COMMONWEALTH POWER TO REGULATE INDUSTRIAL POLLUTION

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[*In recent years, the problems of pollution have come in for increasing attention. In this article, Mr Opie examines the scope of the Commonwealth's power to deal with these problems. It is to be hoped that his comprehensive survey will prove to be of practical utility.*]

I INTRODUCTION

(1) *Approach*

The purpose of this article is to explore the limits of the power of the Commonwealth to regulate industrial pollution in Australia. By pursuing a maximum reading of Commonwealth powers the fundamental issue of the proper place of a central government in a Federation is necessarily overlooked. This concept of proper place is today equated with 'states' rights', but, in truth, it should mean 'what is the best distribution of powers and responsibilities needed to solve the problem at hand?'

Pollution and conservation are national,[1] if not world problems, and 'the hotchpotch of mostly inadequate State legislation'[2] presents great difficulties for planners, polluters and public. Nevertheless, there are a number of specific issues that are best handled by local planning and community involvement. Although, it is submitted, these are the essential considerations, for present purposes they will be pursued no further other than to comment that great challenges are posed for the Constitution, the High Court and co-operative federalism.[3]

(2) *Pollution*

'Pollution', 'conservation', 'environment' and 'ecology' are words new to the modern vocabulary and illustrative of a whole range of issues of increasing public concern. Thus, protection of the environment from

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1 On the need for a national approach see, *e.g.*: Australia, *Report of the Senate Select Committee On Water Pollution* (1970) 183-90; Australia, *Report of the Committee of Inquiry Into the National Estate* (1974) 274-5.

2 Cranston R., 'The Law, the Environment and the Individual (1972) 7 *University of Queensland Law Journal* 401, 415.

3 This challenge has in a small way been recently taken up by the Commonwealth and New South Wales through the *Captains Flat (Abatement of Pollution) Agreement*, which provides for Commonwealth finance to assist the State to combat pollution resulting from mine wastes at Captains Flat.

industrial pollution can only be a part of any overall government strategy.

First, what is pollution? It has been defined as:

> alteration of the natural environments, air, water and land, so that they are rendered offensive or deleterious to man's aesthetic sense and uses or to resources which man wishes to conserve. It is recognized that some degree of alteration of the environment is a necessary consequence of man's activities. Such alterations are not considered pollution until they reach the limit of tolerance.[4]

There are many sources of pollution: sewerage, chemical and general industrial wastes, oil, detergents, pesticides and fertilizers, mining and quarrying, radioactive wastes, motor vehicle emissions, heat and noise. Not all are commonly considered industrial pollution, which is best confined to that pollution resulting in the course of the production and distribution of goods and services, the most highly pollutant sources being the asphalt, cement, petro-chemical and metal industries.[5]

Secondly, what are the methods of regulating industrial pollution? There are three principal means:

(i) Regulation — reduce pollution levels to x amount or be penalised.

(ii) Subsidies — the provision of funds to municipalities or private enterprise to install pollution control equipment.

(iii) Pollution charges — a discharge fee based on the nature and quantity of pollution.

Although pollution charges are favoured as they incorporate the 'cost' of pollution into the price of the product, each method has its own advantages and a role to play in combating industrial pollution.

(3) *The Federal Structure*

Now that the nature of industrial pollution has been considered it will be apparent that considerable powers of regulation are required.

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. However, the position is not quite so simple, for the Commonwealth dominates the Federation through its financial power and exercises considerable leverage over State administrations. Furthermore, the very newness of the problem upsets past conceptions. In the words of Jacobs J.:

> [t]he substance of the battle is not one which easily lends itself to determination by the courts along established avenues of legal decision.[6]

The indication is that it is time to look again at the Commonwealth's specific powers and ascertain whether in fact it can regulate industrial pollution directly, or influence its regulation. When rejecting submissions

[4] Edgell M. C. R., 'Environment Pollution' in Campbell I. and Chessman B., *Pollution and the Environment* (1970) 5.

[5] *Sun*, 14 August 1975.

[6] *Johnson v. Kent* (1975) 49 A.L.J.R. 27, 30.

for narrow readings of Commonwealth power Dixon J. has reminded us:

> that it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.[7]

The general approach employed in this article has been to divide the Commonwealth's power into five classes, dealing with each in turn and illustrating how they are being used in relation to the environment. These classes are: the financial powers, the powers of regulation on a nationwide basis, the means of expanding the scope of Commonwealth power, the powers of the Executive, and powers flowing from the Commonwealth's 'ownership' of an area.

II FINANCIAL POWERS

(1) *Taxation*

The Constitution section 51[8] empowers the Commonwealth 'to make laws for the peace, order and good government of the Commonwealth with respect to: (i) . . . (ii) Taxation but not so as to discriminate between States or parts of States'.

This provision is a most important one in any consideration of Commonwealth powers. Its importance results in part from the broad definition of a tax as any 'compulsory levy by a public authority for public purposes'.[9] Only penalties and fees for service[10] are outside the scope of section 51(ii), although they may be within or incidental to the other heads of section 51 power. Another reason for its significance is taxation's effective exclusiveness to the Commonwealth. With respect to income tax, by far the greatest revenue earner, the Commonwealth has in practice exclusive control resulting from the interpretations placed on section 96 in the *First*[11] and *Second*[12] *Uniform Tax* cases and the judicial 'blind eye' turned to legislative schemes in *Moran's* case.[13] With respect to duties of customs and excise the Commonwealth is expressly given exclusive power by section 90. The exclusive nature of the power arose upon the imposition of uniform duties. Although the Constitution clearly contemplates that duties are to be uniform[14] it has been suggested that there is no necessary implication that they remain so.[15] Even if this be the case section 51(ii) and section 99

[7] *Australian National Airways Pty Ltd v. The Commonwealth* (1945) 71 C.L.R. 29, 81. Also *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association* (1908) 6 C.L.R. 309, 367-8, *per* O'Connor J.

[8] All further references to sections will be to the Constitution unless specified otherwise.

[9] *Barton v. Milk Board (Victoria)* (1949) 80 C.L.R. 229, 259 *per* Dixon J.

[10] *Crothers v. Shiel* (1933) 49 C.L.R. 399.

[11] (1942) 65 C.L.R. 373.

[12] (1957) 99 C.L.R. 575.

[13] *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty Ltd* (1939) 61 C.L.R. 735 (H.C.); (1940) 63 C.L.R. 338 (P.C.).

[14] Apart from s. 90 this is found in ss. 88, 89, 92, 93 and 94.

[15] Howard C., *Australian Federal Constitutional Law* (2nd ed. 1972) 368.

prevent discrimination or preference. Duties of customs are imposed on goods imported into Australia whilst excise duties may bear one of two meanings: first, duties on goods produced in Australia (a corollary of customs), or, secondly, duties on goods in Australia be they imported or produced here.

There is considerable scope for the application of section 51(ii) to regulate industrial pollution. High duties of customs may be levied on imports of goods that are particularly pollutant. For example, high duties on vehicles with excessive exhaust emissions or on raw materials for industries that use polluting processes in refining. Hopefully this will encourage overseas suppliers to alter their specifications or encourage local purchasers to switch to less pollutant (and cheaper) products. Similar considerations apply for excise duties.

Installation and operation of anti-pollution equipment in manufacturing processes can be extremely costly, in some cases many millions of dollars.[16] Generous income tax deductions in the form of accelerated depreciation allowances would be an encouragement to installation of the requisite equipment. Furthermore, taxpayers could be deprived of deductions if they did not incorporate emission control devices when installing new plant. Present provisions of Commonwealth taxation law that encourage overuse of the environment could be repealed.[17]

The most ambitious use of the taxing power is through pollution taxes. Whereas with income tax the criterion of liability is income, or with an excise duty the sale or manufacture of goods, a pollution tax would be assessed on the amount of effluent discharge into the environment. Tax scales could be made progressive, dependent upon the quantity and nature of the discharge. As companies today regard income taxes almost as a cost of production the pollution tax could be incorporated into the price of the commodity, hopefully decreasing demand and pollution.[18]

The greatest difficulty facing the outlined uses of the taxation power, apart from administrative costs in the case of pollution taxes, is the possibility of constitutional challenge on the characterization ground that the law is not really a law to do with taxation but to do with pollution, the latter not being within the Commonwealth's legislative competence. A leading case on this point is *R. v. Barger*,[19] which held invalid an excise duty

[16] Stairmand C. J., 'The Cost of Air Pollution Control — Can We Draw A Balance Sheet?' in The Clean Air Society of Australia And New Zealand, *Proceedings of The 1972 Clean Air Conference* (1972) 120, 121-3.

[17] *E.g.* Income Tax Assessment Act 1936-74 (Cth) s. 75(1)(a), which allows deductions to primary producers for 'the destruction and removal of timber, scrub or undergrowth indigenous to the land'.

[18] Pollution taxes are not accepted universally as a cure. Some writers prefer licensing and financial incentives with charges lurking in the background. *E.g.* Dorcey A. H. J., 'Effluent Charges, Information Generation and Bargaining Behaviour' (1973) 13 *Natural Resources Journal* 118.

[19] (1908) 6 C.L.R. 41.

on the grounds that it was really a law about an aspect of labour conditions beyond Commonwealth power. The present status of this 69 year old case is of fundamental importance, particularly as it is a precedent on the use of the taxation power. However, there are some factors that have detracted from the strength of *R. v. Barger*[20] as an authority. First, a number of decisions on, *inter alia*, the taxation power have failed to follow it although it was open on the facts for them to do so.[21] Secondly, the case was very much influenced by the now discredited doctrine of implied prohibitions on the power of the Commonwealth to interfere in 'State matters'. The *Engineers*' case[22] has held that it is sufficient that the law in question falls within the plain meaning of a legislative head of power and does not breach an express constitutional limitation.[23] Thirdly, there is developing what may be called a 'double characterization approach':[24]

> [I]f a law can properly be described as with respect to more than one subject matter, one of which is within and another outside Commonwealth power, then its validity is assured unless it happens to contravene some other constitutional prohibition.[25]

It would seem, therefore, that *R. v. Barger*[26] is not a powerful authority, although the courts have left open the possibility of a revival.[27] This might occur if the extension of Commonwealth power was too flagrant a breach of the constitutional balance.

Should the Commonwealth enact a pollution tax various measures for the measurement of discharge levels would be required. That the Commonwealth can take appropriate action through the taxation power supported by section 51(xxxix) (the incidental power) is quite clear.[28] But to prevent duplication of existing State services it may be preferable to reach an agreement with the States for the joint use of facilities.

The quantity of industrial pollution varies from location to location and it may be that the Commonwealth would desire to introduce a 'point-by point' scheme whereby the taxation measures taken are of greater scope

[20] *Ibid.*

[21] *Osborne v. The Commonwealth* (1911) 12 C.L.R. 321; *R. v. Brislan; Ex Parte Williams* (1935) 54 C.L.R. 262; *Fairfax v. The Commissioner of Taxation* (1965) 114 C.L.R. 1.

[22] *Amalgamated Society of Engineers v. Adelaide Steamship Company Ltd* (1920) 28 C.L.R. 129.

[23] *Ibid.* 155.

[24] *E.g. Melbourne Corporation v. The Commonwealth* (1947) 74 C.L.R. 31, 79 *per* Dixon J.; *Victoria v. The Commonwealth (The Payroll Tax* case) (1969) 122 C.L.R. 353, 400 *per* Windeyer J., but note the more cautious approach of Barwick C.J. at 372-3.

[25] Evans G., *Constitutional Aspects of the Trade Practices Act 1974* (1975) 17.

[26] (1908) 6 C.L.R. 41.

[27] *E.g. Fairfax's* case (1965) 114 C.L.R. 1, 17 *per* Menzies J., 19 *per* Windeyer J.

[28] Considerable scope has been given to s. 51(xxxix) in supporting the taxation power especially in the assessment and enforcement areas. *E.g. Griffin v. Constantine* (1954) 91 C.L.R. 136, where it was held within power to create an offence of selling food or drink which contained methylated spirits. An Excise Act imposing duty on spirits exempted methylated spirits, but to prevent abuse another Act imposed the offence.

and intensity in Melbourne and Sydney than in Perth. This raises all sorts of difficulties with respect to the discrimination and preference provisions in sections 51(ii) and 99 respectively. Such matters have been adverted to when discussing section 90, but the greatest scope for effective pollution control through differentials is in income and pollution taxes.

