

The Laws of Nature, State or Federal?: A Legal History of the Informal Transition of Responsibility over Environmental Policy in the Australian Commonwealth, 1974 – 1983

BLAKE ALLEN

Abstract: Between 1974 and 1983 the Australian Federal Government in Canberra enacted a series of legislation which was designed to gradually transfer authority for environmental policy away from the state governments and towards itself. This informal transition was enacted, built upon, and completed by three consecutive governments representing both of the country's main political parties, indicating the bi-partisan attitude towards reforming the federal relationship in Australia during this period. This paper, in looking at the constitutionality of Canberra's actions, is one of the first attempts to produce a legal history of this legislative transition of environmental policies in Australia. Through this process it is obvious that the development of these pieces of legislation falls into two discernible historical periods defined by their effectiveness in asserting a federal presence in Australian environmental policymaking. In the background of these developments are important questions concerning the traditional emphasis placed by the High Court of Australia on state rights, and Canberra's cautious manoeuvring around this contentious issue. By also addressing these questions, this paper helps to expand upon the relatively small body of work surrounding this period of great constitutional change in Australia, suggesting that these developments were instrumental in the fundamental changes to the federal relationship associated with the governments of Gough Whitlam, Malcolm Fraser, and Bob Hawke.

The exact constitutionality of binding environmental policies set forth by the Australian Federal Government is, at best, one of an ambiguous nature. By design, Australia governs itself under a constitution which strives to severely restrict the powers wielded by the federal government, hereby referred to as Canberra, in exchange for a greater emphasis on state powers. The continued

maintenance of the sovereign integrity which was first afforded the six colonies (now states) of Australia by limited home-rule in the nineteenth century became a guiding principle of the Australian Constitution. Article 51 of the Australian Constitution, which establishes legislative powers granted to Canberra, makes no direct reference to matters concerning the Australian environment. Article 51 along with Article 107, which sets all powers not vested by the constitution in Canberra as the responsibility of the state government, clearly makes matters of environmental protection solely a state responsibility. However, having capitalized on legal precedents set by High Court rulings, Canberra has carved itself an informal constitutional means to set its own national policies regarding the environment, capable of overruling state policies and law.

This development occurred over the span of three decades and under the guidance of three separate Prime Ministers: Gough Whitlam (Labor), Malcolm Fraser (Liberal), and Bob Hawke (Labor). This paper divides these three decades into two distinct periods that are defined by the effectiveness of the legislation in question. The primary focus of this paper will be the earlier of those time periods, which spanned from 1974–1982 and covers both the Whitlam and Fraser governments. This period is marked by the establishment of a legislative precedent by both governments in setting a national environmental policy, effectively entrenching Canberra’s constitutional capability to do so. The latter of these two periods spans from 1983 to present and was marked by the sustained growth of environmental legislation set by Canberra and upheld by the High Court. This paper touches on early legislation from the Hawke government passed in 1983 as it delineates the two periods, but will otherwise maintain its focus on the earlier period and the struggle to effectively set the precedents that were built upon by the Hawke government and its successors.

To fully contextualize this legal development, we must first address the legacy of the ‘Engineers Case.’ Better known as *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920), the final ruling rejected the practice (or notion) that the

High Court should approach cases with *concern* for powers reserved, or that could be seen as reserved, for the State and instead ruled that the High Court should read the division of powers as *literal*.¹ While this ruling does not explicitly grant additional powers to Canberra, nor remove powers from the state, it does grant Canberra the freedom to draft legislation that can usurp state powers, provided the legislation is written with a literal interpretation of the defined powers of Canberra (as set out in Article 51 of the Constitution). Prior to 1920 this was nearly impossible for Canberra to do because the High Court maintained an emphasis on state powers and rights during the considerations of their rulings.² During this time, national environmental policy was set by means of creative interpretation of the various national powers, in line with the precedent established by the *Engineers'* case. Of these, there are two particularly prominent powers that form the primary foundation of national environmental policy: the power regarding trade and commerce (Article 51, Section 1), and the power regarding external affairs (Article 29). For this reason, we will consider both of these powers and their associated legislation independently.

Art. 51 (1): Trade and Commerce with other countries and among the States

Matters of trade and commerce were the driving forces of Australian Federation and a key issue around which the Constitution was structured. They formed the driving force behind the push for Federation in 1901 and were the overwhelming focuses of the biannual meetings of the Federal Council of Australasia (predecessor of the Australian Commonwealth).³

¹ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.

² Cheryl Saunders, "The Constitutional Division of Powers with Respect to the Environment in Australia" in *Federalism and the Environment: Environmental Policy Making in Australia, Canada, and the United States*, ed. Kenneth M. Holland, F. L. Morton, and Brian Galligan (Westport: Greenwood, 1996), 60.

