliament has substantive legislative power.[25] It is likely that the broader view will prevail, if only because it is extremely difficult to formulate with any precision a satisfactory narrower view: it is in principle impossible to list in an exhaustive way the activities or transactions with respect to which the Commonwealth may legislate. In any event, even proponents of the narrower view are agreed that the Commonwealth has power to legislate on matters of national concern, that is matters appropriate to the Commonwealth's position as the central government in a nation State.[26] Given the breadth of this formula, it is not surprising that there is no case in which an expenditure has been held

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23 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622; *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678.

24 For example, *State Grants (Nature Conservation) Act* 1974, replaced by the *Environment (Financial Assistance) Act* 1977; *States Grants (Air Quality Monitoring) Act* 1976; *National Water Resources (Financial Assistance) Act* 1978; *River Murray Waters Act* 1983; *Soil Conservation (Financial Assistance) Act* 1985. The machinery of the *Environment Protection (Impact of Proposals) Act* 1974 is expressly stated to apply to grants to the States under s96: s5(2).

25 The leading case is the *Australian Assistance Plan* case, *Victoria v Commonwealth* (1975) 134 CLR 338.

26 Id at 361-2 (Barwick CJ), 396-7 (Mason J): cf id at 378 (Gibbs J).

unconstitutional. Thus the Commonwealth can spend money on major environmental projects such as land reclamation, tree planting or the preservation of rain forests.[27]

Perhaps the liveliest issue in relation to federal fiscal powers is not the scope of federal power but the extent to which States are excluded by the prohibition on State excises. The question what constitutes an excise prohibited to the States has had a long and chequered career in the High Court. Consensus seemed to have been reached in the 1960s on a relatively formal, and not very extensive test for State excise, but decisions in the last fifteen years have thoroughly unsettled that earlier position in favour of a broader and more flexible text — one whose application is accordingly more difficult to predict.

The impact of this situation on taxation of natural resources is illustrated by *Hematite Petroleum Pty Ltd v Victoria*.[28] This was a challenge to a Victorian licence fee, described as a "current pipeline operation fee", which singled out three pipelines carrying petroleum products between plants in Victoria as part of the production process. The fee was a flat fee of $10,000,000 per annum (the fee for other pipelines of equivalent length would have been more than a thousand times smaller). The commercial reality was clear enough: this was a tax on a vital aspect of Bass Strait oil production. However the pipeline operation fee differed from what would ordinarily be an excise. It was a flat fee imposed on plant, irrespective of the volume of production of the plant, or even whether the plant was used at all for the purposes of production in the year in question. The formal test for excise requires that there be a reasonable correlation between the quantity of production, distribution or exchange and the amount of the fee. That key element appeared to be lacking here. Yet a majority of the Court held that the fee was an excise. There was no complete agreement among the majority, but plainly a broad view of the term was taken (Gibbs CJ (dissenting) described it as "a wide and loose construction").[29] Thus Mason J, with whom Brennan and Deane JJ in substance agreed, expressed. . .

> strong support for a broad view of what is an excise, one which embraces all taxes upon, or in respect of, a step in the production, manufacture, sale of distribution of goods, for any such tax places a burden on production. A tax on goods sold, like a tax on goods produced, is a burden on production, though less immediate and direct in its impact. It is a burden on production because it enters into the price of the goods — the person who is liable to pay it naturally seeks to recoup it from the next purchaser. As the tax increases the price of the goods to the ultimate consumer, the thereby diminishes or tends to diminish demand for the goods, it is a burden on production.[30]

Applying this flexible test, it was held that the tax was in substance a tax on the production of hydro-carbons. Again, in Mason J's words:

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27 See for example, *Australian Centennial Roads Development Act* 1988; *Exotic Animal Disease Control Act* 1989.

28 (1983) 151 CLR 599.

29 Id at 618.

30 Id at 632.

> The pipeline operation fee payable by the plaintiffs is not a mere fee for the privilege of carrying on an activity; it is a tax imposed on the step in the production of refined petroleum products which is so large that it will inevitably increase the price of the products in the course of distribution to the consumer. The fee is an exaction of such magnitude imposed in respect of a step in production in such circumstances that it is explicable only on the footing that it is imposed in virtue and value of the hydro-carbons produced from the Bass Strait fields.[31]

Although the case depended on its rather special facts, in particular the enormous size of the fee and its discriminatory character, it certainly demonstrates the determination of the majority to penetrate the form of State tax enactments in an attempt to capture their substance.