The fact that an industry is singled out for special attention need not constitute a breach of sections 51(ii) or 99 even if it is to be found in only three States. This is so because on the face of the Act there is no discrimination or preference and the court will not look behind the legislation to consider its effects.[29]

Returning to the point-by-point scheme, a difference in pollution taxes between Sydney and Perth would be a discrimination as it involves putting one at a disadvantage compared with the other. Although there is a dispute as to what is meant by discrimination between 'parts of States'[30] section 51(ii) does seem to support, as a general proposition, non-discrimination between States and the suggested plan would seem to discriminate in the relevant sense. A provision that gave a more generous tax deduction for installation of pollution control devices in Sydney than Perth would be a revenue law giving a 'tangible, definite and commercial'[31] preference 'to one State or any part thereof over another State or any part thereof'.[32] Hence point-by-point schemes can only be achieved indirectly by singling out high pollutant industries that happen to operate in some areas and not others, but nevertheless applying the Act on its face to the whole of Australia.

(2) *Bounties*

The Commonwealth under section 51(iii) may pay bounties on the production or export of goods, but such bounties must be uniform throughout the Commonwealth. Exclusive power to grant bounties is vested in the Commonwealth by section 90, subject to limited exceptions in section 91.

[29] *Colonial Sugar Refinery v. Irving* [1906] A.C. 360; *James v. The Commonwealth* (1928) 41 C.L.R. 442; *Conroy v. Carter* (1968) 118 C.L.R. 90; *contra R. v. Barger* (1908) 6 C.L.R. 41.

[30] The majority in *Elliot v. The Commonwealth* (1936) 54 C.L.R. 657 following Isaacs J. in *R. v. Barger* (1908) 6 C.L.R. 41 considered that the choice of a part of a State on the basis that it was part of the Commonwealth did not breach s. 51(ii). However, in *Commissioner of Taxation v. Clyne* (1958) 100 C.L.R. 246, 266 Dixon C.J., *obiter*, but speaking for a majority, considered the distinction meaningless, although he offered no further comment.

[31] *Elliot's* case (1936) 54 C.L.R. 657, 669-71 *per* Latham C.J., 683 *per* Dixon J.

[32] It is interesting to note the difference in wording of s. 51(ii) and s. 99. The former covers discrimination between two parts in the same State whilst s. 99 contemplates preferences only on a State versus State plane. However, the practical significance of this for planning purposes by giving preferences 'equally' to States, but applying them differentially to parts of the same State, would seem beyond reach as a '[p]reference necessarily involves discrimination' and, therefore, a breach of s. 51(ii). *Elliot's* case (1936) 54 C.L.R. 657, 668 *per* Latham C.J., 683 *per* Dixon J.

To amount to a bounty the payment must be made to a producer determined on the amount of the goods produced.[33]

Section 51(iii) has a number of applications for present purposes. Briefly they are:

(i) The removal of bounties on goods with high pollution effects in use or production. For example, the superphosphate bounty.

(ii) The provision of bounties on the production of low pollution substitutes for high pollution goods currently in use. For example, a subsidy on liquefied petroleum gas as a substitute for petrol.

(iii) In view of the high cost of anti-pollution equipment, bounties could be paid on the production of high pollutant goods to finance effluent reduction measures. In the case of a monopoly, for example steel production, this is simple as no bounty is paid unless the remedial action is taken. However, in an industry with a number of producers recalcitrant operators would still be entitled to a bounty which has to be uniform throughout the Commonwealth. To grant the bounty only to producers using the non-pollutant processes might face unfavourable characterization unless the end-products are discernibly different. Also, conditional payment of bounties would seem impermissible as bounties are paid on the production or export of goods, with production or export being the only conditions and Parliament having a discretion as to which goods. Contrast the taxation power under which conditions are effectively imposed in the allowable deductions for income tax, however, section 51(ii) is just a power as to 'taxation'. A possible means of avoiding these difficulties is to place a bounty on the 'production' of pollution, which can often be characterized as a good, and vary the bounty inversely with the amount of pollution produced per unit of product of the factory or mine. Remember, bounties are imposed on the production and not the sale of goods. Although any novel approach faces characterization difficulties 'behind-the-scene' policy considerations might influence the High Court not to overthrow such a bounty.

Another means of bringing recalcitrant producers into line is to support the bounty power with some of the powers to be discussed below, particularly the corporations power.

(3) *Grants Power*

Section 96 so far as is relevant provides that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'. The financial dominance of the Commonwealth resulting from section 96 has been noted. Flowing from this, the Commonwealth has been able to influence markedly the use of State legislative powers.

[33] *Moran's* case (1939) 61 C.L.R. 735.

The wide operation given to section 96 has followed from the contract or bargain approach used by the High Court. The Parliament offers the States finance (which they desperately need) on certain conditions. The States have the option of either rejecting or accepting the offer. If the conditions are too demanding or the finance is insufficient then that is a political matter which the High Court has refused to consider. So long as the Commonwealth does not seek 'to impose a legal duty on States either to accept assistance or comply with conditions',[34] section 96 will not be infringed. The difficulty with this approach is that it ignores the difference in bargaining strengths between the respective parties, but it is consistent with the High Court's policy of 'strict legalism'.

The terms and conditions which the Commonwealth can ask to be fulfilled are quite literally those which the Parliament thinks fit. This means that the States may have to exercise legislative powers as the Commonwealth desires but which it does not possess.[35] This may even extend to requiring the States to refer powers to the Commonwealth pursuant to section 51(xxxviii).[36] On principle there would seem no reason against this and since the *Second Uniform Tax* case[37] 'it appears that no terms and conditions can be held invalid on the grounds that they offend against some . . . implication from the nature of federalism'.[38]

Myers[39] has suggested that if the terms and conditions are too elaborate the grant might be characterized as an attempt to indirectly legislate on the matter. He cites in support the *Pharmaceutical Benefits* case,[40] where some judges[41] held a section 81 appropriation invalid on such a characterization argument. This line of thought may be open to doubt. There would seem to be no reason why once a State has agreed to accept terms and conditions in exchange for a grant that it cannot be characterized as anything but a section 96 grant. Section 96 is not limited by any division of powers as in section 51, rather it is an absolute but dormant power, only operating when the States and Commonwealth agree.

The grants power has a number of important roles in the fields of pollution and conservation:

(i) If the Commonwealth can obtain the States' agreement it can

[34] Campbell E., 'The Commonwealth Grants Power' (1969) 3 *Federal Law Review* 221, 222.

[35] *Victoria v. The Commonwealth (Roads* case) (1926) 38 C.L.R. 399; *Pye v. Renshaw* (1954) 84 C.L.R. 58.

[36] This is suggested by Campbell E., *op. cit.* 228. Whether States can revoke such referrals or whether exclusive power is given to the Commonwealth is uncertain. See generally Anderson R., 'Reference of Powers By the States to the Commonwealth' (1951) 2 *University of Western Australia Annual Law Review* 1.

[37] (1957) 99 C.L.R. 575.

[38] Myers A. J., 'The Grants Power. Key to Commonwealth — State Financial Relations' (1970) 7 *M.U.L.R.* 549, 553.

[39] *Ibid.* 554-5.

[40] *Attorney-General for Victoria (Ex Relatione Dale) v. The Commonwealth* (1945) 71 C.L.R. 237.

[41] *Ibid.* 263 *per* Latham C.J., 269-70 *per* Dixon J., with Rich J. concurring.

require a State (or States) to exercise its powers over industrial pollution in a certain way or to refer those powers to the Commonwealth.

(ii) It can give money to the States for specific environment projects. For example, the States' Grants (Soil Conservation) Act 1974 (Cth). Section 4 of that Act provides for the submission of plans by the States and their alteration or approval by the Federal Minister. This is a more co-operative approach — mainly because it is less controversial. The States' Grants (Nature Conservation) Act 1974 (Cth) provides finance for the acquisition of national parks and nature reserves by the States. Section 6 of the Act provides for the imposition of conditions by the Commonwealth. Such conditions could include restrictions on mining and manufacturing in and around such parks and reserves.

(iii) There could be review of Commonwealth financed State spending with the aim of regulating any deleterious effects on the environment that might result. This is the case under the Environment Protection (Impact of Proposals) Act 1974-5 (Cth), section 5(i):

> The object of this Act is to ensure to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to — . . . (a) the incurring of expenditure, by, or on behalf of the Australian Government. . . .

This object is fulfilled by the preparation of an Environmental Impact Statement (E.I.S.) which will highlight the environmental issues so that Parliament can make better informed decisions. An E.I.S. has, however, no binding force.

Before leaving the grants power, it should be noted that if the States defaulted on the terms and conditions imposed by Parliament, the Commonwealth could probably not recover the money,[43] although it would, the next time around, be placed in an especially strong bargaining position.

III REGULATORY POWERS

(1) *Trade and Commerce*

Section 51(i) gives the Commonwealth legislative power with respect to '[t]rade and commerce with other countries, and among the States'. It is one of a number of provisions in the Constitution

> dealing with finance and trade . . . and designed . . . to ensure that Australia's fiscal regime would treat Australia as a single economic unit, regardless of State boundaries.[44]

Section 51(i) is very closely connected to what Federation was all about.

[42] *New South Wales v. The Commonwealth (No. 1) (Garnishee* case No.1) (1932) 46 C.L.R. 155.
[43] Bailey K. H., 'The Constitutional and Legal Framework' in Sinden J. A., *Natural Resources of Australia* (1974) 58, 64.
[44] *W. & A. McArthur Ltd v. Queensland* (1920) 28 C.L.R. 530, 546-7 *per* Knox C.J., Isaacs and Starke JJ.

> 'Trade and commerce' between different countries . . . has never been confined to the mere act of transportation of merchandise over the frontier. . . . The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls trade and commerce.[45]

In brief, trade and commerce involves the movement and exchange of goods (including the supply of gas and electricity[46]), persons and intangibles.[47] Also transport is a part of trade and comemrce[48] and not merely incidental thereto, as was for a long time thought.

The important issue for pollution control is whether trade and commerce can be said to include manufacturing. There have been a number of statements to the effect that to manufacture is not to trade.[49] However, most of those statements have occurred in section 92 cases (section 92 employing the words 'trade and commerce') and although they are relevant for the meaning of trade and commerce they must be seen in the context of the court trying to limit the broad operation of section 92. On the other hand, section 51(i) certainly does extend to manufacturing activities that have a direct and immediate effect on trade and commerce. For example, safety standards for Australian exports are best policed in the factory and not on the wharf.[50]

Nevertheless, the power to intervene in intra-state matters, manufacturing being basically intra-state, would not seem to extend to regulating just anything to do with manufacturing. The incidental power has been used quite considerably to expand the definition of trade and commerce to its present form and it would seem improbable that pollution regulation could be a part of trade and commerce, or that pollution's control be needed to make effective the main grant of power.

Section 51(i) has two limbs: (i) 'with other countries', and (ii) 'among the States'. As the important section 92 applies only to the second[51] they will be dealt with separately.

(a) TRADE AND COMMERCE WITH OTHER COUNTRIES

Section 51(i) is a power to legislate with respect to the activity of trade and commerce. It follows, therefore, that merely because a person is engaged in overseas trade and commerce there is no power to legislate with respect to anything done or carried on by that person, including pollution. Laws must be directed to the conduct of trade and commerce or matters incidental thereto.

[45] *Bank of New South Wales v. The Commonwealth (Bank Nationalization* case) (1948) 76 C.L.R. 1, 381.
[46] *Ibid.* 382.
[47] *Australian National Airways Pty Ltd v. The Commonwealth* (1945) 71 C.L.R. 29.
[48] *E.g. Beal v. Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283, 306 *per* Menzies J.
[49] *O'Sullivan v. Noarlunga Meat Ltd* (1954) 92 C.L.R. 565.
[50] *R. v. Anderson; Ex Parte Ipec-Air Pty Ltd* (1965) 113 C.L.R. 177.
[51] *O'Sullivan's* case (1954) 92 C.L.R. 565, 598.