³ Frank Welsh, *Australia: A New History of the Great Southern Land* (New York: Overlook Press, 2006), 282; W.G. McMinn, *Nationalism and Federalism*

Because of this and despite its traditional emphasis on state powers, the High Court (Australia's supreme judicial body) has almost always ruled in favour of Canberra's power over trade and commerce. This is despite the frequent challenges to the extent of Canberra's authority in matters of trade and commerce during the first decade of the Commonwealth. But the early judicial rulings, such as *New South Wales v. Collector of Customs for New South Wales* (1908) and *Australian Steamship Ltd v. Malcolm* (1914) enshrined an uncharacteristically high degree of federal authority in matters of the Australian economy.⁴

Because Canberra's authority over trade and commerce was usually upheld by the High Court even prior to its ruling on the *Engineers'* case, responsibility for trade and commerce emerged almost immediately as a possible avenue for the federal government to establish an effective environmental policy. This development first began under Gough Whitlam who inherited two particularly prominent environmental controversies: the mining of the Great Barrier Reef in Queensland and the damming of the Serpentine Valley in Tasmania. Whitlam was elected Prime Minister with a national majority in 1972 on a platform that made relatively few promises regarding these controversies and as such was uncertain of the full extent to which Canberra could interject. The Impact of Proposals Act of 1974 was something of an experiment for the development of national environmental policy. This Act established federal guidelines for the conduct of environmental impact statements (EIS) for commercial operations

in Australia (Melbourne, Oxford University Press, 1994), 90 - 93. The importance of state power over trade and commerce is reflected throughout the Constitution, specifically through Chapter IV which deals exclusively with matters of finance and trade. At twenty-five clauses in length, Chapter IV is one of the largest and most detailed chapters in the Constitution and ultimately grants Canberra full power to impose customs and duties, collect taxes, and heavily regulate interstate trade to ensure that "whether by means of internal carriage or ocean navigation, [it] shall be absolutely free;" Constitution of the Commonwealth of Australia, Chapter 4, Section 92.

⁴ These rulings acted as something of an early precedent before the *Engineers'* case, granting Canberra the authority to regulate the rights and obligations of people engaged in commerce. For example:

Australian Steamships Ltd. v. Malcolm (1914) 19 CLR 298.

and projects as well as the procedure by which federal inquiries into such matters would be performed.⁵ However, because responsibilities regarding the environment were already regarded as a matter of state policy rather than national policy, the legislation could only be applied to projects that required financing from Canberra.⁶ Thus, Canberra could use its power to make financial grants to the states (Article 96) to force state governments into submitting to a federal EIS or inquiry (as the Whitlam government attempted to do with Queensland in 1975), but these were rarely effective and under Whitlam, both the Queensland and Tasmanian governments successfully resisted federal EIS pressures.⁷

Further compounding the difficulties of making EIS legislation binding to state policies was the fact that many states had already established their own variation of environmental impact statements. Among the most comprehensive of these acts was the State Pollution Control Commission enacted by New South Wales in 1974, Tasmania also enacted its own variation of this legislation under the Environmental Protection Act of 1973. These state variations were seldom effective, however. Tasmanian legislation, for example, included an exemption that allowed the Mount Lyell Mine, the largest industrial polluter in the state, to continue the practice of releasing industrial tailings into the

⁵ Environmental Protection (Impact of Proposals) Act 1974, Article 5, Section 1 (Requirement for EIS); Article 14 (Guidelines for Inquiry).

⁶ Environmental Protection (Impact of Proposals) Act 1974, Article 5, Section 2.

⁷ Malcolm Fraser, *The Political Memoirs* (Carlton: Miegunyah Press, 2010), 559; Greg Buckman, *Tasmania's Wilderness Battles: A History* (Crows Nest: Allen & Unwin, 2008), 29 - 36. Controversy surrounding Whitlam's use of environmental impact statements was not just limited to Tasmania and Queensland. Following pressure from a local citizen's group in the Canberra Capital Territory to issue an EIS for the construction of a communications tower being built by Australian Post on Black Mountain, Whitlam took pressure for allowing the EIS to make use of selectively chosen composite photographs which minimized the impact of the tower on native flora.

William J Lines, *Taming the Great Southern Land: A History of the Conquest of Nature in Australia* (Berkeley: University of California, 1991), 233 - 234.

already heavily polluted Queen River.⁸ The existence of state variations on environmental impact statements, the majority of which predated federal legislation, made it difficult for Canberra to establish a binding precedent for the use of its own EIS even in the rare cases in which it could be applied.

The early failures of a federal EIS system could be evidence of Canberra's constitutional inability to protect the Australian environment from state policies. However, most of the failings of the EIS system are traceable to Gough Whitlam's unwillingness to intervene in state authority in matters of the environment. While the Whitlam government was working to redefine the very nature of Australian federal relations, it found itself limited both by the considerable range of reforms the government had sought to enact (with issues such as education and social security commanding greater focus and attention) and the limited number of 'friendly' state governments (only South Australia and Tasmania were under Labor governments at this time).⁹ Further weakening Canberra's effectiveness at this time was Whitlam himself, who was frequently criticized for his difficulties, at times bordering on incompetence, in governing. The veteran political correspondent Wallace Brown praised Whitlam as having "rivalled [former Prime Minister Robert] Menzies in his passion for the House of Representatives and ability to use it as his stage" yet heavily criticizes "his parliamentary skills [which]

⁸ Buckman, *Tasmania's Wilderness Battles*, 157 - 158. This omission allowed the Mount Lyell Mine to continue dumping approximately 2,000,000 tonnes of tailing discharge into the Queen River on an annual basis without ever having to file an EIS on its operations.