This rather rigorous approach to the characterization of State legislation has since been qualified in one important respect. In *Harper v Minister for Sea Fisheries*,[32] the High Court held that a royalty payment for the right to exploit a public or State-owned resource was not an excise, even though the amount of the payment was proportionate to the value of the resource. The leading judgment was that of Brennan J (with whom, subject to certain points of explanation, the rest of the Court agreed). Brennan J held that:

> A limited natural resource which is otherwise available for exploitation by the public can be said truly to be public property whether or not the Crown has the radical or freehold title to the resource. A fee paid to obtain such a privilege is analogous to the price of a profit a prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a license to sell liquor) where there is no resource to which a right of access is obtained by payment of a fee.[33]

Brennan J's reasoning was explicitly not related to the question whether the Crown was the owner of the abalone: it was sufficient that the license scheme related to a scarce public resource, and that it produced a private right analogous to a property interest in the resource.[34]

Clearly *Harper* gives the States more leeway in raising revenue from the harvesting of natural resources, at least where the resources are in the public domain and where the legislation is directed at the overall management of the resources and not merely at the raising of revenue. But it remains to be seen how far the *Harper* principle will be taken. For example, there are proposals for some States to impose a license fee on the discharge of atmospheric pollutants. Such a fee would presumably bear some relationship to the quantum of production, and although this would vary for different products and production techniques, it might be a sufficiently close relationship to come within the broad and flexible standard required by cases such as *Matthews v Chicory Marketing Board*[35] and *Logan Downs Pty Ltd* v

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31 Id at 634. Similarly id at 659 (Brennan J), 664-5 (Deane J). Murphy J agreed (id at 640), though he would not adopt as wide a definition of "excise".

32 (1989) 88 ALR 38.

33 Id at 47-8.

34 Id at 46-7.

35 (1938) 60 CLR 263.

Queensland.[36] To pollute the atmosphere is in a real sense to "use" it, to appropriate it for private purposes, even though the atmosphere is, within certain limits, a renewable resource. But a license to pollute is not very closely analogous to a *profit a prendre* or a proprietary right. It is better described in the words of Mason CJ, Deane and Gaudron JJ in *Harper* as...

> an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognise that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content.[37]

On the other hand Dawson, Toohey and McHugh JJ in their joint judgment warned that the decision...

> by no means carries with it the consequence that no exaction of money can constitute a tax if it is demanded for the purpose of conserving a public natural resource. In particular, if the exaction 'has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax'. This may be so notwithstanding that the exaction is one means of ensuring the conservation of a natural resource.[38]

It would be curious if the air emission license fee was held to be a tax because it did not bear a close enough relationship to the value of the resource appropriated, but was then held to be an excise because it did bear a sufficiently close relationship to the value of the goods produced. On one view of this dictum that could be the result.

Despite the qualification inherent in *Harper v Minister for Sea Fisheries*, then, the uncertainties surrounding the broader definition of excise present real difficulties for the States. In particular the *Hematite* case demonstrates again the inherently weak legal position of the States viz-a-viz the Commonwealth under the Constitution. In a situation where the States are not protected in any significant way by guarantees of power, and where federal power prevails over State power, the States are vulnerable. This is exacerbated (from a State point of view) by the perfectly justifiable judicial technique of construing powers formally (thus in effect expanding the range of effects or consequences that can be achieved by an exercise of power), while construing prohibitions in a flexible way, to ensure their effectiveness. All that appears to prevent a widespread invalidation of State taxes having significant price implications for production, distribution or exchange of goods is the power of precedent. The High Court has repeatedly reaffirmed its earlier, indefensible, decision in *Dennis Hotels Pty Ltd v Victoria*[39], primarily on the ground that "the States have organised their financial affairs in reliance on" that decision.[40] But it has so far declined to take the opportunity to adopt a narrower view of excise, more in line with the original intention behind

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36 (1977) 137 CLR 59.
37 (1989) 88 ALR 38, 40.
38 Id at 49, citing *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467.
39 (1960) 104 CLR 529.
40 *Evda Nominees Pty Ltd v Victoria* 154 CLR 311 (1984) (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Dawson JJ). Deane J, rather reluctantly, agreed.