As already indicated pollution caused by mining or manufacturing would not be within power. This statement needs qualification. There may arise circumstances whereby industrial pollution affects the quality of exports, for example meat, such that a lower price is received or the export is rejected as unacceptable. Here regulation would be within power. In the words of Fullagar J.:

> By virtue of . . . [section 51(i)] . . . all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth. . . . Such matters include . . . anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it.[52]

An example of such a use of section 51(i) in the near future could be limits on the use of D.D.T. and other insecticides, which are increasingly unacceptable overseas, in and around plant and animal crops.

The main power with respect to trade and commerce with other countries lies in a power of prohibition. This stems from the idea that the provisions of the Constitution 'vest in the Commonwealth the power of controlling in every respect Australia's relations with the outside world'.[53] Apart from this conception of Federation a number of judicial statements have referred to a power of prohibition[54] as well as indicating that Parliament is given a virtually unlimited discretion in its reasons for prohibition.

Section 51(i) can have an effect on industrial pollution and conservation matters although it is not as precise a tool as section 51(ii). Under the Customs (Prohibited Export) Regulations the export of kangaroo skins was banned for a time. The threat of the withdrawal of an export licence also keeps the woodchip industry under control. Similarly dependent on export licences are the mineral sands and uranium[55] extraction industries, although uranium mining could be controlled under the defence power, section 51(vi).

Another important application of section 51(i) stems from Australia's dependence on overseas sources of capital for its largest manufacturing and mining projects. Foreign exchange clearance dependent upon appropriate environmental safeguards would significantly affect future pollution levels.

Trade and commerce extends to tourism. However, the Commonwealth may be *ultra vires* in passing the National Parks and Wildlife Conservation Act 1975 (Cth), section 6(1)(f), which provides for the establishment

[52] *Attorney-General of New South Wales v. Collector of Customs for New South Wales* (1908) 5 C.L.R. 818, 842 *per* O'Connor J., and quoted by Latham C.J. *R. v. Burgess; Ex Parte Henry* (1936) 55 C.L.R. 608, 645.

[53] *Bank Nationalization* case (1948) 76 C.L.R. 1, 330-3 *per* Dixon J.; *Redfern v. Dunlop Rubber Australia Ltd* (1964) 110 C.L.R. 194, 219-20 *per* Menzies J.

[54] *Radio Corporation Pty Ltd v. The Commonwealth* (1938) 59 C.L.R. 170, 180-1 *per* Latham C.J.; *Burton v. Honan* (1952) 86 C.L.R. 169, 177 *per* Dixon C.J.

[55] The subject of uranium exports and their environmental implications is presently under inquiry by the House of Representatives Standing Committee on Environment and Conservation.

and management of national parks and reserves 'conducive to the encouragement of tourism between Australia . . . and other countries'.

(b) TRADE AND COMMERCE AMONG THE STATES

With interstate trade and commerce the Commonwealth's power does not extend to prohibition; section 92 has been construed as a constraint here.[56] Given the limitations with respect to manufacturing, the regulation of pollution caused by interstate[57] transport[58] appears the only fruitful area for section 51(i). Noise and exhaust emissions of aircraft and motor vehicles, and oil discharge from ships are the chief menaces.

Not only is transport a part of interstate trade and commerce, but also the Commonwealth has control of shipping and railways by virtue of section 98. Section 51(xxix), the external affairs power, has been used to extend Commonwealth power over all aviation.[59]

With respect to oil discharge by ships the Commonwealth and States have enacted complementary legislation to implement the *Convention on the Prevention of Pollution of the Sea by Oil* (1954).[60] The Convention however, was loosely drafted in the first place and is now 22 years out of date. Sections 51(i) and 98 would empower the Commonwealth to take tightening-up action.

There have been a number of suggestions that the mere fact that transport is a part of interstate trade and commerce does not give a power to legislate with respect to any aspect of transport. Ideas of fostering trade and commerce or regulating it for its betterment can be found,[61] but such limitations are inconsistent with the principles espoused in the *Engineers'* case.[62] *Prima facie* such limitations would exclude emission controls. However, even if the limitations are valid, which is unlikely, Parliament can control trade and commerce to protect public health and safety;[63] the essence of concern about pollution being over such matters.

[56] *A.N.A. v. The Commonwealth* (1945) 71 C.L.R. 29; *Bank Nationalization* case (1948) 76 C.L.R. 1 (H.C.); (1949) 79 C.L.R. 497 (P.C.).

[57] It is assumed that transport is interstate. There has been much litigation on what constitutes an interstate journey. There is the added difficulty of border hopping. For a discussion of these issues see Howard C., *op. cit.* 325-57.

[58] The analysis applies equally to international transport, but without the section 92 difficulties of reasonable regulation.

[59] *Airlines of New South Wales v. New South Wales (No. 2) (1965)* 113 C.L.R. 54. See *infra* 30-1.

[60] Pollution of the Sea By Oil Act 1960-5 (Cth); Prevention of Oil Pollution of Navigable Waters Act 1960-9 (N.S.W.); Navigable Waters (Oil Pollution) Act 1960; Pollution of waters By Oil Act 1960-1 (Qld); Prevention of Pollution of Waters By Oil Act 1961-9 (S.A.); Prevention of Pollution of Waters By Oil Act 1961-7 (W.A.); Oil Pollution Act 1961-4 (Tas.); Prevention of Pollution of Waters By Oil Ordinance 1971 (N.T.).

[61] Lane P. H., 'The Airlines' Case' (1965) 39 *Australian Law Journal* 17, 18-21 where the *dicta* are discussed.

[62] (1920) 28 C.L.R. 129.

[63] Public safety: *Ex Parte Walsh; In Re Yates* (1925) 37 C.L.R. 36, 132 *per* Starke J., *Victoria v. The Commonwealth* (1937) 58 C.L.R. 618, 631 *per* Dixon J., 633 *per* Evatt J., Public health: *Swift Australian Company (Pty) Ltd v. Boyd Parkinson* (1962) 108 C.L.R. 189, 226 *per* Owen J.

Alternatively, these emissions are subject to the powers incidental to the section 51(i) power over transport. There are two sources of incidental power in the Constitution: the express power in section 51(xxxix) and an implied power in each head of legislative power. The latter has American origins[64] and it is considered that:

> every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancilliary to the subject matter.[65]

The express power may not be different, but it has been suggested that while the implied power extends the subject matter of the main grant, section 51(xxxix) is concerned with the execution of the grant of the legislative power.[66] The issue is not resolved.[67]

Whether in fact control over pollution is necessary to effectuate the power in the main grant with respect to transport brings us substantially back to the question whether section 51(i) empowers the regulation of all aspects of transport or not. Anyway, there at least seems power on the basis of public safety, if safety can include pollution control.

When drafting any legislative measures concerning interstate trade and commerce section 92 must be considered. It binds the Commonwealth[68] and, incidentally, has not had a good record with conservationists.[69] Section 92 provides that 'trade, commerce, and intercourse among the States . . . shall be absolutely free' and that if a law operates on interstate trade and commerce as its criterion of liability, and its effect is to impose a burden, then section 92 is infringed, subject to the law being reasonable regulation.[70] Recently, Barwick C.J.[71] has been placing emphasis on the economic or practical effect of a law rather than its direct legal operation, but to date this approach has not prevailed.

Emission controls on interstate transport would be a burden on trade and commerce. The key point in reasonable regulation.[72] The best way of implementing controls is to require licences for interstate transporters and a

[64] *M'Culloch v. Maryland* (1819) 4 Wheat. 316, 321-3 *per* Marshall C.J.

[65] *Grannall v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55, 77 *per curiam*. Also: *D'Emden v. Pedder* (1904) 1 C.L.R. 91, 110; *O'Sullivan v. Noarlunga Meat Ltd* (1954) 92 C.L.R. 565, 597-8 *per* Fullagar J.

[66] *Attorney-General (Cth) v. Colonial Sugar Refinery Co. Ltd* (1913) 17 C.L.R. 644; *Le Mesurier v. Connor* (1929) 42 C.L.R. 481.

[67] See *Victoria v. The Commonwealth* (1975) 7 A.L.R. 277, for recent *dicta* on this question.

[68] *James v. The Commonwealth* (1936) 55 C.L.R. 1.

[69] *Fergusson v. Stevenson* (1951) 84 C.L.R. 421, where the banning of possession of kangaroo skins was held invalid in so far as it related to skins brought from interstate.

[70] There are many authorities for this proposition; a leading one is the *Bank Nationalization* case (1948) 76 C.L.R. 1.

[71] *Samuels v. Readers Digest Association Pty Ltd* (1969) 120 C.L.R. 1; *Associated Steamships Pty Ltd v. Western Australia* (1969) 120 C.L.R. 92; *North Eastern Dairy Co. Ltd v. Dairy Industry Authority of New South Wales* (1975) 7 A.L.R. 433.

[72] *A.N.A. v. The Commonwealth* (1946) 71 C.L.R. 29; *Bank Nationalization* case (1948) 76 C.L.R. 1.

condition of issue would be the reduction of emissions. In such '. . . matters of regulation a very wide range of discretion must be allowed to the legislative body'.[73] However, it may be that the more restrictive a law the more likely it will breach section 92 even though it falls into a category of laws considered regulatory. Safety and public health are obviously matters of reasonable regulation,[74] but it remains to be seen whether emission controls have a sufficiently publicised connection with the core of health and safety to convince a court that they would be a reasonable limitation.

Administrative needs require that the issue of licences be delegated to the Executive, but unless, as painful experience has shown,[75] there are clearly defined standards and directions to ensure that an administrative discretion will be exercised in accordance with section 92, the licensing provisions will be invalid.[76]

Should controls over emissions be considered incidental to trade and commerce then section 92 problems are removed as the subject matter protected does not include incidentals.[77] This is the result of the criterion of liability and direct legal effect approach. However, if the wider reading of Barwick C.J. is to gain ascendancy then incidental matters will come within section 92.

To enforce the controls criminal penalties are permissible if passed in pursuance of a valid exercise of Commonwealth power.[78]

To complement Commonwealth control over capital inflow for major mining and industrial projects domestic measures are needed. Through the trade and commerce, banking,[79] insurance,[80] and financial corporations[81] powers the Commonwealth can exercise a tight rein over internal capital markets. However, such an interference might not be reasonable regulation to satisfy section 92 as the necessary controls would not be

> . . . in the interests of security, efficiency, uniformity of practice and so on.[82]

Nevertheless, as a practical matter, the Commonwealth can exercise considerable influence over lending policies.

(2) *Corporations Power*

Section 51(xx) is the corporations power and applies to '[f]oreign corporations, and trading or financial corporations formed within the limits

[73] *McCarter v. Brodie* (1950) 80 C.L.R. 432, 495 *per* Fullagar J., approved by the Privy Council in *Hughes & Vale Pty Ltd v. New South Wales (No. 1)* (1954) 93 C.L.R. 1.
[74] *Kerr v. Pelly* (1957) 97 C.L.R. 310 (weighbridge inspection); *Greutner v. Everard* (1960) 103 C.L.R. 177 (vehicle dimensions).
[75] *Hughes & Vale Pty Ltd v. New South Wales (No. 2)* (1955) 93 C.L.R. 127, where legislation regulating interstate hauliers was held invalid. It was subsequently redrafted, but barely passed scrutiny in *Armstrong v. Victoria (No. 2)* (1957) 99 C.L.R. 28.
[76] *Hughes & Vale (No. 2)* (1955) 93 C.L.R. 127.
[77] *James v. The Commonwealth* (1936) 55 C.L.R. 1.
[78] *R. v. Kidman* (1915) 20 C.L.R. 425.
[79] S. 51(xiii).
[80] S. 51(xiv).
[81] S. 51(xx).
[82] *Bank Nationalization* case (1948) 76 C.L.R. 1, 389, *per* Dixon J.

of the Commonwealth'. In 1908, the High Court, in *Huddart Parker & Co. Pty Ltd v. Moorehead*,[83] influenced by ideas of implied prohibitions, gave a very narrow intepretation to the scope of the power. For approximately 60 years the power remained dormant until 1971, when, in *Strickland v. Rocla Concrete Pipes Ltd*,[84] each member of the Full High Court expressly disagreed with the decision in *Huddart Parker*.[85] The substance of the result is that the Commonwealth under section 51(xx) is not limited to corporations operating on an international or interstate plane, as previously held, but has legislative competence over intra-state corporations.