⁹ Neal Blewett, "Review of 'Gough Whitlam in and out of Government'" in *Australian Book Review*, no. 346, November 2012. Blewett offers a unique insight into this issue. The Tasmanian-born representative for South Australia in Canberra from 1977-1994 served as a high-ranking Minister under the government of Bob Hawke and as High Commissioner to the UK from 1994-1998. In his review of Whitlam, whose policies were dramatically expanded under the Hawke government, Blewett highlights the importance of Whitlam's poor relationship with the states as a key component to the inevitable failure of his government, noting that Whitlam tried to maintain strong relations with Tasmania and South Australia but that eventually even these labour-controlled States turned on him (South Australia specifically).

were rhetorical and not tactical. He could devise a strategy and then often botch the tactics in trying to implement that strategy”.¹⁰ This critique, viewed in relation to the full range of his reform promises and limited political allies at the state level captures Whitlam’s inability to establish an *effective* environmental legacy in Canberra.

Rather than reverse the policies of his predecessor, Malcolm Fraser built upon many of Whitlam’s legislative actions and their potential to set important precedents for Canberra. Fraser ran on a platform that promised not to introduce new regulations to Australian businesses and was therefore constrained, compared to his contemporaries, in his use of the trade and commerce clause for establishing a national environmental policy. However, he did make use of the clause to strengthen Whitlam’s existing legislation, especially in regards to the growing controversy surrounding the Queensland government’s proposal to engage in mining activities on the Great Barrier Reef. Shortly following his electoral victory, Fraser publically challenged the unregulated, heavily pro-mining policies of the Queensland government. Following the recommendations of the EIS instigated by the Whitlam government (and boycotted by Premier Bjelke-Peterson) the Fraser government passed legislation which banned the export of mineral sands in 1976.¹¹

This legislation was written in accordance to a provision set up in the Customs Act of 1901 which permitted the Governor-General to ban ‘the exportation of goods absolutely.’¹² Historically, this power had been reserved for Canberra in order to ensure that a minimum export price for any natural resource was guaranteed and to help prevent the exploitation of Australian

¹⁰ Wallace Brown, *Ten Prime Ministers: Life Among the Politicians* (Sydney: Longueville Books, 2002), 120. Brown is a highly distinguished commentator of Australian politics. Throughout his career he covered seventeen Federal elections and, as the title of his book would suggest, ten Prime Ministers serving in the Federal Parliamentary Press Gallery from 1961–1995.

¹¹ Government of Malcolm Fraser. Council Decision 1750 & 1794 (November 9th, 1976); Council Decision 2094 (December 17th, 1976).

¹² Customs Act, 1901, Article 112, Section 2A.

resources.¹³ However, Fraser enacted this power under highly controversial circumstances. It quite clearly had nothing to do with the health of the sand mining industry itself but rather was introduced for the purpose of crippling the Great Barrier Reef mining industry and ensuring that Canberra's policy towards the ecosystem remained effective against the opposing policies of the state. Because of this the Murphyores mining firm, who held a lease to mine a small portion of the reef at Fraser Island that had been issued by the Queensland government, moved immediately to challenge the constitutionality of this legislation in the High Court.

Murphyores Inc. Pty Ltd v. Commonwealth is a little discussed, example of the legacy of the Engineer's Case in the Australian judicial system. Surprisingly, it has been heavily overlooked in Australian historiography. This ruling set the first High Court precedent for a federal environmental policy, and established the legal foundation for the *Tasmanian Dams* case (to be discussed later). Despite the lease issued to Murphyores by the Queensland government for mining rights on Fraser Island, Canberra stepped in to halt all further exploration on the island until an EIS (which Queensland boycotted) was completed. Murphyores responded to this by challenging both the constitutional validity of Canberra's actions and of the EIS itself. Had such a case been brought to the High Court before the 1920 ruling on the *Engineers'* case, Canberra would have almost certainly been overruled due to its clear infringement on a policy which clearly falls under state authority. However, Fraser made this decision through the use of the clearly defined power granted to the federal government by the Custom's Act (Article 112, Section 2A), whose constitutional validity had already been upheld by the High Court in previous cases. The High Court had unanimously ruled that both the EIS and the government's actions were a valid exercise of the trade and commerce power of Canberra.¹⁴ More importantly, the High Court further ruled that

¹³ Gough Whitlam, *The Whitlam Government 1972–1975* (Markham: Penguin Publishing, 1986), 240.