section 90. And current explanations of *Dennis Hotels* leave State licensing fees, for example, on petroleum, vulnerable to attack.[41]

(4) The External Affairs Power: Constitution, Section 51(xxix)[42]

The most important head of power in environmental matters during the last decade has been the external affairs power. At least fifteen Commonwealth Acts dealing specifically with the environment have enacted under section 51(xxix) over the past fifteen years.[43] It is true that at least some of these Acts were non-contentious exercises of the external affairs power. For example the *Wildlife Protection (Regulation of Imports and Exports) Act* 1982, though enacted to implement an International Convention,[44] could have been enacted independently of the external affairs power, under section 51(i) of the Constitution.[45] However some of the other Acts — such as the *World Heritage Properties Conservation Act* 1983 and the *Lemonthyme and Southern Forests (Commission of Inquiry) Act* 1985 — were much more controversial.

Section 51(xxix) confers power on the Commonwealth to legislate with respect to "external affairs". The potential of that power was well recognised,[46] but until the decisions of the High Court in *Koowarta v Bjelke-Petersen* in 1982[47] and *Commonwealth v Tasmania* in 1983,[48] how much of that wider potential would be realised had remained uncertain. It is uncertain no longer.

A matter can be a matter of external affairs, with respect to which the Commonwealth has power to legislate, for any of three reasons. The first and most straightforward is that a matter which occurs outside Australia is for that reason alone to be a matter of external affairs. This was established by the *Seas and Submerged Lands Act* case in 1975,[49] which also held that for this purpose the States ended not at the three-mile territorial sea limit but at the low water mark, or the base line of internal waters, where applicable. (Some of the consequences of this decision were reversed by the "off-shore constitutional settlement" of 1980,[50] the validity of which was upheld in the

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41 *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399; *Coastace Pty Ltd v New South Wales* (1989) 167 CLR 503.

42 On s51(xxxix) see further Zines, L, *The High Court and the Constitution* (2nd edn, 1987), Lane, "The Federal Parliament's External Affairs Power: 'The Tasmanian Dam Case'" (1983) 57 *ALJ* 554; Crock, M, "Federalism and the External Affairs Power" (1983) 15 *MULR* 238, and the works cited above n3.

43 In addition to legislation discussed elsewhere, see *Crimes (Biological Weapons) Act* 1976; *Historic Shipwrecks Act* 1976 (in part); *Whale Protection Act* 1980; *Environment Protection (Sea Dumping) Act* 1981; *Protection of the Sea (Civil Liability) Act* 1981; *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (replacing the *Protection of the Sea (Discharge of Oil from Ships) Act* 1981); *Torres Strait Fisheries Act* 1984; *Nuclear Non-Proliferation (Safeguards) Act* 1987; *Ozone Protection Act* 1989.

44 The Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973.

45 The same is true of the *Protection of Movable Cultural Heritage Act* 1986.

46 *R v Burgess, ex parte Henry* (1936) 55 CLR 608; *Airlines of NSW v New South Wales (No2)* (1965) 113 CLR 54.

47 (1982) 153 CLR 88

48 (1983) 158 CLR 1

49 *New South Wales v Commonwealth* (1975) 135 CLR 337.

50 *Coastal Waters (State Powers) Act* 1980; *Coastal Waters (State Title) Act* 1980, and

Port MacDonnell case.[51]) Apart from any question relating to the three-mile territorial sea, it appears that any matter occurring outside Australia is for that reason alone one of external affairs. For example the *Historic Shipwrecks Act* 1976, the *Antarctic Treaty (Environment Protection) Act* 1980 and the *Fisheries Amendment Act* 1978, proclaiming and regulating an Australian fishing zone,[52] are all valid under this aspect of section 51(xxix).[53]

Legislation whose primary operation is within Australia might be sustained under the external affairs power in several ways. One possibility (the second of three "heads" of the external affairs power) concerns matters which are inherently or intrinsically of international concern, independently of any treaty or international agreement. A good example is the *Foreign States Immunities Act* 1985 (Cth). But there is no clear example of environmental legislation enacted on this basis.