Nevertheless, section 51(xx) still remains a mystery as the judges did not expand on its scope in the *Concrete Pipes* case[86] nor have they done so subsequently.[87] Reference must be made to *obiter dicta*, even from *Huddart Parker*,[88] to solve two key questions for the purposes of this article:

(i) does a trading corporation include a manufacturing or mining corporation? and,

(ii) once a corporation is within section 51(xx) what is the extent of the Commonwealth's regulatory power?

The lack of clarity over section 51(xx) has prompted hot dispute in academic and professional circles,[89] especially in view of recent Commonwealth initiatives based on the power.[90]

An initial point is that section 51(xx), like for example the aliens power (section 51(xix)), is a 'person' power and is to be contrasted with most of the section 51 *placita* which are 'activities' powers. This and its potential width may be reason to approach with caution, although the correctness of the suggestion that the power should be read as 'every corporation shall . . .' has yet to be decided.[91]

It would seem uncontentious to assert that a foreign corporation is one operating in Australia but formed under a foreign legal system, and that a financial corporation is one taking 'money from the public in order to lend it to others or buy[ing] securities in other . . .'[92] corporations.

[83] (1908) 8 C.L.R. 330.
[84] (1971) 124 C.L.R. 468.
[85] (1908) 8 C.L.R. 330.
[86] (1971) 124 C.L.R. 468.
[87] *R. v. Trade Practices Tribunal; Ex Parte St. George County Council* (1974) 2 A.L.R. 371.
[88] (1908) 8 C.L.R. 330.
[89] Principally in a series of articles in the Australian Law Journal: Lane P. H., 'Corporations and Trade Practices: The Concrete Pipes Case' (1971) 45 *Australian Law Journal* 616; Taylor J. L., 'The Corporations Power: Theory and Practice' (1972) 46 *Australian Law Journal* 5; Lane P. H., 'Can There Be A Commonwealth Companies Act' (1972) 46 *Australian Law Journal* 407; Taylor J. L. and Frankel O. I., 'A 1973 National Companies Act? The Challenge To Parochialism' (1973) 47 *Australian Law Journal* 119; Tonking A. I., 'Federal Competence to Legislate For Control of the Securities Market' (1973) 47 *Australian Law Journal* 231.
[90] Trade Practices Act 1974 (Cth); Foreign Takeovers Act 1975 (Cth).
[91] *Concrete Pipes* case (1971) 124 C.L.R. 468, 507-8 *per* Menzies J.
[92] Evans G., *op. cit.* 10.

More uncertainty surrounds the meaning of 'trading corporations'. Should manufacturing and mining corporations not be considered trading corporations, the usefulness of section 51(xx) for pollution control will be severely curtailed.

A narrow reading has drawn support from statements, particularly in section 92 cases,[93] that manufacturing is preliminary to trade. These have been referred to *supra*, where it was indicated that such cases should be approached cautiously and as merely limiting a possible wide meaning of the negative section 92. Contrast decisions[94] extending trade and commerce into some aspects of manufacturing, although arguably an extension based on the incidental power.

The 1900 conception of a trading corporation supports the narrow view. Quick and Garran believed that:[95]

> A trading corporation is one formed for the purpose of carrying on trade. To trade . . . means to buy and sell . . . or to carry on commerce as a business.

Similarly Isaacs J. in *Huddart Parker*[96] considered that:

> [i]t is clear that the power is to operate only on corporations of a certain kind, namely, foreign, trading, and financial corporations. For instance, a purely manufacturing company is not a trading corporation. . . . This leaves entirely outside the range of Federal power . . . all those domestic corporations for instance, which are constituted for municipal, minings, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading. . . .[97]

An important point to note from Isaacs J. is that he refers to *purely* manufacturing companies. This is supported by his implication in the last lines that a trading corporation can include a corporation which is not *wholly* trading. I shall return to this point subsequently.

The other judges in *Huddart Parker*[98] did not consider the point fully, nor was it squarely raised until the *St. George* case,[99] the matter having been conceded for purposes of argument in *Concrete Pipes*.[1] In the *St. George* case[2] the Court was divided on the test to be applied in determining if a corporation was a trading corporation. Menzies and Gibbs JJ. agreed that the purpose for which the corporation was formed is essential. Gibbs J. said:

> A trading corporation is one formed for the purposes of trading. However, as I have indicated, the mere fact that a corporation in trading does not mean that it is a trading corporation. It is necessary to determine the true character of the

[93] *Grannall v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55; *Beal v. Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283.
[94] *E.g. O'Sullivan v. Noarlunga Meat Ltd* (1954) 92 C.L.R. 565.
[95] Quick J. and Garran R. R., *Annotated Constitution of The Australian Commonwealth* (1901) 606.
[96] (1908) 8 C.L.R. 330, 393-6.
[97] *Ibid.* 393.
[98] (1908) 8 C.L.R. 330.
[99] (1974) 2 A.L.R. 371.
[1] (1971) 124 C.L.R. 468.
[2] (1974) 2 A.L.R. 371.
[3] *Ibid.* 393.

> corporation, upon a consideration of all the circumstances that throw light on the purpose for which it was formed.[3]

Barwick C.J. and Stephen J. preferred to examine the corporation's current activities. Barwick C.J. said:

> [A] corporation whose predominant and characteristic activity is trading, whether in goods or services, will, in my opinion, satisfy the description.[4]

He prefaced those remarks with the comment that:

> [t]o say that a corporation's description for relevant purposes will be determined by its activities does not mean of course, that a corporation which to any extent engages in trade is a trading corporation.[5]

The other member of the Court, McTiernan J., did not find it necessary to consider any of these issues.

There are three points to note:

(i) The case did not raise directly the issue of whether a manufacturing corporation is subsumed under 'trading corporation', rather the issue related to the distinction between a government corporation and a trading corporation.

(ii) The four judges who considered the question were unanimous in saying that just because a corporation trades it does not follow that it is trading corporation.

(iii) Although the activities approach meant a wider application for section 51(xx) in the particular circumstances, the purpose test is more useful for enmeshing manufacturing companies in the section 51(xx) net. A manufacturing company's purpose is to produce and sell goods. Without production there cannot be sale and without sales there eventually cannot be production. Even if the sale is to an associated trading company there is still a sale. On the other hand, it is more difficult to assert that a manufacturing company's 'predominant or characteristic activity is trading'.

Returning to the *dictum* of Isaacs J., is there such a thing as a *purely* manufacturing corporation in today's world of multi-national agglomerations incorporating within the one organization everything from the mining and processing of raw materials through to sales and finance?

Although the question remains undecided, if the High Court adheres to the Chief Justice's undertaking not to approach the problem in a 'narrow or pedantic manner'[6] the Commonwealth will hopefully have a power commensurate with its national status.

The second key question with respect to section 51(xx) is the extent of regulatory power over corporations within its operation. In the absence of authority one would think that, on *Engineers'* case[7] principles, once a corporation is classified as foreign, trading or financial there is a full power

[4] *Ibid.* 377.
[5] *Ibid.*
[6] *Concrete Pipes* case (1971) 124 C.L.R. 330, 395-6 *per* Barwick C.J.
[7] (1920) 28 C.L.R. 129.

with respect to it. To do otherwise would be to read words into the Constitution and this is forbidden.[8]

However, it has been assumed from the beginning, although never authoritatively decided, that the power of regulation over section 51(xx) corporations is limited. Isaacs J. gave a long list of matters that the Commonwealth could not control.[9] He believed all that was entrusted

> to the Commonwealth was the regulation of the conduct of the corporations in their transactions with or affecting the public.[10]

The *Concrete Pipes*[11] and *St. George*[12] cases have not been of real assistance as both concerned trade practices, a matter the Court has without hesitation held to be within the power. Although Barwick C.J. has indicated that trading matters are not the outer limits of power, judges have been extremely reluctant to give guidelines, preferring to decide questions as they arise. Isaacs J., nevertheless, did indicate that the Commonwealth could not protect corporations from State laws imposing liability in nuisance,[13] from which it follows that the Commonwealth cannot impose nuisance liability, that is, anti-pollution regulations. Like most of his *dicta* on section 51(xx) this statement has neither been disapproved or affirmed, only noted. Thus, the existence of a power to regulate pollution caused by corporations within section 51(xx) remains in doubt.

Whether the Commonwealth has power to control incorporation depends upon whether the word 'formed' in section 51(xx) is treated as a past or future participle. The judges have been unanimous in their *dicta*[14] favouring a past participle, with the resultant absence of control. However, there is no principle of construction which requires this to be so[15] and so the issue is the centre of debate.[16] If the Commonwealth has a power over incorporation it could set as a condition compliance with specified environmental standards. The same would be true if the Commonwealth has what may be a very wide power 'with respect to the recognition of corporations as legal entities'.[17]

There are three further points:

(i) Whether pollution caused by non-corporate persons in their

[8] *Federated Municipal etc. Union of Australia v. Melbourne Corporation (The Municipalities* case) (1919) 26 C.L.R. 508.
[9] *Huddart Parker* (1908) 8 C.L.R. 330, 395-6.
[10] *Ibid.* 395.
[11] (1971) 124 C.L.R. 468.
[12] (1974) 2 A.L.R. 371.
[13] *Huddart Parker* (1908) 8 C.L.R. 330, 396.
[14] *E.g. ibid.* 394 *per* Isaacs J., *Insurance Commissioner v. Associated Dominions Assurance Society Pty Ltd* (1953) 89 C.L.R. 78, 86 *per* Fullagar J.
[15] Stephen J. has considered that a word such as 'formed' can apply 'equally to the future as to the past'. *Mikasa (N.S.W.) Pty Ltd v. Festival Stores* (1972) 47 A.L.J.R. 14, 30-1. His Honour was not referring to section 51(xx), but to the Trade Practices Act 1965-71, s. 66B(2)(d)(ii), where the word 'supplied' was used.
[16] Contrast Taylor J. L. and Frankel O. I., *op. cit.* 122, who quote Stephen J. with approval, with Tonking A. I., *op. cit.* 240 n. 68, who disapproves of the use of the *dictum*.
[17] *Huddart Parker* (1908) 8 C.L.R. 330, 374 *per* O'Connor J.

dealings with corporations can be regulated. This is important but best left for another occasion.[18]

(ii) Any moves by the Commonwealth to forestall developments such as the Victorian Newport Power Station under the corporations power would raise all the issues directly. The result would be uncertain given the division of opinion in the *St. George* case.[19]

(iii) The use of the power over financial corporations has been mentioned *supra* in relation to intra-state trade and commerce. The regulation of the lending policies of such corporations would be in respect of their conduct of 'transactions with or affecting the public'. Even though a law is not expressed to be with respect to trade and commerce reasonable regulation under section 92 must be satisfied if a burden is imposed.

Section 51(xx) has great potential for pollution control, however, when examining it we are in the realm of conjecture rather than settled law.

(3) *Posts and Telegraph Power*

Section 51(v) gives the Commonwealth power over 'postal, telegraphic, telephonic, and other like services'. In a handful of decisions,[20] the High Court has interpreted this provision as giving a most extensive control over all the communications media, with almost the sole exception being newspapers.

As section 51(v) is not limited to interstate communications[21] could the Commonwealth withhold the services if users did not comply with pollution guidelines?[22]

This is basically a question of characterization and although the power has been given a very wide operation[23] such an extreme use would very likely be held to be invalid.

IV CONSTITUTIONAL EXPANSION — THE EXTERNAL AFFAIRS POWER

Section 51(xxix) is the external affairs power. It is an important part of what we have already seen to be the Commonwealth's control of matters external to Australia.

[18] It was also left undecided in the Industrial Court by Smithers J. in *Commissioner of Trade Practices v. Caltex Oil (Australia) Pty Ltd* (1974) 4 A.L.R. 133, 160. Again, in *Quadramain Pty Limited v. Sevastopol Investments Pty Limited* (1976) 8 A.L.R. 555, this issue was argued before the High Court but left undecided.

[19] (1974) 2 A.L.R. 371.

