Chapter Seven

The Constitutionality of the *Environmental Protection and Biodiversity Conservation Act*

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In the *Tasmanian Dam case* in 1983, the then Chief Justice, Sir Harry Gibbs, said in his dissenting decision:

> The external affairs power differs from the other powers conferred by s. 51 in its capacity for almost unlimited expansion. As Dixon J. pointed out in *Stenhouse v. Coleman*[1]: 'In most of the paragraphs of s. 51 the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognized category of legislation (as taxation, bankruptcy).' The boundaries of those categories of power may be wide, but at least they are capable of definition. However, there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power. Whether Australia enters into any particular international agreement is entirely a matter for decision by the Executive. The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely as a device for the purpose of attracting legislative power. Section 51(xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive. To say this is of course not to suggest that by the Constitution any powers are reserved to the States. It is to say that the federal nature of the Constitution requires that 'no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament': *Bank of New South Wales v. The Commonwealth*,[2] which I cited in *Koowarta* at p.637.[3]

The majority of the High Court in the *Tasmanian Dam case* upheld the validity of legislation based on what were held to be obligations the Federal Government had assumed when it ratified the Convention for the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) in 1974.

While it may not be possible to say that up until now the Federal Government's reliance on the majority decision in the *Tasmanian Dam case* to pass legislation has "rendered absurd the assignment of particular carefully defined powers to that

Parliament", I would argue that it has radically transformed the balance of constitutional power between the Commonwealth and the States and the potential of that change has been realised in relation to what is now called "the environment" and what, in the past, was called natural resources.

Two of the most contentious political issues in the country at the moment arise from legislation that relies, in part, on the *Tasmanian Dam case* principle for constitutional validity. They are the carbon tax and the Murray-Darling Basin. The legislation in relation to both matters relies on international environmental conventions ratified by the Federal Government. The carbon tax legislation enacted in 2012 by the Gillard Government relies on the United Nations Framework Convention on Climate Change (the Climate Change Convention). The *Water Act* 2007 sets out the regime for allocating water in the Murray-Darling Basin. It was enacted by the Howard Government in 2007, under the stewardship of Malcolm Turnbull, the Minister for the Environment and Heritage. That Act refers specifically to the Convention on Biological Diversity (the Biodiversity Convention), the Climate Change Convention and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention).

The carbon tax and the Basin legislation had been preceded in 1999 by the *Environment Protection and Biodiversity Conservation Act* (the EPBC Act), also enacted by the Howard Government. The following international conventions underpin the constitutional validity of the EPBC Act: the Biodiversity Convention, the World Heritage Convention, the Ramsar Convention, the Convention on Conservation of Nature in the South Pacific (the Apia Convention), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Bonn Convention on the Conservation of Migratory Species of Wild Animals, the Chinese/Australia Agreement on the protection of migratory birds and their environment (CAMBA) and the Japan/Australia Agreement for the protection of migratory birds and birds in danger of extinction and their environment (JAMBA).

Background

Before looking at the EPBC Act, I need to set out developments in environmentalism between 1983 and 1992 internationally, and, nationally, until 1999.

In 1987, the World Commission on Environment and Development published its report, *Our Common Future*, usually referred to as the Brundtland Report, after the chair of the Commission. The Commission called for sustainable development, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[4]

The Commission also recommended a comprehensive global conference on environment and development.[5]

In 1989, the United Nations General Assembly resolved to hold the United Nations Conference on Environment and Development (UNCED). The mandate of the conference was "to devise integrated strategies that would halt and reverse the negative impact of human behaviour on the physical environment and promote environmentally sustainable economic development in all countries".[6]

As we all know, the conference was held in Rio de Janeiro in 1992 and is often referred to as the "Earth Summit".

In 1991, the International Union for the Conservation of Nature and Natural

Resources, the United Nations Environment Programme and the World Wide Fund for Nature prepared and published *Caring for the Earth: A Strategy for Sustainable Living* which was intended to update an earlier document, the *World Conservation Strategy*.[7] One recommendation was that the national legal system implement the principles of ecologically sustainable development (ESD).[8]

In summary, the principles of ESD are:

> the precautionary principle;
> intergenerational equity;
> conservation of biological diversity; and
> ecological integrity, and improved valuation, pricing and incentive mechanisms (the polluter pays principle).