The third of the "heads" of the external affairs power involves legislation implementing an international treaty or convention. The *Tasmanian Dams* case established clearly that no independent requirement of "international concern" is necessary where the legislation implements a treaty. Because the Commonwealth was a party to the World Heritage Convention of 1974, and because the Tasmanian wilderness areas which were in dispute had been listed on the World Heritage list under that Convention, the Commonwealth acquired under section 51(xxix) the power to implement the Convention with respect to that area. What was in dispute in the High Court, amongst other things, was the extent of the Commonwealth's obligations under the Convention, having regard in particular to the "federal clause" it contained. But the majority held that the undoubtedly flexible language of the Convention nonetheless required States parties to it to preserve and protect heritage areas. The effect was to confer a discretion upon the Commonwealth, under the external affairs power, to decide whether it should intervene to prevent the building of a dam. The federal clause in the Convention (Article 34) did not stand in the way of this conclusion, because it merely referred to the internal distribution of legislative power in each contracting Party, and in Australia that distribution of power was affected by the external affairs power.

On all of these points the majority (Mason, Murphy, Brennan, Deane JJ) agreed, although there was some disagreement between them as to some provisions of the challenged legislation, and Deane J also held certain provisions invalid on the ground that they constituted an acquisition of

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cognate legislation.

51 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 88 ALR 12. In 1983 the Labor Party was committed to renegotiate or revoke the 1980 Settlement. This raised legal as well as political difficulties, and in the event was not proceeded with. For a analysis of the legal issues see Crommelin, M "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 *AMPLJ* 191; Crawford, 38-46.

52 This would also be valid under the fisheries power (s51(x) "Fisheries in Australian waters beyond territorial limits").

53 One unresolved issue under this aspect of the power is the validity of a law which has its primary effect within Australia but which operates by reference to events which occurred abroad. A possible example is the *War Crimes Amendment Act* 1989 (Cth) which is a purely retrospective law. Presumably such a law would be valid, provided the foreign event by reference to which it operates was not merely trivial or remote.

property on other than "just terms". By contrast the minority (Gibbs CJ, Wilson J, Dawson J expressing no opinion on this point) held that the Convention imposed no obligation on Australia with respect to the World Heritage area, and that even if it had done so, the question of preservation of the environment was not as such a matter of international concern, a requirement they regarded as necessary to activate the external affairs power.

In *Richardson v Forestry Commission*,[54] the whole Court indicated support for the majority decision in the *Tasmanian Dams Case*, and that has been reaffirmed in *Queensland v Commonwealth*.[55] Thus the broad view of the treaty power is now beyond challenge:[56] the real issue now is to determine the implications, and the parameters, of the broad view.

Despite some of the comments that have been made, the decision does not give the Commonwealth carte blanche to add to its powers by the device of making agreements with other countries. There are several reasons for this.

This first is one of international practice. Despite the many thousands of treaties made this century, there is no case where another country has entered into an agreement solely to allow its contracting partner internal legislative power over the subject of the agreement. Moreover the High Court has reserved the right to examine the bona fides of such an agreement, in the very unlikely event that this occurred.[57]

A second limitation is that the High Court is likely to be reticent in declaring subjects of international regulation, manifold as these are, to constitute matters intrinsically of international concern. In other words, category two is likely to be restricted for the foreseeable future to the more obvious cases of direct international communication (for example, diplomatic relations, international drug trafficking). Generalised international concern, such as now exists with respect to the environment and to human rights, will not be sufficient to translate a subject from the third to the second category under the external affairs power.

This is important because of a significant limitation applying to the third (but possibly not to the second) of the three categories. Where the basis for particular legislation is the implementation of a treaty (as distinct from a subject, whether or not regulated by a treaty, which is intrinsically of international concern) then it is a requirement that the legislation be in reasonable conformity with the treaty. That the Commonwealth is a party to an international treaty does not mean that it acquires general or plenary power over the subject matter dealt with or referred to in the treaty. The power is to implement the treaty so far as it is necessary, and to enact other provisions reasonably incidental to the implementation to the treaty. This limitation was a ground for invalidating some aspects of section 9 of the *World Heritage*

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54 (1988) 164 CLR 261.

55 (1989) 167 CLR 232.

56 In addition, the Commonwealth can take whatever action of an interim character is reasonably necessary in the process of determining whether a treaty obligation exists (or, perhaps, should be complied with) in relation to a given situation: *Richardson v Forestry Commission* (1988) 164 CLR 261.