¹⁴ *Murphyores Inc. Pty Ltd. v. Commonwealth* (1976) 136 CLR 1.

the motivation and/or intent of Canberra's legislation was ultimately irrelevant due to its adherence of constitutional divisions of power.¹⁵ This ruling was not only an early victory for federal environmental policy, but an early lesson in how its constitutional powers could be re-appropriated by Canberra to redirect state environmental policy.

Eight years later, Fraser was able to draw upon the legal trade, commerce, external affairs, and quarantine power of Canberra. He used these powers to set a monumental precedent for the federal government by drafting one of the most effective pieces of environmental legislation in Australian legal history. The Wildlife Protection (Regulation of Exports and Imports) Act of 1982 was passed in conjunction with the federal government's signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Drawing off the same precedent which had been set in the *Murphyores* case¹⁶ this legislation granted Canberra the sweeping power to both regulate and prohibit trade in red-listed species, as designated by a director appointed exclusively by Canberra.¹⁷ This legislation, along with Bob Hawke's Ozone Protection Act of 1989 dramatically expanded the scope of the precedent set by the *Murphyore* case to allow Canberra the authority to set policy regarding the protection of specific species and regulation of pollutants, cornerstones of environmental policymaking. Successive governments following Fraser took note of this precedent and made use of it to the advantage of Canberra.

Fraser's immediate successor, Bob Hawke, swept into power through a decisive electoral victory in 1983 in which he campaigned on what his platform termed the 'New Federalism' initiative. Marketed to the public as a policy that would bolster the economy and increase employment opportunities, New Federalism restructured the federal system so that it favored

¹⁵ *Murphyores Inc. Pty Ltd. v. Commonwealth* (1976) 136 CLR 1.

¹⁶ Wildlife Protection (Regulation of Exports and Imports) Act 1982, Article 5, Section 1A.

¹⁷ Wildlife Protection (Regulation of Exports and Imports) Act 1982, Article 17 – 18.

Canberra as the national policy director. The Labor Party believed this could be achieved through the literal interpretation of federal powers, as had been done by both the Whitlam and Fraser government to increasingly set a national environmental policy.¹⁸ In a speech made to the National Press Club, Hawke introduced the Australian public to this policy initiative. He identified one of the two objectives of New Federalism as the establishment of a “process to explore and map the areas where co-operation for common objectives is not only desirable but realistically achievable.”¹⁹ Hawke did not attempt to hide his intentions for federal reform and his sizable mandate from the 1983 election gave him the legitimacy to pursue such goals.

In the pursuit of further centralizing authority for the setting of environmental policies in Canberra, Hawke capitalized on the precedent set by Fraser under the trade and commerce power by passing the Endangered Species Protection Act. This legislation greatly expanded the scope of the Wildlife Protection (Regulation of Exports and Imports) Act by introducing both the concept, and the responsibility for protection of, an “ecological community” into Australian legislation. Defined as an “integrated assemblage of native species” that “inhabits a particular area in nature”, this legislation expanded federal protections to entire ecosystems considered to be endangered (again, as assessed by a Canberra appointed director). Once such an ecosystem was identified, this legislation also granted the federal government the power to supersede state policies and regulations, and directly intervene with economic activities (i.e. resource extraction and industrial polluters) which operated in such environments.²⁰

¹⁸ Bob Hawke, *The Hawke Memoirs* (London: William Heinemann Ltd, 1994), 528 - 529; W.G. McMinn, *Nationalism and Federalism in Australia* (Melbourne: Oxford University press, 1994), 282.

¹⁹ *Ibid.* This same speech also highlights, as the second of the two objectives of the New Federalism policy, the importance of “establishing in the public mind the urgency of the need to change.”

²⁰ Endangered Species Protection Act 1992, Article 6. This article in particular is more interested in the identifications of ecological communities. The act itself, is divided into 176 articles each of which go into considerable detail for dealing with responses to activities which may be endangering flora and fauna

Article 51 (29): External Affairs

Regulation of internal and external state trade is traditionally viewed by constitutional scholars of Australia as the driving impetus for Federation.²¹ For this reason the trade and commerce power is one of the most well defined federal powers in Australia. The interpretive clarity of the trade and commerce power stems from the Customs Act of 1901 and various High Court rulings, many of which predate the Engineers Case, making this federal power considerably useful for Canberra in the setting of environmental policy. However, no other prerogative of Canberra's has been utilized by the federal government more frequently and more successfully than that of external affairs. The effectiveness of this power concerning foreign interaction in relation to the development of Australian national environmental policy stems from the exposure to external attitudes, pressures, and approaches regarding environmental law and conservation which have been applied to the Australian state through the signing of treaties and conventions.