They were novel concepts formulated by environmental ideologues with specific *political* objectives.

Meanwhile, in Australia, there was work to move from the *National Conservation Strategy for Australia* to a *National Strategy for Ecologically Sustainable Development*.[9] In mid-1990, a discussion paper, "Ecologically Sustainable Development", was released. Nine working groups on ESD were established to investigate the possibility of introducing sustainable development policies for each major economic sector. The working groups reported their findings at the end of 1991.

In mid-1992, the *Draft National Strategy for Ecologically Sustainable Development* was published and public submissions invited.

In May 1992, the Commonwealth, all State and territory governments, and the Australian Local Government Association, met and agreed upon the *Intergovernmental Agreement on the Environment* (IGAE).[10]

Under the IGAE, the three levels of government agreed that development and implementation of environmental policy and programs by all levels of government should be guided by the considerations and principles that related to ESD.

Governments of 172 countries participated in the Rio Conference in June 1992. The international instruments signed at the conference included the Rio Declaration on Environment and Development, Agenda 21, and, more importantly for present purposes, the Biodiversity Convention and the Climate Change Convention. Australia signed and later ratified both conventions, which included the principles of ESD.

By December 1992, the National Strategy for ESD was launched in Australia and adopted by the Commonwealth, States and territories.[11]

Within a matter of about five years, environmental ideologues had succeeded in having principles of ESD incorporated into international conventions, and into the framework for the making of domestic law in Australia at the national, State, territory and local government levels, without any real scrutiny of what those principles meant and what their consequences would be.

The *Environmental Protection and Biodiversity Conservation Act* 1999 (*EPBC Act*)

Dr Sharman Stone, Parliamentary Secretary and Liberal member for Murray in the House of Representatives, read the second reading speech introducing the EPBC bill. On Tuesday 29 June 1999 she was representing Senator Robert Hill, the Minister for the Environment and Heritage. Dr Stone said:

The Environment Protection and Biodiversity Conservation Bill 1999 is perhaps the most significant legislation dealing with environmental issues that has ever been presented to the Commonwealth parliament. The bill represents the only comprehensive attempt in the history of our federation to define the environmental responsibilities of the Commonwealth. It proposes the most fundamental reform of Commonwealth environmental law since the first environment statutes were enacted by this parliament in the early 1970s.

. . . . . .

The bill will replace five existing Commonwealth acts . . .

The bill will establish a new legislative framework to overcome the deficiencies of the existing regime and to allow Australia to meet the environmental challenges of the 21st century with renewed confidence. The bill will promote, not impede, ecologically sustainable development and will conserve biodiversity. The bill will ensure the Commonwealth is equipped to deal with current and emerging environmental issues in accordance with contemporary approaches to environmental management.

. . . . . .

The bill introduces a new and more efficient assessment and approval process that applies to actions which are likely to have a significant impact on the Commonwealth marine area; world heritage properties; Ramsar wetlands of international importance; nationally threatened species and ecological communities; and internationally protected migratory species.

Some Provisions of the *EPBC Act*

The objects of the Act are set out in section 3. They are:

(a) To provide for the protection of the environment that are matters of national environmental significance;
(b) To promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
(c) Promote the conservation of biodiversity;
(d) To assist in the co-operative implementation of Australia's international environmental responsibilities.

Section 3A of the Act defines the principles of ESD:

The principles of ecologically sustainable development are:

(a) Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations
(b) If there are threats of serous or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (the precautionary principle)
(c) The principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations (inter-generational equity)
(d) The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making
(e) Improved valuation, pricing and incentive mechanisms should be promoted

(the polluter pays principle).

Section 391 provides that the Minister must consider the precautionary principle in making a wide range of decisions under the Act. Section 136 requires that the principles of ecologically sustainable development must be taken into account when considering environmental assessments and approvals.