57 On the bona fides test see for example, *Commonwealth v Tasmania* (1983) 158 CLR 1, 121-2 (Mason J), 219 (Brennan J).

Properties Conservation Act 1983, which were held to go beyond the requirements of the Convention. The test of conformity for this purpose is whether the legislation is "conductive to the performance of the obligation imposed by the Convention".[58] There must be "reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it".[59] The treaty-implementing aspect of the external affairs power is not, therefore, a charter for general Commonwealth control, as distinct from a basis for the implementation of obligations (or the acquisition of rights) pursuant to the terms of treaties. Nonetheless it cannot be denied that the external affairs power is likely to continue to prove a major source of power with respect to environmental management.[60] This is especially so given the growth of treaty making, and other international activity, on such matters as global warming, deforestation, acid rain and the depletion of the ozone layer.

(5) The Corporations Power: Constitution, Section 51(xx)

A power which is proving of increasing significance for present purposes is the corporations power. Section 51(xx) of the Constitution gives the Commonwealth power to legislate for "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". It is now settled that the corporations power enables the Commonwealth to regulate at least the trading and financial activities (and activities incidental thereto) of trading or financial corporations formed under Australian law, together with all the activities in Australia of foreign corporations.[61] It is also settled that a trading corporation includes any corporation set up for the purposes of trading, or a substantial activity of which is trade (even though it may have other activities).[62] It is no objection that the corporation is a State-owned corporation. For example the Hydro-Electric Corporation of Tasmania was held to be a trading corporation in the *Tasmanian Dam* case.[63]

Two points remain unresolved about section 51(xx), and until they are resolved the full potential of that power for environmental regulation of the activities of corporations in Australia may not be realised. The first question is whether the Commonwealth is restricted to regulating only the trading (and incidental) activities of trading corporations, or whether it may regulate any activity whatever of such corporations. Three members of the High Court in the *Tasmanian Dam* case adopted the broadest view,[64] a view which is also supported by the language of the provision. A power to legislate with respect to a corporation that is a trading or financial corporation is one thing: a power

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58 Id at 232 (Brennan J).

59 Id at 260 (Deane J).

60 The degree of control the power gives over the process of decision-making (for example, under the World Heritage Commission) is also shown by *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 75 ALR 218; *Queensland v Commonwealth* (1988) 77 ALR 291 (Mason CJ); (1989) 167 CLR 232 (Full Court).

61 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

62 See *R v Federal Court of Australia, ex parte WA National Football League* (1979) 143 CLR 190; *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Commonwealth v Tasmania* (1983) 158 CLR 1.

63 (1983) 158 CLR 1.

64 Id at 147-53 (Mason J); 179 (Murphy J); 269-72 (Deane J).

to regulate only the trading or financial activities of a trading or financial corporation is another. To construe section 51(xx) as the latter rather than the former requires reading in an extra limitation: on accepted principles of constitutional interpretation, the broader view would appear to be the better one. It is reinforced by the obvious point that the power with respect to foreign corporations is not restricted to their foreign activities: apart from the word "formed",[65] section 51(xx) makes no distinction between the three sorts of corporations. In the *Tasmanian Dam* case, the fourth majority judge, Brennan J, expressly refrained from deciding the point,[66] which accordingly remains open. However for the reasons given it seems likely that the broader view will be taken.

The second question is whether the term "trading corporation" is restricted to corporations specifically engaged in trade, as distinct from what Isaacs J (dissenting) in *Huddart Parker's* case described as mining or manufacturing corporations.[67] Developments in other aspects of section 51(xx), and in the interpretation of the analogous term "trade and commerce" in section 51(i), suggest that the narrower view will be hard to sustain. For one thing, corporations do not engage in major mining or manufacturing processes except for the purpose of selling the end product. The act of sale is plainly enough an act of trade, and is the point of the activity. Even if the mining be regarded as not itself trading, the subsequent sale must surely be sufficient to make the corporation a trading corporation. This was precisely the ground relied on by Brennan J in holding valid the relevant provisions of the *World Heritage Properties Conservation Act* 1983. He said:

> The dominant, if not exclusive, purpose of constructing the dam is to provide additional generating capacity for the HEC system, an element in the HEC's co-ordinated activity of generation, distribution and sale of electrical energy. The carrying out of the Gordon below Franklin Scheme is thus for the purposes of the HEC's trading activities.[68]

On this view few (if any) mining or manufacturing activities of trading corporations would fall outside the scope of the corporations power.