The foreign affairs power of Canberra formed the basis of "The Great Barrier Reef: Legal Aspects," a paper presented to the Symposium on the Future of the Great Barrier Reef by former President of the ICJ Sir Percy Spender in 1969. Spender's paper highlights several historical precedents which imply that the internal waters of Queensland (and other states) only extend to three miles off the mainland. At the same time, Spender draws heavily upon the Australian ratification of the UN Convention on the Law of the Sea (UNCLOS I) as a way to effectively suggest that the Great Barrier Reef is located within *Australian* territorial waters rather than *Queensland's* territorial water, making it subject

or otherwise outline the procedures of federal management and recovery programmes. For example, Article 79 reinforces the use and issuing of a federal EIS while Article 117 specifically concerns activities within the Great Barrier Reef National Marine Park. For definition of "ecological community," see definitions under Endangered Species Protection Act 1992, Article 4.

²¹ Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Hong Kong: Cambridge University Press, 1997), 80.

to legislation from Canberra rather than Brisbane.²²

Part of what makes Spender's argument so effective is that it does not impose on Canberra a responsibility for environmental stewardship, but rather manipulates prior precedents and High Court rulings to grant the Federal Government a means to fill this role. To be clear, the territorial distinctions which are made by the treaties of UNCLOS I are primarily concerned with the exclusive rights of states for economic activity. As has already been demonstrated, the creative uses of legal precedents have been fundamental to Canberra's assumption of responsibility over its environment. To this end, the Spender Paper became an important early guide for Canberra in setting environmental policies, and was used by both the Whitlam and Fraser governments for drafting their own legislation regarding the conservation of the Great Barrier Reef.²³

One of the earliest pieces of legislation passed by the Whitlam government was the Seas and Submerged Lands Act of 1973, which was a second attempt at the Territorial Sea and Continental Shelf Bill which had found fierce opposition from the state governments and forced John Gorton to step down from the Prime Minister's office. This act complies with UNCLOS I and

²² Spender derails Brisbane's claim to ownership of the Great Barrier Reef by citing both the legal clarification of the 1855 State Constitutions as being intended to apply only to the mainland of the states in question, effectively nullifying the Coastal Island's Act while simultaneously drawing international precedent to his side by citing a similar Supreme Court Case in Canada regarding British Columbia. Percy Spender, "The Great Barrier Reef: Legal Aspects" in *The Future of the Great Barrier Reef: Papers of an Australian Conservation Foundation Symposium* 3 (1969): 27-30.

²³ In Whitlam's memoirs he recounts the importance of a seminar at the University of Sydney given by Spender regarding his paper and his reference to precedents upheld by the American and Canadian Supreme Court are direct references to Spender's paper. Whitlam, *The Whitlam Government*, 530-531. As Minister of Science, Fraser was invited to speak at the same Symposium as Spender, Fraser mirrored Spender's conclusions and committed himself to the conservation of the Great Barrier Reef when he committed the Federal government wholly with the conservation of the Reef and claimed "In so far as the Commonwealth has the power, it will use this power to prevent the reef's being despoiled." Malcolm Fraser, *The Political Memoirs* (Carlton: Miegunyah Press, 2010), 177-178.

concedes to Canberra the sovereign control of the territorial seabed and all of its resources (an issue of great contention) beyond the three-mile limit of the state's internal waters.²⁴ This legislation was subject to an immediate challenge in the High Court by the New South Wales government in *New South Wales v. Commonwealth* (better known as the Seas and Submerged Lands Case). The High Court ruling, while closely divided, ruled in favour of Canberra; and much like the *Murphyores* case, it set an important precedent for the federal government. The High Court ruled that federal sovereignty over the continental shelf was an established part of international law and therefore within the realm of Canberra's external affairs power.²⁵ Seeking to establish a greater degree of clarity in the legal record Chief Justice Barwick defined the extent of the external affairs power as being applicable to anything "which in its nature is external [to Australia]."²⁶

With the sovereignty of Canberra's territorial waters firmly established, the Whitlam government was free to enact more legislation that was clearly conservation-oriented. The most publically recognizable of which would likely be the Great Barrier Reef Marine Park Act of 1975, which established the reef as a national park subject to federal protections. The legislation identifies the whole of the "reef region" as part of the Great Barrier Reef Marine Park but also grants the Governor-General the right to declare any additional territory within the reef area, which may not be included within the original park, a protected area under the Park Authority.²⁷ Furthermore, while the legislation does provide for a degree of reconciliation with Brisbane by granting Queensland a shared role in the administration of the Park Authority, it also shows an awareness to the commercial pressures facing the reef and restricts the activities within the park to those

²⁴ Seas and Submerged Lands Act, 1973.

²⁵ *New South Wales v Commonwealth* (1975) 135 CLR 337.