[20] *R. v. Brislan; Ex Parte Williams* (1935) 54 C.L.R. 262; *Jones v. The Commonwealth* (1965) 112 C.L.R. 206; *Herald & Weekly Times v. The Commonwealth* (1969) 115 C.L.R. 418.

[21] Most communications are intra-state and s. 92 would not apply.

[22] A limited use of the power has been made in the Trade Practices Act 1974 (Cth), s. 6(3).

[23] *Herald & Weekly Times* case (1969) 115 C.L.R. 418.

Conduct of the nation's foreign affairs, for example the signing of treaties and diplomatic representation, is undertaken by the Executive. Even the finance of such matters would seem independent of section 51(xxix) given the Executive[24] and appropriations[25] powers.

The external affairs *placitum* empowers legislation on a number of matters, for example international fugitives.[26] A recent application is to be found in the Seas and Submerged Lands Act 1973 (Cth), which declared certain rights to the Territorial Sea and Continental Shelf to be vested in the Commonwealth. The validity of the Act was upheld by a majority[27] so far as it related to the Territorial Sea and unanimously so far as it related to the Continental Shelf in *New South Wales v. The Commonwealth*.[28] It was considered that, as State boundaries end at the low water mark, the Act concerned matters external to Australia and was, therefore, a valid use of the power. A State-Commonwealth clash did not arise. However, the principal application for our purposes does involve such a conflict. The problem originates in the rule in *Walker v. Baird*,[29] which provides that:

> [t]reaties entered into by a British or Australian Government which, by virtue of their provisions or otherwise, impair the private rights or duties of British or Australian subjects or involve any modification of the common or Statute laws, are ineffective to bind citizens and will not receive application by courts of law in the absence of specific legislation implementing the relevant provisions of the treaty concerned.[30]

This rule rests on the foundation that national governments can and do enter into treaties knowing that their domestic laws must necessarily be changed. It is a sign of an increasingly inter-dependent world. Yet in a federal system such as Australia's, where the treaty making power rests with the central government and much of the power of domestic law making rests with the States, Australia might be prevented from entering into many international agreements because it cannot guarantee the requisite changes in domestic law, or be unable to fulfill its international obligations should the States prove unco-operative.

The High Court, applying United States doctrine,[31] has[32] interpreted the external affairs *placitum* as empowering the Commonwealth to intrude into State preserves in implementation of Australia's international treaty[33]

[24] S. 61.
[25] Ss. 81 and 83.
[26] *McKelvey v. Meagher* (1906) 4 C.L.R. 265, 278-9 *per* Griffith C.J., 286 *per* Barton J.
[27] Barwick C.J., McTiernan, Mason, Jacobs and Murphy JJ.
[28] (1975) 8 A.L.R. 1.
[29] [1892] A.C. 491. The rule has been referred to or applied in Australia in *Brown v. Lizars* (1905) 2 C.L.R. 837, 851 *per* Griffith C.J.; *Chow Hung Ching v. The King* (1948) 77 C.L.R. 449, 478 *per* Dixon J.; *Bradley v. The Commonwealth* (1973) 47 A.L.J.R. 504, 514 *per curiam*.
[30] Starke J. G., 'International Legal Note' (1974) 48 *Australian Law Journal* 368.
[31] Notably *Missouri v. Holland* (1920) 262 U.S. 416.
[32] *R. v. Burgess; Ex Parte Henry* (1936) 55 C.L.R. 608 and *Airlines of New South Wales Pty Ltd v. New South Wales (No. 2)* (1965) 113 C.L.R. 54.
[33] The power may not be confined to just treaty obligations. In *R. v. Burgess* (1936) 55 C.L.R. 608, 687 Evatt and McTiernan JJ. believed that the power extended to draft international conventions or their recommendations. An even wider view was expressed by Murphy J. in *New South Wales v. The Commonwealth* (1975) 8

obligations. This means that the Commonwealth has the ability to markedly alter the Federal-State balance pursuant to an exercise of its external affairs power. This proposition is of great significance to any attempts to regulate industrial pollution.

However, before turning to the practical applications, a more detailed analysis of the authorities is needed. Only seven judges have elaborated in any detail on the scope of the power: Latham C.J., Starke, Dixon, Evatt and McTiernan JJ. in *R. v. Burgess*;[34] Barwick C.J. in the *Second N.S.W. Airlines* case[35] and Murphy J. in *New South Wales v. The Commonwealth*.[36] All supported the general proposition that the Commonwealth can enter the State law making area (and displace State law through section 109) pursuant to an international treaty. However, all (except Murphy J. who did not consider the point) ruled out the use of a treaty as a 'device' for extending Commonwealth power.[37] One example would be a treaty between Australia and Cuba to standardize the size of automobile tyres produced in each country. Subject to this qualification Latham C.J.[38] and Evatt and McTiernan JJ.[39] were prepared to accept almost any international agreement as a valid subject for the power. So was Murphy J.,[40] Dixon[41] and Starke JJ.[42] and Barwick C.J.[43] favoured a narrow view which spoke of matters 'indisputably international in character'[44] and 'of sufficient international significance to make . . . them . . . a legitimate subject for international co-operation and agreement'.[45] Neither the narrow nor the wide view has been accepted.[46] However, the former must be favoured. The Court still seems (improperly) influenced by implied prohibition doctrines[47]

A.L.R. 1, 117, when he said that the power was not necessarily limited to conventions, treaties or the affairs of international bodies. In the *Second N.S.W. Airlines* case (1965) 113 C.L.R. 54, 85, Barwick C.J. spoke of 'treaties, conventions and other international documents'. Even Dixon J. in *R. v. Burgess* (1936) 55 C.L.R. 608, 669, was not prepared to rule out the possibility, preferring to leave it till it arose.

[34] (1936) 55 C.L.R. 608.
[35] (1965) 113 C.L.R. 54.
[36] (1975) 8 A.L.R. 1.
[37] *Ibid.* 85 *per* Barwick C.J.; *R. v. Burgess* (1936) 55 C.L.R. 608, 642 *per* Latham C.J.; 687 *per* Evatt and McTiernan JJ.; 669 *per* Dixon J.; 658 *per* Starke J.
[38] *R. v. Burgess* (1936) 55 C.L.R. 608, 640-1.
[39] *Ibid.* 680-1
[40] *New South Wales v. The Commonwealth* (1975) 8 A.L.R. 1, 117.
[41] *R. v. Burgess* (1936) 55 C.L.R. 608, 669.
[42] *Ibid.* 658.
[43] *Second N.S.W. Airlines* case (1965) 113 C.L.R. 54, 85.
[44] *R. v. Burgess* (1936) 55 C.L.R. 608, 669 *per* Dixon J.
[45] *Ibid.* 658 *per* Starke J.
[46] In *New South Wales v. The Commonwealth* (1975) 8 A.L.R. 1, three judges considered a decision on this issue to be unnecessary to the case at hand: 9 *per* Barwick C.J.; 112 *per* Jacobs J.; 117 *per* Murphy J. Nevertheless, as outlined *supra* Murphy J. devoted a significant portion of his judgment to this. Additionally, three judges made brief comments without adding new material: 19 *per* McTiernan J. (wide view); 30 *per* Gibbs J. (narrow view); 75-6 *per* Stephen J. (narrow view).
[47] In *R. v. Burgess* (1936) 55 C.L.R. 608, 658 Starke J spoke of 'implied' limitations, as did Barwick C.J. in the *Second N.S.W. Airlines* case (1965) 113 C.L.R. 54, 85. However, Barwick C.J. appeared to revise this opinion in *N.S.W. v. The Commonwealth ibid.* 10, where he said, 'The ambit of the power with respect to external affairs cannot be restrained by any reserved powers doctrine'.

— an idea of the proper federal balance — and will keep its options open to review an especially offensive treaty in this regard.

Much of this difficulty possibly stems from the conception of an external affair. A distinction can be drawn between matters of international concern which affect directly the relations between nations or the well-being of nations as inhabitants of the same planet, and matters of international concern which are primarily directed to the internal affairs of a country. The freedom of international travellers not to be molested by domestic authorities is an example of the former, whilst an example of the latter is the treatment of its own citizens by a national regime within its own borders. Remember, all are matters of international concern about which agreements are made, but there is the subtle difference which, it is submitted, classifies the former as an external affair and the latter as not. As time passes there would seem to be a shift of issues from the second category to the first.

Two further limitations exist. First, the power is subject to express limitations in the Constitution, for example sections 92 and 116. This is evidenced by the decision in *N.S.W. v. The Commonwealth*,[48] in which it is implicit that an alteration of State limits could not be effected except in accordance with section 123. Secondly, the proposed domestic legislation must correspond to the terms of the treaty. However, the strict approach in *R. v. Burgess*[49] seems to have given way in practice to a more liberal approach, allowing the Commonwealth to adapt the terms for drafting convenience and applicability to Australian conditions.[50]

The regulation of aircraft noise and jet exhaust emissions has already been mentioned under the trade and commerce power. The external affairs power probably provides a more fruitful legislative head. *The Chicago International Civil Aviation Convention* (1944) has been held to be an external affair within *placitum* (xxix).[51] Articles 31 and 33 provide for the issue of air-worthy certificates and, under Annex 16 of 1972, noise levels are a part of air-worthiness. The Commonwealth can, therefore, set noise levels for all aircraft operating in Australia,[52] although it must accept overseas aircraft complying with the minimum standards of the Convention. The difficulty is that Australia has not specifically enacted its ratification of Annex 16 into domestic law. The extraordinary result, it has been contended, is that noise levels at Melbourne Airport can only be regulated by a City of Keilor by-law dealing with public nuisances.[53]

[48] (1975) 8 A.L.R. 1.
[49] (1936) 55 C.L.R. 608.
[50] The *Second N.S.W. Airlines* case (1965) 113 C.L.R. 54, in effect used the liberal approach of Starke J. *ibid.*, who dissented on this point, whilst affirming the narrower approach as a statement of principle.
[51] *Second N.S.W. Airlines* case (1965) 113 C.L.R. 54.
[52] *Ibid.*
[53] Golden G., 'Noise Emissions in Australia: The Present Framework of Legal Control and Responsibility' (1975) 49 *Australian Law Journal* 123.

In recent years the Commonwealth has entered into a number of major international agreements for the protection of wildlife and the prevention of pollution.[54] However, the full force of the external affairs power has yet to be used to control industrial pollution; this is an indication that it is still in its formative stages as a world issue. Most of the treaties signed are either too vague to implement, already within other Commonwealth powers, or have been implemented co-operatively with the States, for example, notably, the *Prevention of Pollution of the Sea by Oil Convention* (1954).

Whether treaties dealing with pollution will fall within the category of matters of international concern properly considered external affairs will depend on just how serious an issue pollution becomes, but certainly treaties concerning the disposal of radioactive wastes and oil pollution of the seas would pass the test.

Another potentially important application exists with respect to the territorial sea and continental shelf, which is discussed *infra*.

V EXECUTIVE POWERS

(1) *General*

Whereas the Constitution sets out in great detail the legislative powers of the Commonwealth surprisingly little is said about the Crown or Executive. The Executive power of the Commonwealth, according to section 61, '. . . extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. Under this formula the status of the Crown's prerogative powers is uncertain.

As Sovereign of the Realm the Crown possessed vast powers of law making and enforcement, but slowly these were whittled away by Act of Parliament. Upon Federation the six colonial Governors exercised on behalf of the Crown a narrower prerogative than the Imperial Crown, which exercised for the colonies at least the prerogatives relating to foreign affairs and defence.

With Federation, in so far as the Commonwealth was concerned, it may be asked whether section 61 superseded the Crown's prerogative as a source of Executive authority, founding it in the maintenance and execution of the Constitution and the laws of the Commonwealth. If it did not, then

[54] This list does not purport to be exhaustive:
(a) *International Whaling Convention* 1946.
(b) *International Plant Protection Convention* 1951.
(c) *Prevention of Pollution of the Sea By Oil Convention* 1954.
(d) *Plant Protection Agreement for the Southeast Asian and Pacific Region* 1956.
(e) *Wetlands of International Importance especially as Waterfowl Habitat Convention* 1971.
(f) *Conservation of Antarctic Seals Convention* 1972.
(g) *International Trade in Endangered Species of Wild Fauna and Flora Convention* 1973
(h) *Japan-Australia Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment* 1974.

how was the prerogative, previously exercised by the colonial governors on behalf of the Crown and by the Imperial Crown itself, to be divided (if that is possible with the doctrine of indivisibility of the Crown) between the States and the Commonwealth? Or were in fact the States and the Commonwealth to have a full prerogative each? This is an unsettled area of law and one of great complexity; authoritative decision is lacking.