It is probable then that the corporations power gives the Commonwealth the power to control the environmental impact of the mining, manufacturing or other activities of trading or financial corporations, as it certainly does with respect to foreign corporations. It might perhaps be possible to organise one's way out of a ambit of section 51(xx), for example, by having the actual process of mining etc which was deleterious to the environment performed by a corporation which did not sell the items, made no profit, but simply transferred them to another corporation which did sell them. But that would undoubtedly be a related corporation, whose profit motive could be attributed to the transferor, so that such devices are unlikely to be successful.

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65 This has been held to limit the power to corporations already formed: *New South Wales v Commonwealth* (1990) 90 ALR 355. It has no particular implication for present purposes. See Crawford, J, "The High Court and the Corporations Power: Incorporation 'Reserved' to the States" (1990) 1 *Australian Corporation Law Bulletin* 32.

66 (1983) 158 CLR 1, 241.

67 (1909) 8 CLR 330, 393.

68 (1983) 158 CLR 1, 241.

(6) Other Particular Commonwealth Powers

In addition, a number of other heads of Commonwealth power have been, and are likely to continue to be, important as a basis for environmental regulation. The trade and commerce power (section 51 (i)) is of particular significance, since most major industrial or resources projects are carried out with a view to interstate or overseas sale of the product. Apart from its power to prevent the import into or export from Australia of any goods whatever and on whatever ground,[69] the Commonwealth has extensive power to regulate the production of goods for interstate or overseas trade, that is, to go back to the factory or the mine.[70] It is possible for the Commonwealth not merely to require compliance in practice with certain environmental standards in production, manufacture or mining of goods for interstate trade or export, but to impose those standards as a matter of law through regulating the process of production, manufacture or extraction for the purposes of interstate trade or export. It would be no objection to such legislation that the goods were not at the moment of application of the standards identifiable in any precise way as destined for interstate or overseas trade as distinct from domestic consumption.[71]

On the other hand the "reasonableness" of environmental standards applied to production for interstate trade cannot be challenged under section 92 of the Constitution, because that vexed provision now only applies to laws which are protectionist and discriminatory.[72] In the nature of things (especially having regard to section 99), a federal law is most unlikely to contravene section 92 in its new dispensation.[73]

Another relevant power, which was debated at some length in the *Tasmanian Dam* decision, is the power to make "special laws" for people of

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69 See for example, *Hazardous Wastes (Regulation of Exports and Imports) Act* 1989.

70 Cf *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565. See also *Roelandts v A Raptis & Sons* (1984) 59 ALR 323.

71 *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194. It is true that some of the commentaries on s51(i), and some of the language in the cases, assumes a narrower view of the power, one which requires that the particular production be specifically related to interstate trade ("directed in point of quantum", whatever that may mean). See for example, Lane, P, *A Manual of Australian Constitutional Law* (4th edn, 1987) 43 for a narrow reading of *O'Sullivan*. But this cannot be right. Production of goods knowing that the goods, or some more than trivial part of them, were going to be exported or sold interstate would be sufficient. But it is possible to go further. Legislation could simply prohibit the export or interstate sale of goods not produced or manufactured in a certain (environmentally sensitive) way. That legislation would be with respect to interstate or overseas trade, notwithstanding that at the time of the production or manufacture it may not have been known whether the goods would in fact be exported or sold interstate. The consequence would simply be that at that point in time the federal offence was inchoate or incomplete — or, to put it another way, that goods so produced could only lawfully be sold etc within the State concerned.

72 *Cole v Whitfield* (1988) 165 CLR 360.

73 The same is true of the States, but not as true. Thus in *Castlemaine Tooheys Ltd v South Australia* (1990) 90 ALR 371, a South Australian law aimed at encouraging the recycling of bottles was held invalid under s92, after fairly rigorous scrutiny. No one denies the legitimacy of environmental conservation as an interest protected by State law (cf *Ackroyd v McKecknie* (1986) 161 CLR 60, 291 (Gibbs CJ)), but the legislation must not seek to achieve that goal by a law which discriminates against interstate trade in a protectionist way.

any race, including "the Aboriginal people of Australia", for whom it is necessary to make special laws (Constitution, section 51 (xxvi)). There is, for example, no doubt that the Commonwealth could enact Aboriginal land rights legislation for Australia under section 51(xxvi). The difficulty is that, to the extent that such legislation acquired or authorised the acquisition of property to be held as Aboriginal land in the States, it would require the payment of just terms under section 51(xxxi). Section 51(xxxi) applies also to Aboriginal land acquired from the States themselves (though what constitutes "just terms" in such cases might be a difficult question). This was a major impediment to the proposed Commonwealth land rights legislation.[74]