²⁶ *Ibid.*

²⁷ Great Barrier Reef Marine Park Act 1975, Article 30 (Marine Park Area); Article 31, Section 1 (Expansion by Governor-General). Article 31, Section 2 further clarifies that any expansion of the Marine Park under the Governor-General must abide by the definition of territorial waters set out by the Seas and Submerged Lands Act.

of an educational or recreational nature.²⁸

The successful application of federal authority over territorial waters as a means of establishing national environmental policies is one of the most resounding legacies of the Whitlam government and one which was further developed by the Fraser government. For its part, the Fraser government did not do away with the progress of the Whitlam government in restructuring the federal relationship of Australia, but rather developed Canberra's authority over the states. Having also utilized the guidelines set out by the Spender Paper, the Fraser government moved beyond the mere establishment of marine reserves and pursued a policy which ensured the health of the marine ecosystem. The Environmental Protection (Sea Dumping) Act of 1981 identified specific types of waste that could be considered harmful to the marine environment and banned their disposal in territorial waters while also closely regulating the amount of non-hazardous waste which could be released into the sea.²⁹ The High Court ruling in the *Seas and Submerged Lands Case* granted full sovereignty of Australia's territorial waters to Canberra. Nevertheless, the Fraser government sought to further legitimize this legislation by citing Australia's ratification of the 1977 London Protocol on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.³⁰ This was emblematic of both the authority with which the external affairs power granted Canberra, and the uncertainty that remained over its full reach.

The fact that the Sea Dumping Act is valid within the coastal waters of the states, effectively granting the federal government the ability to interject itself into state policies concerning what were traditionally regarded as its territorial waters, validates its inclusion in this legal review. To fully appreciate the importance of this provision we need to consider

²⁸ Great Barrier Reef Marine Park Act 1975.

²⁹ Environmental Protection (Sea Dumping) Act 1981, Article 10A – D. This legislation doesn't completely ignore the importance of creating spaces for conservation activity, and offers legal guidelines for the creation of an artificial reef in territorial waters. Environmental Protection (Sea Dumping) Act 1981, Article 10E.

³⁰ Environmental Protection (Sea Dumping) Act 1981, Article 9.

legislation passed one year prior to the Sea Dumping Act. Following Canberra's victory in the Seas and Submerged Lands Case the states called upon Canberra to pass legislation clarifying the exact distinction between Australia's territorial waters and the internal waters of the state. The Coastal Waters (State Powers) Act of 1980 uses the same arguments put forward in the Spender Paper to justify a limit of only three miles as the full extent of state 'coastal waters,' while reaffirming the validity and full extent of territory granted to Canberra by the Seas and Submerged Lands Act.³¹ However, the Act also clarifies that within coastal waters the state has full authority over the regulation of all industrial, commercial, and recreational activities.³² Therefore, only one year after reaffirming the states prerogative in its own coastal waters, Canberra had once again restricted state authority when it passed legislation that was valid in both federal and state waters. The validity of this was achieved by way of the previously mentioned London Protocol which granted authority to national legislation, reaffirming Australian policy to the stated intent of the London Protocol.³³

A key component to the obligations stemming from international treaties granted Canberra authority over state powers became a key component to the legitimization of national environmental policies. By 1980, Australia had participated in a great number of environmental treaties, allowing the primary focus of the country's national policies to expand beyond the scope of the Great Barrier Reef. But most environmental campaigns up

³¹ Coastal Waters (State Powers) Act 1980, Article 4. In Article 1, this legislation uses "any sea that is on the landward side of any part of the territorial sea of Australia" as its definition for 'coastal waters of the state.' This is similar to the precedents and arguments utilized in the Spender Paper when distinguishing state and federal waters in a historical context, and arguing for the legitimacy of federally controlled waters. Spender, *Great Barrier Reef Symposium*, 35-36.

³² Coastal Waters (State Powers) Act 1980, Article 5.

³³ The Sea Dumping Act even provides a provision that should the Minister be "satisfied" that individual state law is effective enough in meeting the goals of the London Protocol the full extent of the legislation may be eased in those specific coastal waters. Environment Protection (Sea Dumping) Act 1981, Article 9, Section 1.

until this point regarded the federal government as a powerless ally in the fight for conservation. In his book “Tasmania’s Wilderness Battles,” Greg Buckman notes the “key difference” in the failure to fight the Lake Pedder damming versus the successful stopping of the Franklin River dam lies in the failure of the Pedder protesters to approach Canberra, while an early appeal was made by the Franklin protesters to the federal government.³⁴

In the case of the Franklin River, Canberra had successfully stopped the Gordon-below-Franklin dam project by invoking its obligations to protect its World Heritage Sites of which, the national parks of central Tasmania where the river was located, were listed as the “Western Tasmanian Wilderness.” The Whitlam government, at the advice of Barry Cohen, Minister for Environment, ratified the UN Convention Concerning the Protection of the World’s Cultural and Natural Heritage in 1974. Cohen urged the ratification to the Prime Minister due to his belief that federal environmental laws would be less likely to be challenged in the High Court if they were supported by international conventions.³⁵ The fact that Australia’s World Heritage Areas were designed to serve a dual purpose as wilderness reserves was an open secret as all three of the country’s first inscriptions, listed by the Fraser government in 1981, were large tracts of potentially threatened wilderness.³⁶

While both the Whitlam and Fraser governments saw potential in utilizing international treaties for the pursuit of environmental policies, the extent to which Canberra could protect

³⁴ Buckman, *Tasmania’s Wilderness Battles*, 29-30; claim is further reinforced on 45, 57.