Claims to a full and separate prerogative for the Commonwealth and each of the States appear to be of doubtful validity. In *Joseph v. Colonial Treasurer (N.S.W.)*[55] Isaacs, Powers and Rich JJ. in a joint judgment held that the defence prerogative was exclusively within the power of the Commonwealth, a consequence of the Commonwealth's exclusive legislative power with respect to defence.[56] This implies that prerogative powers attributable to concurrent legislative powers are shared by the States and Commonwealth and that exclusive State legislative powers carry with them an exclusive control of the relevant prerogatives.

A fortiori section 61 does not replace the prerogative, but transfers it from the Imperial Crown and colonial Governors according to some unexplained formula. This is supported in *Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd*[57] by Dixon[58] and Evatt[59] JJ., who both delivered themselves of leading *dicta* on the prerogative under the Australian Constitution. Furthermore, Evatt J. considered it a general rule

> that the division of *legislative* power as between Commonwealth and state *may*[60] determine the authority which is capable of exercising a relevant prerogative of the King.[61]

He cited *Joseph's* case[62] as an example of the rule. In an article by Campbell[63] further support is received for this proposition. She says:

> The Executive power of the Commonwealth probably includes all such prerogative powers as are appropriate to a government with the limited powers of the Commonwealth which are not inconsistent with the Constitution and not expressly mentioned elsewhere in the Constitution.[64]

Evatt J., however, posited an important qualification:

> What is however frequently overlooked in the discussion of these difficult questions is the fact that the royal prerogatives are so disparate in character and subject matter that it is difficult to assign them to fixed categories or subjects and thereby to determine whether they are exercisable by the Commonwealth Executive or that of a State or by both or by neither.[65]

[55] (1918) 25 C.L.R. 32.
[56] *Ibid.* 46. Higgins J. at 50-1 also supported an exclusive Commonwealth war prerogative.
[57] (1940) 63 C.L.R. 278.
[58] *Ibid.* 301-5.
[59] *Ibid.* 319-24.
[60] Emphasis added to the word 'may'.
[61] *Farley's* case (1940) 63 C.L.R. 278, 320.
[62] (1918) 25 C.L.R. 32.
[63] Campbell E., 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14. Campbell quotes further authorities some which will be examined *infra.* Further support has been received recently from Mason J. in *Barton v. The Commonwealth* (1974) 48 A.L.J.R. 161, 169.
[64] *Ibid.* 17
[65] *Farley's* case (1940) 63 C.L.R. 278, 320.

Bearing these points in mind, an examination will be made of three topics of interest to the regulation of industrial pollution: the Commonwealth's powers to acquire land, to spend and to enter contracts. In this consideration we are, unfortunately, plagued by variation in the language of the Constitution itself: section 51(xxxi) refers to 'any purpose in respect of which Parliament has power to make laws'; section 53(i) to 'acquired by the Commonwealth for public purposes'; and section 81 to 'appropriated for the purposes of the Commonwealth'. However, Barwick C.J. has recently said that the words in ss. 51(xxxi) and 81 are synonymous.[66]

(2) *Acquisitions Power*

The potential of this power was in relation to the purchase of land for national parks, wildlife reserves and historic sites, where pollution can be regulated by virtue of the control over Commonwealth places (*infra*). Section 51(xxxi) enables

> [t]he acquisition of property[67] on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

As the main purpose of the power is to ensure that just terms are paid, the High Court has limited its operation to compulsory acquisitions.[68] Not even the incidental power can authorize a compulsory acquisition law free from the limitation as to just terms.[69]

Section 51(xxxi) must be used in conjunction with other Commonwealth powers and its scope is limited to and dependent upon the effective use of such powers. It is not in its own right a power to acquire property. Nevertheless, the Commonwealth can enact legislation enabling the voluntary acquisition of land.[70] Unfortunately, none of the heads of power offer great scope for the purchase of areas suitable for national parks. There are possibilities though, and it has been suggested[71] that purchases of land for lighthouses, astronomical observatories and quarantine stations (under *placita* (vii), (viii) and (ix) respectively of section 51) should be as large as can be.

What then of the Executive power to acquire land? A power of compulsory acquisition lies with the English Crown, but is limited to the

[66] *Victoria v. The Commonwealth (A.A.P.* case), (1975) 7 A.L.R. 277.

[67] The meaning of 'property' has been the subject of discussion in *Minister of State for the Army v. Dalziel* (1944) 68 C.L.R. 261; the *Bank Nationalization* case (1948) 76 C.L.R. 1, 349 *per* Dixon J. affirmed in *Attorney-General (Cth) v. Schmidt* (1961) 105 C.L.R. 361.

[68] *John Cooke & Co. Pty Ltd v. The Commonwealth* (1924) 34 C.L.R. 269, 382, where there is an implication to this effect by the Privy Council; *McClintock v. The Commonwealth* (1947) 75 C.L.R. 1, 18-9 *per* Latham C.J.; 30 *per* McTiernan J.; *British Medical Association v. The Commonwealth* (1949) 79 C.L.R. 201, 269-71 *per* Dixon J.

[69] *Dalziel's* case (1944) 68 C.L.R. 261; *W.H. Blakely & Co. Pty Ltd v. The Commonwealth* (1953) 87 C.L.R. 501.

[70] *Poulton v. The Commonwealth* (1953) 89 C.L.R. 540, 573 *per* Fullagar J.

[71] *Inquiry into the National Estate, op. cit.* 207.

[72] *The Saltpetre* case (1606) 12 Co. Rep. 172; 77 E.R. 1294; *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508.

emergencies of defence.[72] This is not useful for our purposes, but some observations can be made. It would appear from a number of *dicta* that this prerogative of the Crown does exist in Australia and is vested exclusively in the Crown in right of the Commonwealth.[73] These *dicta* support the two propositions, *supra*, that:

(i) Section 61 does not supplant the prerogative but merely transfers it to the Crown in right of the Commonwealth; and

(ii) There is a division of the prerogative between the States and the Commonwealth approximating the breakdown of legislative powers.

Executive acquisition by agreement, it follows, is similarly limited. As Campbell says:

> There is no express constitutional provision which imposes . . . a section 51(xxxi) . . . restriction on the acquisition of property by the Commonwealth by purchase or voluntary grant,[74] but if Commonwealth executive power is limited to the constitutional domain assigned to federal parliament, acquisitions of property by the Commonwealth by purchase must be for purposes in respect of which the federal parliament has power to make laws.[75]

Even if there existed the necessary Executive authority its scope has been modified by Parliament, it being within its competence to do so, by the Lands Acquisition Act 1955-73 (Cth), which embodies the section 51(xxxi) formula that all land acquisitions must be for purposes in respect of which Parliament has power to make laws.

Two points need to be mentioned for completeness:

(i) National parks could be acquired under the external affairs power. Some members of the High Court have referred to an external affair as more than just a treaty.[76] This is relevant as the International Union for the Conservation of Nature and Natural Resources, of which Australia is a member, has recommended that a minimum of 5 per cent of the land area of a country be set aside as national parks or equivalent reserves. It is the author's belief that the external affairs power does not extend this far for the sort of reasons outlined above.

(ii) It has been suggested that the Commonwealth could acquire land for a national park and dedicate it to war dead this being a valid exercise of the defence power, section 51(vi).[77] Obviously there is a limit to this practice.

(3) *Appropriations Power*

Given the enormous financial resources of the Commonwealth, it is relevant to ask whether it can spend money on anything it likes irrespective

[73] *Johnston Fear and Kingham v. The Commonwealth* (1943) 67 C.L.R. 314, 318-9 *per* Latham C.J.; 325 *per* Starke J.; *Andrews v. Howell* (1941) 65 C.L.R. 255, 268 *per* Starke J.; *Attorney-General (Cth) v. Schmidt* (1961) 105 C.L.R. 361, 372 *per* Dixon C.J.

[74] See Commonwealth Places *infra* p. 608 ff.

[75] Campbell E., *op. cit.* 20.

[76] *Supra* n. 33.

[77] Lane P. H., *The Australian Federal System With United States Analogues* (1972) 164.

of whether it has legislative power over the object of its beneficence? As long as it does not try to legislate on the matter can the Commonwealth just spend?

Successive Commonwealth Governments have incurred expenditure of a nature substantially unrelated to the heads of legislative power. Take for example, the C.S.I.R.O. and the Snowy Mountains Scheme. In the environmental sphere the Commonwealth has financed nuisance actions by citizens through its legal aid programs[78] and provided funds for research and local conservation bodies. Could money be given to manufacturers to improve their pollution control systems and thereby avoid the problems associated with bounties?

Section 83 provides that '[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law'. It is sufficient that there be a law appropriating moneys from Consolidated Revenue, but section 81 prescribes that such moneys 'be appropriated for the purposes of the Commonwealth'. Do these words import limitation or are the *purposes* of the Commonwealth any purposes which the Parliament determines?

In the United States of America, the Supreme Court has considered that the Constitution, Article 1(8), enabling the Congress to provide for the 'general welfare' of the nation, removes the shackles of the enumerated heads of power,[79] although it is not in itself a separate head of power.[80]

Whether the American experience is applicable to Australia has been questioned in the High Court,[81] although it is arguable that the 'purpose' of any government is to provide for the 'general welfare' of its citizens. However, this approach has all sorts of difficulties in determining where 'general' ends and 'specific' begins.

This leaves the question whether the words 'the purposes of the Commonwealth', which include both legislative and executive purposes,[82] extend the Commonwealth's power to spend money beyond the executive and legislative matters mentioned elsewhere in the Constitution?

This was litigated in the *Pharmaceutical Benefits* case[83] and, more recently, in *Victoria v. The Commonwealth.*[84] The former case involved litigation concerning the Pharmaceutical Benefits Act 1944 (Cth), which appropriated moneys for payment to chemists who supplied free of charge to the public medicines prescribed by medical practitioners. The Court

[78] *E.g.* The Commonwealth is financing a citizen's challenge to the extension of a quarry at Ferntree Gully, *Age*, 30 August 1975.
[79] *Cincinatti Soap Co. v. United States* (1937) 301 U.S. 308.
[80] *United States v. Butler* (1936) 297 U.S. 1.
[81] *Pharmaceutical Benefits* case (1945) 71 C.L.R. 237, 265 *per* Starke J., 270-1 *per* Dixon J, but contrast 255 *per* Latham C.J.; *A.A.P.* case (1975) 7 A.L.R. 277, 296 *per* Barwick C. J., 325-6 *per* Mason J., but contrast 346 *per* Murphy J.
[82] *Ibid.* 266 *per* Starke J.
[83] (1945) 71 C.L.R. 237.
[84] (1975) 7 A.L.R. 277.

held[85] that the legislation was invalid. Latham C.J. and Dixon and Rich JJ. characterized the Act not as an Appropriations Act but as one to do with medical benefits, a matter then beyond Commonwealth power.[86] Starke and Williams JJ. preferred to hold that the provision of benefits was not a Commonwealth purpose.[87]

All judges, however, went on to consider the scope of 'Commonwealth purposes'. Latham C.J.[88] and McTiernan J.[89] believed that no limits should be placed on section 81 other than for the peace, order and good government of the Commonwealth. By doing otherwise they believed that the Court would become involved in a political matter properly left to the legislature.