Section 528 sets out a general list of definitions. Biodiversity is defined to mean the variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and includes diversity within species and between species; and diversity of ecosystems.

Environment includes ecosystems and their constituent parts, including people and communities; and natural and physical resources; and the qualities and characteristics of locations, places and areas; and the social, economic and cultural aspects of each of those things previously mentioned.

The scheme of the *EPBC Act*

Following is a brief outline of the scheme of the Act. It provides for the listing and managing of World Heritage properties and Ramsar wetlands. It sets out a regulatory scheme for approvals for actions that have a significant impact on the environment in various contexts including in declared World Heritage and Ramsar wetland areas, and on listed threatened species or endangered communities.

The Act deals comprehensively with the conservation of biodiversity, that is, listed threatened species, threatened ecological communities, threatening processes, and critical habitat, which is habitat critical to the survival of a species.

It establishes a threatened species scientific committee and a biological diversity advisory committee to advise the Minister.

The Act provides controls for access to biological resources, which include genetic resources, organisms, parts of organisms, populations and any other biotic component of an ecosystem with actual or potential use or value for humanity. It permits the provision of aid for conservation of species in foreign countries if the species is covered by international agreements to which Australia is a party.

There are provisions for establishing and managing biosphere reserves, which means an area designated for inclusion in the World Network of Biosphere Reserves by the International Co-ordinating Council of the Man and the Biosphere program of the United Nations Education, Scientific and Cultural Organisation.

The question of language

Building on an environmental movement that had evolved from the publication of Rachel Carson's book, *Silent Spring*, in 1962, environmentalists had succeeded in incorporating ESD principles into the Biodiversity and Climate Change Conventions at the Rio Conference and into the mechanisms for making Australian domestic law at all levels in 1992.

Within about ten years of that success, the environmental movement had succeeded in popularising the phrase, "ecologically sustainable development", or the abbreviated version, "sustainable development", so that it had become the only kind of development any "right thinking" individual would embrace. Everyone wanted to save "the environment", that is, the natural environment, excluding mankind. The extreme development of the popular embrace of environmentalism is the branding of those

who do not "believe" in anthropogenic climate change as "sceptics" or "denialists", who are either ignored or ridiculed if they manage to appear in the media.

The principles of ESD were novel and the terminology vague. They were developed at an international level. They are now what are often referred to as "international norms". Consequently, their interpretation in Australian courts has been, and is likely to be in the future, strongly influenced by the large body of international academic writing and international jurisprudence which is developing around them principally from those of an activist bent.

In *Telstra Corporation Ltd v Hornsby Shire Council* in 2006, Chief Justice Preston of the Land and Environment Court of New South Wales set out his interpretation of the precautionary principle.[12] Before doing so he comprehensively surveyed the extensive body of international academic writing and jurisprudence on the principles of ESD, the latter extending from the European Court of Justice to the Supreme Court of Pakistan.

In a speech in 2009, His Honour talked about his interpretation of the precautionary principle in that case.

Bear in mind that the precautionary principle in the legislation he considered was in terms similar to the definition in the EPBC Act, that is, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. His Honour said:

> The precautionary principle has work to do. I endeavoured to explain how the precautionary principle works in my judgment in *Telstra Corporation Ltd v Hornsby Shire Council*. In essence, the principle operates to shift the evidentiary burden of proof as to whether there is a threat of serious or irreversible environmental damage. Where there is a reasonably certain threat of serious or irreversible damage, the precautionary principle is not needed and is not invoked. The principle of prevention, one of the ESD principles, would require the taking of preventative measures to control or regulate the relatively certain threat of serious or irreversible environmental damage. . . . But where the threat is uncertain, past practice had been to defer taking preventative measures because of that uncertainty. The precautionary principle operates, when activated, to create an assumption that the threat is not uncertain but rather certain. Hence, if there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty, the precautionary principle will be activated. A decision-maker must assume that the threat of serious or environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not, in fact, exist or is negligible effectively reverts to the proponent of the project. If the burden is not discharged, the decision-maker proceeds on the basis that there is threat of serious or irreversible environmental damage and determines what preventative measures ought be taken. The decision-maker is in the same position as if there had been a relatively certain threat of serious or irreversible damage.