³⁵ Gough Whitlam, *Abiding Interests* (St Lucia: University of Queensland Press, 1997), 101.

³⁶ The Great Barrier Reef, Kakadu, and the Willandra Lakes Region—all of which were threatened by mining interests and all of which UNESCO recommended enlarging in order to maintain healthy ecosystems. UNESCO World Heritage Committee, Fifth Session (October 1981), Title VIII, Section 15.

The national parks of Western Tasmania were added the following year for the purpose of curtailing hydroelectric development in the region. Whitlam, 101 – 102.

the environments of World Heritage Sites was still unchallenged and lacked legal clarification. The Hawke government sought to address these weaknesses by passing the World Heritage Properties Conservation Act in 1983. This was one of the more daring interpretations of the federal division of powers which, citing obligations under international treaties, granted Canberra the power to make proclamations relating to the conservation of specific sites. Simultaneously, this act also made use of the federal government's corporations power (Article 51, Section 20) and the acquisition of property power (Section 31) to ban certain activities within designated areas. In this regard, this legislation which provided for three different types of proclamations was something of a legal masterpiece, and while its relevance to this paper is restricted, this legislation is certainly worthy of greater independent study.

The first of these proclamations concerned the protection of World Heritage *nominated* sites under Australia's obligations to international treaties.³⁷ Should the government be satisfied that such sites were at risk of being "damaged or destroyed," then it could issue a proclamation halting the destructive activities occurring within the site (i.e. halting the construction of the Gordon-below-Franklin dam in the Western Tasmanian Wilderness).³⁸ From here, the guidelines for unlawful acts set under Article 9 could be used to build a comprehensive conservation strategy through strategic limitations (i.e. the banning of logging). Every proclamation issued by the government had to be approved by both houses of the legislature, ensuring that they accurately reflected party policies.³⁹

The second form of proclamation applied to sites which were outside the coverage of the UNESCO treaty, which allowed the government to identify threatened sites but only granted Canberra the power, under the banner of its corporations' power,

³⁷ World Heritage Properties Conservation Act 1983, Article 6 (definition of specific properties in question); Article 9 (unlawful acts within designated areas).

³⁸ World Heritage Properties Conservation Act 1983, Article 6, Section 3.

³⁹ The World Heritage Properties Conservation Act 1983, Article 15, Section 1.

to ban activities performed by foreign and/or trading corporations in the area.⁴⁰ Similarly, the third form of proclamation also allowed Canberra to expand its reach beyond the scope of the UNESCO treaty by allowing the government to interfere in sites of “particular significance to the Aboriginal people of the race.”⁴¹ These three tiers of federal intervention in state and private actions granted Canberra a *de jure* power to set its own environmental policies without the need to rescind any authority from state governments or issue any amendment to the Constitution.

The anticipated challenge laid by the Tasmanian government in the High Court, *Commonwealth v. Tasmania 1983* (the Tasmanian Dams Case) resulted in the legality of Hawke’s legislation being upheld by a 4 to 3 ruling, with only Article 8 being ruled unconstitutional.⁴² The ruling constitutionally enshrined the World Heritage Properties Conservation Act as the foundation of modern, federal environmental policies in Australia. More so, its use as a means of further centralizing political authority in Canberra fell in line with the official platform of reforming the federal relationship of Australia on which the Hawke government had campaigned. The World Heritage Properties Conservation Act became one of the most effective means through which this policy was pursued.⁴³ The Hawke government had been the first to make environmental issues a key aspect of its electoral campaign, and further cemented federal authority in the realm of environmental policy by building on the precedents set by the Fraser and Whitlam governments. Some of the most successful examples of this include the Ozone Protection Act of 1989 (in conjunction with Canberra’s ratification of the Vienna Convention and Montréal Protocol) and the Protection of the Sea (Prevention of Pollution from Ships) Act of 1983, built

⁴⁰ The World Heritage Properties Conservation Act 1983, Article 10, Section 2.

⁴¹ The World Heritage Properties Conservation Act 1983, Article 8, Section 2.

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

⁴³ Bob Hawke, “National Reconciliation: The Policy of the Australian Labor Party,” in *National Reconciliation: The Speeches of Bob Hawke*, ed. John Cook (Sydney: Fontana Press, 1984), 32 - 33; Bob Hawke, *The Hawke Memoirs* (London: Heinemann, 1994), 528 - 531.

upon the foundations of Fraser's Sea Dumping Act.⁴⁴ In fact, the sheer volume of legislation passed by Hawke and other successive governments regarding the environment speaks to the firm establishment of environmental policy as a shared responsibility of both the states and Canberra.