On the other hand, without any acquisition of property, the Commonwealth could under the "races" power impose requirements of consultation with Aboriginal people affected by a particular development. For example, it could require that resource or other projects affecting Aboriginal communities be conducted in ways that were not environmentally harmful.[75]

Finally, it is necessary to refer to an "innominate" power sometimes relied on in the environmental context. This is the putative "national affairs power", the power to legislate on matters peculiarly appropriate to the Commonwealth as the central government of a nation. It appears, both from the *Tasmanian Dam Case*[76] and from *Davis v Commonwealth*[77] that the power has no very substantive effect, and that it is not a source of substantive regulatory power over the environment. On the other hand, in addition to laws dealing with national emblems and symbols (such as those distinctive to the Bicentennial celebrations), it does enable the Parliament to engage in inquiries and assessments on matters of national significance. Thus it would extend to enabling inquiries and reports into the proper use of resources (as envisaged by the *Resource Assessment Commission Act* 1989), if not to the establishment of national standards with legislative backing (as envisaged by the *Motor Vehicle Standards Act* 1989).

(7) Legislation Relying Collectively Upon Commonwealth Powers

A tactic which has been frequently used in legislating in new areas has been for the legislation to derive support cumulatively from a suite of Commonwealth powers. The *World Heritage Properties Conservation Act* 1983 was an example of this technique: that Act relied severally on the external affairs power, the corporations power and the "races" power. Another example of a rather different kind is the *Environment Protection (Impact of Proposals) Act* 1974. Because the Act regulates Commonwealth decision-making with respect to projects, its constitutional underpinning derives from whichever powers the substantive decision or involvement of the Commonwealth.[78]

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74 In the field of Aboriginal land rights, the principal effect of federal law is to preserve gains made at State level from subsequent repeal or erosion: *Mabo v State of Queensland* (1989) 63 ALJR 84, and see Brennan, F and Crawford, J, "Aboriginality, Recognition and Australian Law: Where to From Here?" (1990) 1 *Public Law Rev* 53, 66-7.

75 See the discussion of s51(xxvi) in *Commonwealth v Tasmania* (1983) 158 CLR 1. The major exercise of the power for present purposes is the *Aboriginal and Torres Strait Islander Heritage (Protection) Act* 1984.

76 (1983) 158 CLR 1.

77 (1988) 82 ALR 633.

This legislative technique was extended still further in the *Environment Protection (Nuclear Codes) Act* 1978. According to section 3...

> The object of this Act is to make provision, within the limits of the powers of the Parliament, for protecting the health and safety of the people of Australia, and the environment, from possible harmful effects associated with nuclear activities in Australia, and this Act and the regulations shall be construed and administered accordingly.

The Commonwealth has no special or express power over nuclear activities in Australia as such, but relies on its section 51 powers in order to regulate nuclear activities. The assumption behind the *Environment Protection (Nuclear Codes) Act* 1978 is that the cumulative effect of the various powers is substantially to cover the field, and the way this is achieved is interesting. Rather than provisions being made which are specifically referable to a particular power, the *Nuclear Codes Act* allows for codes of practice to be made, and for regulations to be made pursuant to those codes, and only concerns itself with the constitutional underpinning of the regulations at a third stage of the process. (A number of codes of practice have so far been made.[79]) The Act first defines "nuclear activities" in very broad terms (section 4), and then goes on to provide that codes of practice may be made "for regulating or controlling nuclear activities in Australia" (section 9(i)(a)). Where a code of practice has been made, that code can then be given effect to by a regulation either under section 11 (so far as it applies to Commonwealth places in the States) or section 12 (so far as it applies generally). It is significant that there is no attempt to this point to attribute either the codes of practice or the regulations to any particular Commonwealth power. That attribution occurs only at the stage after the regulations have been made. Sub-sections 13(2) and (3) provide in cumulative terms for the effect of the regulations:

> (2) Regulations [made under section 12] have effect—
>
> (a) in relation to nuclear activities—
>
> (i) carried on by or on behalf of the Commonwealth or an authority of the Commonwealth;
>
> (ii) carried on for the purposes of, or in the course of, trade or commerce with other countries or among the States;
>
> (iii) carried on for purposes related to the defence of the Commonwealth, including, without limiting the generality of the foregoing, the purpose of ensuring the availability in Australia at all times of sources of energy for uses essential to the life of the community;
>
> (iv) carried on by foreign corporations;

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78 On the relationship between the 1974 and 1983 Acts see also the *Conservation Legislation Amendment Act* 1988.