His Honour applied that formulation of the precautionary principle in *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited*.[13] The proposed development was a limestone quarry. His Honour found that there was uncertainty as to the presence of karst features, caves and cave dwelling fauna called stygofauna. His Honour found there was a relevant threat which had the

requisite degree of uncertainty. Therefore, he proceeded on the basis that the threat was certain and imposed conditions of consent addressing that threat.

His Honour's interpretation of the precautionary principle distorts the process of environmental assessment in favour of the environment over social and economic considerations. The application of the precautionary principle has provided the momentum to the International Panel on Climate Change (the IPCC) in the climate change debate. The formulation of the principle relied on by the IPCC is a less powerful formulation than that enunciated by Justice Preston. If His Honour's formulation of the principle is applied, it will be very powerful indeed.

The Murray-Darling Basin

The *Water Act* provides for allocation of water in the Murray-Darling Basin between the environment and human use. The *Water Act* makes the environment paramount. The first point is that Ramsar wetland listings are not confined to natural wetlands. This is very important in current debate about the Murray-Darling Basin. The Lower Lakes in South Australia, Lake Alexandrina and Lake Albert, are Ramsar listed. They are fundamental to the demand of environmentalists and the SA Government for 4 000 megalitres to flow to the end of the river system. The Lower Lakes are an artificial, manmade, freshwater wetland, resulting from construction in the 1930s of seven kilometres of barrages or sea dykes. There is no longer a Murray River estuary. The Southern Ocean no longer flows in. The European carp, a pest, has thrived. Anyone who seeks to question the rationale for maintaining that artificial freshwater environment is beyond the pale – either ignored or demeaned.

No threat of a constitutional challenge by any of the States has been foreshadowed. South Australia is threatening High Court proceedings. If it proceeds, the challenge will be because the Murray-Darling Basin Plan does not comply with the *Water Act*. Issues that may arise include whether the precautionary principle and the obligations under the Climate Change Convention have been properly taken into account.

Conclusion

I am critical of the majority decision in the *Tasmanian Dam case* for the following reasons.

> it has increased the Federal Government's power to legislate in matters previously the domain of the States, and has altered the balance of power between the Federal and State governments;
>
> the development of globalism means that it is difficult to imagine any subject matter that will remain "domestic", as Sir Harry Gibbs used that term in the *Tasmanian Dam case;*
>
> international environmental conventions such as the Biodiversity and Climate Change conventions were designed by environmental ideologues to further their political objectives; there has been little or no scrutiny of the concepts in the conventions or their consequences;
>
> the concepts in the conventions were novel and their interpretation in Australian courts has been and is likely to be influenced by the large body of mostly activist international academic writing and jurisprudence which is developing around them and which, as a consequence, diminishes Australia's sovereignty;

finally, the change in constitutional responsibilities has had significant budgetary consequences for the Commonwealth. I would suggest that if the carbon tax and other measures relating to climate change, including renewable energy targets and associated schemes, had not been enacted, the National Disability Insurance Scheme would have been affordable several times over.

Endnotes

1. [1944] HCA 36; (1944) 69 C.L.R. 457, at 471.

2. [1948] HCA 7; (1948), 76 C.L.R. 1, at 184-5.

3. *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 at 100.

4. At 44.

5. *Ibid*., at 387.

6. *Earth Summit Agenda 21: The United Nations Programme of Action from Rio*, United Nations Department of Public Information, New York: 1992 at 3.

7. International Union for the Conservation of Nature and Natural Resources/ United Nations Environment Programme/World Wide Fund for Nature.

8. *Ibid*., at 68.

9. *National conservation strategy for Australia: living resource conservation for sustainable development: proceedings of the national seminar, Canberra, 30 November-3 December 1981.*

10. http://www.environment.gov.au/about/esd/publications/igae/index.html

11. http://www.environment.gov.au/about/esd/publications/strategy/index.html

12. (2006) 67 NSWLR 256; (2006) 146 LGERA 10.

13. [2010] NSWLEC 48 (31 March 2010).