Dixon J., with whom Rich J. agreed and Williams and Starke JJ. did not adopt this approach. Although all applied a limit to the 'purposes of the Commonwealth', none of them provided a clear statement of what those limits were. On the other hand, they were not prepared to limit the appropriation power to just the enumerated heads of legislative authority. The common thread in their judgments related to a conception of the Commonwealth being a national government and that federation was for the purpose of creating a body that could do things none of the colonies could achieve individually.[90]

The *A.A.P.* case[91] concerned the validity of the appropriation of moneys to the Australian Assistance Plan which was an administrative creation for assisting in 'the development, within a nationally co-ordinated framework, of integrated patterns of welfare services'. Although the High Court narrowly dismissed the case four to three, it may be doubted whether in fact the Australian Assistance Plan was upheld. Barwick C.J.[92] and Gibbs J.[93] were of the opinion that 'purposes of the Commonwealth' imports a limitation and that there existed

> . . . no power to deal with matters because they may conveniently and best be dealt with on a national basis. . . .[94]

Both judges preferred the limited view in the *Pharmaceutical Benefits*

[85] McTiernan J. dissenting.
[86] There has since been an amendment, s. 51(xxiiiA), giving the Commonwealth the necessary power.
[87] An additional issue concerns the standing required to challenge a Commonwealth appropriation law. Apart from the *Pharmaceutical Benefits* case (1945) 71 C.L.R. 237 standing has been considered in: *Anderson v. The Commonwealth* (1932) 47 C.L.R. 50; *Attorney-General for New South Wales v. Brewery Employees Union (Union Label* case) (1908) 6 C.L.R. 469; *Pye v. Renshaw* (1954) 84 C.L.R. 58; *Logan Downs v. Federal Commissioner of Taxation* (1965) 112 C.L.R. 177. It is not proposed to give *locus standi* further consideration.
[88] *Pharmaceutical Benefits* case (1945) 71 C.L.R. 237, 255-6.
[89] *Ibid.* 274.
[90] *Ibid.* 266 *per* Starke J.; 269 *per* Dixon J.; 282 *per* Williams J.
[91] (1975) 7 A.L.R. 277.
[92] *Ibid.* 296-300.
[93] *Ibid.* 309.
[94] *Ibid.* 300 *per* Barwick C.J.

case.[95] On the other hand, McTiernan,[96] Mason[97] and Murphy JJ.[98] held that the purposes of the Commonwealth were for the Commonwealth to determine as this was a matter for political and not judicial decision.

These judges concentrated on the legislative aspects of section 81. However, Stephen, Mason and Jacobs JJ. drew a distinction between the legislative and executive implications of the section. All three were prepared to allow the appropriation, either because a mere legislative authorization of proposed federal expenditure was beyond challenge through a total lack of standing (*per* Stephen J.),[99] or through the absence of anything to challenge (*per* Jacobs J.),[1] or because the purposes of the Commonwealth were to be determined by the Commonwealth (*per* Mason J.).[2] Mason and Jacobs JJ. then went on to consider whether the Executive had power to deal with the appropriation; Mason J.[3] held that it did not and Jacobs J.[4] that it did. Stephen J. believed that as no other questions had been raised by the States the case should be dismissed. He did not go on to consider the important issue of whether the Executive could validly deal with the appropriation as provided for in the Plan.

Nevertheless, Mason and Jacobs JJ. did agree that the Executive could only expend moneys in

> . . . the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government.[5]

Unfortunately, for those who follow this is rather vague (as evidenced by the disagreement between Mason and Jacobs JJ.), although the approach of the majority is understandable. On the one hand, there is much Commonwealth expenditure of national importance that just cannot be upheld by enumerated legislative powers, whilst on the other, an unlimited spending power can fundamentally alter the balance of power in the Federation, the death of implied prohibitions notwithstanding. Or does this raise the issue of implied prohibitions at all, rather it being a case of interpreting the words 'purposes of the Commonwealth'?

All appropriations pursuant to sections 81 and 83 may be subject to the preparation of an E.I.S. under the Environment (Impact of Proposals) Act 1974-5 (Cth) section 5(1)(e) discussed above.

[95] (1945) 71 C.L.R. 237.
[96] (1975) 7 A.L.R. 277, 303-4.
[97] (1975) 7 A.L.R. 277, 326.
[98] *Ibid.* 344.
[99] *Ibid.* 319.
[1] *Ibid.* 333.
[2] *Ibid.* 326.
[3] *Ibid.* 327-8.
[4] *Ibid.* 334.
[5] *Ibid. per* Mason J. 326.

(4) *Contract Power*

The familiar story of Commonwealth financial dominance of the States carries with it an enormous impact in the national economy. The Commonwealth is a very large purchaser of goods and services as well as being a valuable customer for the purchase price is 'government guaranteed'. Can this very substantial contractual bargaining power be used to pressure those who tender for government contracts into providing adequate environmental safeguards when producing their goods and services?

The Commonwealth has authority to enter into contracts under its Executive power of executing and maintaining the Constitution and laws of the Commonwealth. Finance is provided to the Executive for Commonwealth purposes under section 81 and if legislative authority is required, which would not appear to be the case, for contracts entered into in the ordinary course of administering a recognized part of the government of the Commonwealth,[6] it is provided by section 51(xxxix) which, as we have seen, is concerned with the executive implementation of laws. It may be that more unusual contracts, but still within Commonwealth power, need initial legislative sanction.[7]

In exercising these contractual powers, the Commonwealth can impose whatever terms and conditions it wishes if the supplier will agree. The production of telephone cables for the Telecommunications Commission, vehicles for the motor pool and materials for constructing government owned buildings would occur under controlled pollution conditions if the Commonwealth's bargaining position was sufficiently strong.

There are, however, as we have seen, many government organizations not falling within the recognized heads of legislative power which are supported by section 81 appropriations. For example, the Australia Council[8] or the Australian Atomic Energy Commission.[9] It appears that the Executive contracting power for the supply of goods and services to these organizations will depend on whether the supporting appropriations are for the 'purposes of the Commonwealth'. Also of crucial significance is whether section 81 extends to more than just the spending of money, that is to the creation and functioning of organizations on which money is to be spent.

Should the Commonwealth wish to finance the installation of pollution control equipment by private enterprise (and ensure its subsequent efficient operation) through a section 81 appropriation law, it may face difficulties in characterization not as an appropriation law but to do with anti-pollution along the lines of the *Pharmaceutical Benefits* case.[10] To

[6] *New South Wales v. Bardolph* (1934) 52 C.L.R. 455.

[7] *The Commonwealth v. The Colonial Combing, Spinning and Weaving Co. Ltd (The Wooltops* case) (1922) 31 C.L.R. 421, 431-2 *per* Knox C.J. and Gavan Duffy J.

[8] Formerly the Australian Council for the Arts.

[9] The A.A.E.C. is supported in part by the defence power, s. 51(vi).

[10] (1945) 71 C.L.R. 237. It is the author's belief that here the Courts will be far more vigorous in the application of characterization techniques of constitutional interpretation than in other areas such as taxation.

avoid this could the Commonwealth appropriate moneys for the purpose of entering into contracts with a similar aim?

The issue of the relationship between the power of the Executive and the limited heads of legislative power arises again.[11] Can the type of contract countemplated, it clearly being beyond legislative power (leaving aside section 81), be validly made by the Executive? If it can, then presumably it will be a Commonwealth purpose for which an appropriation can be made. If it cannot, then will an appropriation law to finance the contract validate it? To give an affirmative answer to this latter question is to confuse the distinction between an appropriation and a contract,[12] as well as to overlook the authorities that favour a narrow meaning for the words 'purposes of the Commonwealth' in section 81. The first

> . . . question has not squarely arisen for judicial decision, but most of the High Court judges who have considered it seem to have taken the view that a contract entered into by the Commonwealth is invalid if a statute authorizing its making would be *ultra vires*.[13]

The authorities for this view are Isaacs J. in the *Wooltops* case[14] and the joint judgment of Knox C.J., Gavan Duffy, Rich and Starke JJ. in *The Commonwealth v. Australian Commonwealth Shipping Board.*[15] The recent *A.A.P.* case[16] would seem to place this issue beyond doubt, as Barwick C.J.,[17] Gibbs,[18] Mason[19] and Jacobs JJ.[20] were generally agreed that, in the words of Gibbs J.

> . . . the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth.

Although there appears to be a power 'to make laws with respect to matters incidental to the execution of the executive power',[21] and on this ground an executive contract could be given legislative support pursuant to section 51(xxxix), the matter still rests on what is meant by the legislative competence of the Commonwealth and this is yet (if ever) to be finally determined.

VI SOVEREIGNTY POWERS

Most Commonwealth legislative powers envisage the regulation of a class of activities or transactions the description of which constitutes the description of

[11] The other problem of whether section 61 'picked-up' the prerogative powers is irrelevant, as the contract making power is not part of the prerogative.

[12] An appropriation law '. . . neither betters nor worsens transactions in which the Executive engages in its constitutional domain'. *The Commonwealth v. Colonial Ammunition Co. Ltd* (1923) 34 C.L.R. 198, 224 *per* Isaacs and Rich JJ. The wider proposition to be drawn is that an appropriation law would not validate an Executive act *outside* its constitutional domain.

[13] Campbell E., *op. cit.* 18.

[14] (1922) 31 C.L.R. 421, 441.

[15] (1926) 39 C.L.R. 1, 9.

[16] (1975) 7 A.L.R. 277.

[17] *Ibid.* 299.

[18] *Ibid.* 312.

[19] *Ibid.* 327-8.

[20] *Ibid.* 334.

[21] *Australian Communist Party v. The Commonwealth* (1951) 83 C.L.R. 1, 269 *per* Fullagar J.

> the power itself. . . . They do not normally encourage the regulation of activities, purposes or other matters by reference to geographical area, for by definition they are intended to operate throughout the Commonwealth as a geo-political unit.[22]

Nevertheless, the Commonwealth does possess powers by virtue of its sovereignty over geographical areas and it is to these that we now turn.

(1) *Commonwealth Places*

A Commonwealth place is land[23] 'acquired by the Commonwealth for public purposes'.[24] The phrase public purposes expresses 'a large and general idea',[25] however, it is descriptive in character rather than empowering.[26] That is, the land must be acquired under some other power and section 52(i) then operates to give the Commonwealth 'exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to' such places.

Apart from the powers of acquisition pursuant to legislative heads of power or an Executive contract financed by section 81, land could be acquired for public purposes if received as 'a gift from a landowner by his deed or will'.[27]

Windeyer J. in *Worthing v. Rowell & Muston*[28] adds support to the view that land may be acquired pursuant to a legislative or executive power under section 81 when he acknowledges that:

> there may be places which are validly acquired by the Commonwealth for some public purpose not obviously embraced by any specific head of legislative power or the incidental power.[29]

By implication he considers that '[l]ands for forests, parks, ranges and wildlife sanctuaries'[30] would be included.

Once a Commonwealth place is acquired, an exclusive power arises that does not have to be connected with the public purpose for which it was acquired.[31] A Commonwealth place is analogous to a territory in that there is a plenary legislative power with respect to it. However, it is not a territory and any suggestion of Commonwealth enclaves existing throughout States has been rejected.[32]

There are three important consequences:

[22] Howard C., *op. cit.* 493.
[23] A lease or a licence would not be sufficient. *Worthing v. Rowell & Muston Pty Ltd* (1970) 123 C.L.R. 89, 124 *per* Windeyer J.
[24] S. 52(i). Land acquired from a State under s. 85 falls within s. 52(i) power.
[25] *Worthing's* case (1970) 123 C.L.R. 89, 125 *per* Windeyer J.
[26] *Ibid.* 127.
[27] *Ibid.* See also *supra* n. 66.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.* 125. This view has been acted on in the National Parks and Wildlife Conservation Act 1975 (Cth), s. 6(1)(a), which provides for the establishment of parks and reserves 'appropriate to be established by the Australian Government, having regard to its status as a national government'.
[31] *Worthing's* case (1970) 123 C.L.R. 89; *R. v. Phillips* (1970) 125 C.L.R. 93.
[32] *Ibid.*

(i) State laws do not apply to Commonwealth places for the regulation of activity thereon.[33]

(ii) The Commonwealth possesses a power to legislate directly for the regulation of industrial pollution occurring on Commonwealth places. For example, the National Parks and Wildlife Conservation Act 1975 (Cth), section 10, prohibits mining, forestry and other works without the permission of the Governor-General, that approval to be given in accordance with a plan of management prepared under section 11.

(iii) Laws made pursuant to section 52(i) may have an extra-territorial operation.

> [T]he validity of the supposed law in its application to the places acquired for Commonwealth purposes would not be affected by the circumstance that it was not limited to those places. Its validity would depend on the question whether or not it should be described as being, in so far as it was made to apply in those places, a law with respect to them.[34]

Thus, under a law penalizing polluters of streams in national parks, a person who polluted a stream flowing into a park could be prosecuted.