79 Code of Practice on Radiation Protection in the Mining and Milling of Radioactive Ores, 1980 (in force, 31 December 1981); Code of Practice on the Management of Radioactive Wastes from the Mining and Milling of Radioactive Ores, 1982 (in Force, 31 December 1983); Code of Practice for the Safe Transport of Radioactive Substances, 1982 (in force, 31 December 1982).

(v) carried on by trading corporations formed within the limits of the Commonwealth for the purposes of, or in the course of, their trading activities;

(vi) carried on in, or in connexion with, a Territory; or

(vii) carried on in the territorial sea of Australia; and

(b) In relation to nuclear activities to the extent that the regulations are necessary or convenient for carrying out the obligations of the Commonwealth under, or the exercise by the Commonwealth of rights under, agreements or arrangements between Australia and other countries, agreements or arrangements between Australia and international organizations or decisions of international organizations.

(c) Regulations made in pursuance of section 12 may provide that, in addition to having effect as provided in sub-section (2) of this section, the regulations have effect as specified in the regulations if the conferring of power to make regulations having such an effect is within the powers of the Parliament.

A similar operation is given to orders made by the Governor-General under section 14 to deal with special situations (section 14(7)).

This legislative technique has been criticised as devious and uncertain,[80] and from a consumer's point of view this may well be so. However the advantage of the technique from the Commonwealth's point of view is that it enables the various powers to operate cumulatively upon each other, thus greatly increasing the coverage of the legislation. For example it is hard to think of any "nuclear activities" that would not be caught by the combination of powers and circumstances referred to in section 13(2). Yet, with one possible exception, there can be no doubt that section 13(2) is constitutionally valid. The possible exception relates to section 13(2)(a)(ii), which assumes that, in addition to more obvious examples of "the defence of the Commonwealth", the defence power or possibly the "national affairs" power would authorise legislation to ensure "the availability in Australia at all times of sources of energy for uses essential to the life of the community".[81] It is by no means clear that in peace-time the defence power could have such a wide application.[82]

The *Nuclear Codes Act* is a vivid example of the technique of legislating by reference to all or some Commonwealth powers cumulatively, and it is significant that it was not passed by a Labor Government. There is no difference in principle or in detail between the *Nuclear Codes Act* and other similar Acts passed during the period 1972 to 1975, or since 1983.[83]

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80 Dawson, D, in Evans, G (ed), *Labor and the Constitution 1972-1975* (1977), 72-3.

81 Similarly *Liquid Fuel Emergency Act* 1984 (Cth) s6(1)(d).

82 Evidently the legislative draftsperson was aware of the possibility, because sub-paragraph (iii) contains the saving clause "without limiting the generality of the foregoing", which would allow the second part of the sub-paragraph to be severed if it was held to be invalid.

83 For other examples of this approach see *Motor Vehicle Standards Act* 1989; *Resource Assessment Commission Act* 1989; *Industrial Chemicals (Notification and Assessment) Act* 1989.

3. *Conclusion*

As we have seen, the traditional view of the Constitution and the environment in Australia was that the Commonwealth's power was limited, and that the States possessed both general legislative power and ultimate title to land. In 1975 the High Court held that the States had no title over off-shore areas, and although that situation was changed by the *Coastal Waters (State Title) Act* 1980 (Cth), the Commonwealth continues to have general legislative power off-shore. Within the States its power over environmental matters is not plenary, but as the legislation and litigation of the last fifteen years has shown, it is certainly substantial. Indeed it can be argued that the real opposition now is between State title and federal power. Since the major impact of title is fiscal, and since the Commonwealth is for other reasons dominant in federal/State financial relations, the underlying State prerogative may be less significant in the long term. And the assumptions which that underlying State prerogative or title tended to create, of general State authority over the environment, can be seen to be defective. The lesson of a careful study of the last fifteen years experience is that the Commonwealth has, one way or another, legislative power over most large-scale mining and environmental matters.