Other Avenues for Canberra and Conclusion

At the beginning of this paper, the trade, commerce, and external affairs powers of Canberra were cited as the most important tools at the federal government's disposal for asserting power concerning environmental policy. However, it would serve this analysis poorly if other avenues utilized to achieve this transition were not also addressed. Canberra also creatively used various other powers to set additional environmental policies. The Australian constitutional scholar Cheryl Saunders notes the taxation power (Article 51 Section 2), corporations' power, race legislation power (Article 26), and seizure of property power as being of particular importance in the federal governments repertoire of relevant powers for environmental legislation.⁴⁵ Also worthy of considerable attention in Saunders opinion is the financial assistance to states power (Article 96), which formed the foundation of Whitlam's States Grants (Nature Conservation) Act of 1974, Fraser's States Grants (Air Quality Monitoring) Act of 1976, and Hawke's Soil Conservation (Financial Assistance) Act of 1985.⁴⁶

The purpose of this paper is not to say that the setting of environmental policy in Australia is solely a federal prerogative. Environmental protection constitutionally remains a state responsibility and to their credit the states have shown great commitment to the protection of the Australian environment.

⁴⁴ Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

⁴⁵ Cheryl Saunders, "The Constitutional Division of Powers with Respect to the Environment in Australia" in *Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States* ed. Kenneth M. Holland, F.L. Morton, and Brian Galligan (Westport: Greenwood Press, 1996), 61 - 66.

⁴⁶ *Ibid*, 67 - 70.

Rather, it is the goal of this paper to examine the constitutional means by which Canberra was able to appropriate a considerable degree of authority over matters pertaining to the environment, changing the direction of future environmental policies at both levels of government. The importance of such an analysis is fundamental to the study of environmental policies. In order for Canberra to use environmental policy as a means of exerting political authority over the states it required a legal basis to do so.

Bibliography

Commonwealth of Australia Legislation

Coastal Waters (State Powers) Act 1980.

Customs Act 1901.

Endangered Species Protection Act 1992.

Environmental Protection (Impact of Proposals) Act 1974.

Environmental Protection (Sea Dumping) Act 1981.

Great Barrier Reef Marine Park Act 1975.

Protection of the Seas (Prevention of Pollution from Ships) Act 1983.

Seas and Submerged Lands Act 1973.

Wildlife Protection (Regulation of Exports and Imports) Act 1982.

World Heritage Properties Conservation Act 1983.

High Court of Australia Cases

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

Australian Steamships Ltd. v. Malcolm (1914) 19 CLR 298.

Commonwealth v. Tasmania (1983) 158 CLR 1.

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

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

Primary Sources

Constitution of the Commonwealth of Australia (1901).

Fraser, Malcolm. *The Political Memoirs*. Carlton: Miegunyah Press, 2010.

Government of Malcolm Fraser. Council Decision 1750 (November 9th, 1976).

Government of Malcolm Fraser. Council Decision 1794
(November 9th, 1976).

Government of Malcolm Fraser. Council Decision 2094
(December 17th, 1976).

Hawke, Bob. *National Reconciliation: The Speeches of Bob Hawke*. Edited by John Cook. Sydney: Fontana Press, 1984.

———. *The Hawke Memoirs*. London: William Heinemann Ltd, 1994.

Spender, Percy. "The Great Barrier Reef: Legal Aspects." In *The Future of the Great Barrier Reef: Papers of an Australian Conservation Foundation Symposium*. 3 (1969).

UNESCO World Heritage Committee. "Convention Concerning the Protection of the World Cultural and Natural Heritage, Fifth Session: Report of the Rapporteur," 26 – 30 October, 1981.

Whitlam, Gough. *Abiding Interests*. St Lucia: University of Queensland Press, 1997.

———. *The Whitlam Government 1972 – 1975*. Markham: Penguin Publishing, 1986.

Secondary Sources

Blewett, Neal. "Review of 'Gough Whitlam in and out of Government,'" In *Australian Book Review* 346 (November 2012).

Brown, Wallace. *Ten Prime Ministers: Life Among the Politicians*. Sydney: Longueville Books, 2002.

Buckman, Greg. *Tasmania's Wilderness Battles: A History*. Crows Nest: Allen & Unwin Press, 2008.

Irving, Helen. *To Constitute a Nation: A Cultural History of Australia's Constitution*. Hong Kong: Cambridge University Press, 1997.

Lines, William J. *Taming the Great Southern Land: A History of*

the Conquest of Nature in Australia. Berkley: University of California Press, 1991.

McMinn, W.G. *Nationalism and Federalism in Australia.* Melbourne: Oxford University Press, 1994.

Saunders, Cheryl. "Constitutional Division of Powers with Respect to the Environment in Australia." In *Federalism and the Environment: Environmental Policy Making in Australia, Canada, and the United States.* Edited by Kenneth M Holland, F.L. Morton, and Brian Galligan. Westport: Greenwood Press, 1996.

Welsh, Frank. *Australia: A New History of the Great Southern Land.* New York: Overlook Press, 2006.