Not only is the Commonwealth place power a plenary one, it is significant in view of the fact that the Commonwealth owns one million hectares (2½ million acres) of land in the States.[35]

(2) *Aboriginal Places*

Section 51(xxvi) gives the Commonwealth legislative power with respect to '[t]he people of any race for whom it is deemed necessary to make special laws'. Until 1967 the aboriginal race was excluded, but in that year a referendum conducted under section 128 expanded section 51(xxvi) to include aboriginals.

The Commonwealth can move to establish aboriginal reserves outside the territories (where it already has full power) in order to preserve the life-style, art, culture or historic sites of aborigines. Such reserves can be protected in a similar manner to other Commonwealth places. As this is implemented under a direct head of legislative power compulsory acquisition can be used subject, of course, to just terms.

Such action has been recommended.[36] However, in the implementation of the National Parks and Wildlife Conservation Act 1975 (Cth) no use of this power seems intended[37] although special protection is provided for traditional use of the land by aboriginals.[38]

[33] *Ibid.* This in fact has created difficulty and required the passing of the Commonwealth Places (Application of Laws) Act 1970 (Cth), for the purpose of adopting for Commonwealth places the State laws operative in the States where the places are located.

[34] *Worthing's* case (1970) 123 C.L.R. 89, 138 *per* Walsh J., also 101 *per* Barwick C.J.; 131 *per* Windeyer J. Analogous authorities are discussed in relation to Territories *infra*.

[35] *Inquiry into the National Estate, op. cit.* 224.

[36] *Ibid.* 207-8.

[37] S. 6.

[38] Ss. 18, 70.

(3) *Territories*

Section 122 empowers '[t]he Parliament . . . [t]o make laws for the government of any Territory'. 'The grant of legislative power by section 122 is plenary in quality and unlimited and unqualified in point of subject matter'.[39]

Section 122 is a source of power in itself[40] and is not subject to the limitations on legislative power expressed in section 51, for example *placitum* (xxxi).[41] Also, it is not confined to the legislature but grants full executive and prerogative powers (in so far as they are not otherwise limited by statute:[42] Hence the Commonwealth in respect of its territories can directly legislate to control industrial pollution.

The principal territories are the Northern Territory and the Australian Capital Territory, additionally there are many smaller ones.[43] Although they do not include any substantial manufacturing areas there are important mining operations in the Northern Territory.

Once a law is shown to be relevant to the government of a Territory 'it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs'.[44] Hence, with this extra-territorial application the Commonwealth could penalize the pollution of streams flowing into territories.

As section 92 does not apply on its own wording to trade between a State and a Territory, the Commonwealth could without restriction regulate exhaust emissions on hauliers' trucks, and ban the sale of imported goods from the States that would add to pollution or the production of which had caused serious pollution in the States. There would be no limitation to saying that all goods sold in the territories had to be produced under certain conditions protective of the environment.

In fact any State law with respect to the extra-territorial operation of the Territory law, to the extent of any inconsistency would be invalid due to section 109. This effect stems from the notion that a Territory is not administered as a quasi-foreign country

> but as a territory of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout its jurisdiction.[45]

[39] *Teori Tau v. The Commonwealth* (1969) 119 C.L.R. 564, 570 *per curiam*.
[40] *Spratt v. Hermes* (1965) 114 C.L.R. 226.
[41] *Teori Tau v. The Commonwealth* (1969) 119 C.L.R. 564.
[42] *Johnson v. Kent* (1975) 49 A.L.J.R. 27.
[43] Discussed in Zelling H., 'Territories of the Commonwealth' in Else-Mitchell R., *Essays on The Australian Constitution* (1961) 3207. Note in particular the other provisions of the Constitution relating to territories: ss. 52(i) and 125, the seat of government; s. 111, the surrender of territories by a State. In 1910 under s. 111 the Commonwealth passed the Northern Territory Acceptance Act, which transferred from South Australia to the Commonwealth what is now the Northern Territory.
[44] *Lamshed v. Lake* (1958) 99 C.L.R. 132, 141 *per* Dixon C.J., expressing the majority opinion on this point.
[45] *Ibid.* 143-4 *per* Dixon C.J.

(4) *The Territorial Sea and Continental Shelf*

Whether the Commonwealth or the States have control of the territorial sea and the continental shelf has been one of the most controversial issues in Australian constitutional law. It was recently determined in favour of the Commonwealth by the Full High Court in *New South Wales v. The Commonwealth.*[46]

Although the question had been thrust to the fore of debate in recent years with three important cases,[47] there had been no resolution of the issues as they faced Australia and we were 'still confronted with a murky legal history, much confused thinking and too much casual research into the antecedents of the problem'.[48] Although the legal debate now appears to be settled, the political bargaining for control of the vast mineral wealth in Australian waters may well prove endless.

(a) THE TERRITORIAL SEA

> International law, both conventional and customary, recognizes that the territorial sovereignty of a coastal state extends to a belt off its coast which is called the 'territorial sea'. All the natural resources of the territorial sea, that is to say both of its seabed and the superincumbent waters, thus belong to the coastal state. The baseline of the territorial sea is ordinarily the low water mark line along the coast. . . . Australia, in common with the United Kingdom . . . belongs to the minority of States that claims only a three-miles territorial sea.[49]

The Seas and Submerged Lands Act 1973 (Cth), section 6, declares and enacts that sovereignty over the territorial sea is vested in the Commonwealth. This was challenged by the States in *N.S.W. v. The Commonwealth*[50] as being *ultra vires* the Commonwealth. The majority considered that, as the States in 1901 were bounded by the low water mark or the closing line of internal waters,[51] section 6 was properly a law with respect to an external affair. Furthermore, the territorial sea is a creation of customary international law (the *Convention on the Territorial Sea and Contiguous Zone* (1958) being merely declaratory) and it vests control of the territorial sea in the international person, and that, in the case of Australia is the Commonwealth.

However, there are two limitations. First, according to *Bonsor v. La Macchia*[52] the Commonwealth does not have regulatory power over fisheries

[46] (1975) 8 A.L.R. 1, discussed *supra* 28.
[47] *Reference re Ownership of Offshore Mineral Rights* (1968) 65 D.L.R. (2d) 353; *The North Sea Continental Shelf* case (1969) I.C.J. Reports 1; *Bonsor v. La Macchia* (1969) 122 C.L.R. 177.
[48] O'Connell D. P., 'The Australian Maritime Domain' (1970) 44 *Australian Law Journal* 192, 194.
[49] Bailey K. H., *op. cit.* 67-8.
[50] (1975) 8 A.L.R. 1.
[51] Internal waters include historic bays such as Spencer Gulf. This is recognized in the *Convention on the Territorial Sea and Contiguous Zone* 1958, Art. 7(b). Commonwealth control would not extend to such bays. Their nature and extent in Australia are considered in Edeson W. R., 'The Validity of Australia's Maritime Historic Claims in International Law' (1974) 48 *Australian Law Journal* 295.
[52] (1969) 122 C.L.R. 177.

within three miles of the coast.[53] There is one important exception relating to whaling: power is given to the Commonwealth by the Whaling Act 1960 (Cth), section 8, implementing the *Whaling Convention* (1946).[54]

Secondly, the States have an extra-territorial power over the territorial sea in so far as it is for the peace, order and good government of the State,[55] subject to section 109. However, on the basis of *N.S.W. v. The Commonwealth*[56] a number of State laws must be considered *ultra vires*. For example, the Proclamation of Port Phillip Bay,[57] paragraph (c) of which extends the Bay out into Bass Strait in semi-circle of three mile radius.[58]

Subject to these limitations, the Commonwealth has a full power over the territorial sea except to the extent that international law has derogated from it.[59] Therefore, regulation of pollution caused by mining, dumping of waste products and oil spills can be undertaken. Similarly for the discharge of pollutants from landbased sources, especially sewerage and discharges into creeks and rivers.[60]

(b) THE CONTINENTAL SHELF

The Sovereign rights with respect to the continental shelf are quite limited compared with other place powers,[61] being confined by the *Convention on the Continental Shelf* (1958) Article 2(i) to sovereign rights for the purpose of exploring and exploiting natural resources.[62] Australia is a party to the Convention[63] and the Seas and Submerged Lands Act 1973 (Cth), section 11, vests these rights in the Commonwealth. In part this is only by way of reaffirmation, for Australia declared rights to the shelf by

[53] *Ibid.* 192 *per* Barwick C.J.; 204-5 *per* Kitto J.; 209-10 *per* Menzies J.; 235 *per* Owen J.; *contra* 226-31 *per* Windeyer J.

[54] The Commonwealth has exercised its powers under s. 51(x) by declaring an exclusive Australian fishing zone out to 12 miles from the Australian Coast; Fisheries Act 1967-75 (Cth).

[55] *Bonsor's* case (1969) 122 C.L.R. 177; *N.S.W. v. The Commonwealth* (1975) 8 A.L.R. 1. For a recent discussion of the extra-territorial power of the States see Trindade F. A., 'The Australian States and the Doctrine of Extra-territorial Legislative Incompetence' 1971 45 *Australian Law Journal* 233.

[56] (1975) 8 A.L.R. 1.

[57] Pursuant to the Marine Act 1958, s. 7. The Proclamation is found in the Victorian *Government Gazette* 26 October 1960. No. 97, 3400.

[58] As a purported declaration of internal waters it would be invalid at international law: *Convention on the Territorial Sea and Contiguous Zone* 1958, Art. 7.

[59] For example, rights of innocent passage and rights of laying submarine cables.

[60] For example, a large colony of dugong, a species of sea-cow, is severely threatened by the mining of mineral sands on Fraser Island, Queensland. *Sun*, 27 August 1975.

[61] It must be stressed that the shelf is not in the strict sense a Commonwealth place or territory but rather an area from which certain benefits are gained and obligations incurred.

[62] The limits of the shelf are defined in Art. 1 as extending as far as a depth of 200 metres or beyond that to the limits of exploitation.

[63] Australia signed the convention on 30 October 1958 and ratified it on 14 May 1963. The convention entered into force on 10 June 1964.

Proclamation of the Governor-General in 1953[64] and has since legislated in respect of it.[65]

In *N.S.W. v. The Commonwealth*[66] the States challenged this action. The High Court held unanimously that international law had created new rights and vested them in the international person and that the Commonwealth as Australia's international person had validly exercised its external affairs powers in enacting those rights into domestic law.

This means that the Offshore Petroleum Agreement[67] between the States and Commonwealth relating to the development of petroleum and other resources on the continental shelf is outmoded, for it was based on an altogether different conception of Commonwealth power.

Thus, the Commonwealth can control exploration and mining on the shelf and any pollution caused by it. In the future this will be a significant power. Furthermore, with continuing developments in international law, especially a 200 mile Exclusive Economic Zone, the Commonwealth's role can be expected to expand.

VII CONCLUSION

With greater public awareness of the menace of industrial pollution comes greater government involvement. Recently we have seen a flurry of activity by the Commonwealth in the form of inquiries,[68] actual[69] and proposed legislation, and various commissions and bodies.[70]

The Commonwealth does have a considerable power to solve the problem but it is not the uniform, direct, plenary power needed. A great challenge is presented to our leaders, the High Court and Federation.

> It is a natural and proper public reaction whenever a problem of national proportions presents itself to demand that the Commonwealth do something about it. Such demands are usually made with an imperfect understanding of the constitutional limitations on Commonwealth legislative power.[71]

[64] Commonwealth *Government Gazette* 11 September 1953 No. 56, 2563.

[65] Continental Shelf (Living Natural Resources) Act 1958 (Cth).

[66] (1975) 8 A.L.R. 1.

[67] *Agreement Relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and Certain Other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of Certain Other Submerged Lands* 1967.

[68] *E.g.* House of Representatives Standing Committee on Environment and Conservation, *Inquiry Into Uranium and the Environment.*

[69] The Great Barrier Reef Marine Park Act 1975 (Cth).

[70] *E.g.* The Australian Heritage Commission and the Bureau of Environmental Studies.

[71] Howard C., 'The Constitutional Power of The Commonwealth to Regulate the Securities Market' (1971) 45 *Australian Law Journal* 389.