

AVENUES FOR SETTLEMENT OF CONFLICT OVER THE DIVISIONS OF
STATE/COMMONWEALTH ENVIRONMENTAL POWERS

BACKGROUND

The conflict over the division of State-Commonwealth environmental powers stems from different interpretations of the Australian Constitution. The basis for such conflict is the Commonwealth's (and wide public) perception that most States, for purely short-term economic reasons, tend to favour development at the expense of conservation.

When State environmental issues are significant enough to be of "national interest" the Commonwealth sometimes intervenes. The Commonwealth obviously sees some short-term electoral advantage in chasing the "green vote" (eg Wesley Vale, Coronation Hill). Thus, the issues become highly political.

The Commonwealth has no direct Constitutional powers over resource development and environmental protection, but uses many indirect powers. The broad extent of these powers is shown at Attachment 1. It is to be noted that the majority of the Commonwealth's powers over resource development can be, and often are, used negatively to prevent development. They can be applied either at a general (climatic) level (eg RRT) or at a specific (geographical/commodity) level (eg Fraser Island).

Apart from taxation and fiscal policy issues, the powers which have the greatest potential to conflict with State development objectives concern export licences, foreign investment, international treaties and aboriginal heritage. To date, the Commonwealth's "aboriginal" powers have been applied only in the Northern Territory.

REFERENDUM

The Prime Minister announced in his July 1989 environmental statement "Our Country Our Future" the possibility of a national referendum "addressing the Constitutional powers of the Commonwealth over the environment (p 10).

However, in the present climate of Commonwealth-State differences of view over resource development and environmental controls it is likely that very few States would support such a referendum. The history of Constitutional amendment by referendum is such that any referendum question which does not enjoy bi-partisan support at the Commonwealth and State level and, on State-related issues, also has the support of the majority of State governments, is not likely to succeed. Therefore, at this point in time the broadening of the Commonwealth's environmental powers by Constitutional referendum is probably not a realistic option.

TREATIES

The Commonwealth has been, and will probably continue to be more successful in centralising environmental controls through international treaties, such as the Law of the Sea and the World Heritage Convention. It is possible that Fraser Island and Cape York could be nominated for World Heritage listing. Future treaties could very well cover the control of greenhouse gas emissions, national parks, and aboriginal lands. The 1982 Premier's Conference agreed on "Principles and Procedures for Commonwealth-State Consultation on Treaties" which require the Commonwealth to consult with the States before signing an international treaty. However, there is no guarantee that the Commonwealth will heed State views and, in view of the Commonwealth's refusal to press for the insertion of "federal clauses" in treaties, it is likely that State interests will be further eroded through this mechanism.

MOU

All states except Queensland have signed a Memorandum of Understanding (MOU) with the Commonwealth regarding approvals required under the Environment Protection (Impact of Proposals) Act (Com). It is believed that the Queensland Minister for Environment and Conservation is presently negotiating an MOU with his federal counterpart.

The purpose of an MOU is to lay down guidelines for the preparation of a single environmental impact assessment study report on projects which require some Commonwealth decision (such as foreign investment, national estate, export licence) which will satisfy both State and Commonwealth IASR requirements.

The "natural resource" departments, such as the Department of Mines, are not involved in the MOU negotiations.

ANALYSIS

The initiative rests with the Commonwealth to intervene in State environmental and resource matters. Although its Constitutional powers are indirect, they are effective in preventing development. However, the Commonwealth does not have the machinery to seek a balance between conservation and development (as required by the National Conservation Strategy for Australia) in the manner of the States' development regimes. The States' primary powers over land management, particularly resource development and environmental protection, provide the flexibility to facilitate balanced development.

Conflict between State and Commonwealth governments over environmental issues is counterproductive. It adds costs, delays and uncertainties to projects and is a disincentive to investment. However, on environmental controls the States must "lift their game" and encourage industry to do likewise. There must also be a concerted attempt to change the public's perception of State and industry environmental attitudes. Only then will the States be in a position to argue successfully with the Commonwealth over the division of environmental powers.

Political commentators generally agree that the settlement of State-Commonwealth conflicts over environmental powers requires a political, not an administrative solution. Thus, the Resource Assessment Commission may inject greater rationality into the resource development and environmental protection debate and reduce developer-environmentalist conflicts on particular profits or strategies; but it is unlikely to resolve State-Commonwealth conflicts which are political in nature. Nevertheless, States should try to gain maximum advantage from RAC enquiries, particularly on coastal zone issues and future world heritage nominations.

SOLUTION

The answer to Commonwealth-State conflict over environmental issues on resource development lies in convincing the Commonwealth, through co-operation, negotiation and example, that Commonwealth intervention is unnecessary. This can take place through existing mechanisms such as:

- . MOU's;
- . Ministerial Councils; and
- . the Resource Assessment Commission.

It would first be essential, however, for each State to articulate an integrated development and conservation strategy.

In the longer-term the States could attempt to negotiate a Resource Constitutional Settlement with the Commonwealth, based on the successful Offshore Constitutional Settlement, whereby, subject to an agreed set of environmental and resource development guidelines, the Commonwealth would agree not to intervene in State environmental affairs and would use its Constitutional powers (such as foreign investment and export controls) for the prescribed purposes only. In return the States would adhere to the environmental guidelines in all resource project approvals and agree not to raise questions of environmental jurisdiction.

CONSTITUTIONAL HEADS OF POWER BY WHICH THE COMMONWEALTH MAY ATTEMPT TO CONTROL ASPECTS OF MININGATTACHMENT 1

| <u>Section</u> | <u>Power</u> | <u>Application</u> | <u>Cases</u> |
|----------------|-------------------------|--|---------------|
| *51(1) | Trade and Commerce | to control exports, marketing or foreign investment; | Murphyores |
| *51(2) | Taxation | to achieve indirect regulation of mining through taxation (including RRT) and subsidies; | |
| 51(3) | Bounties | to aid production or export of goods; | |
| *51(6) | Defence | total control during national hostilities/emergencies, and peacetime control of strategic minerals as an element in defence capability (Snowy Mts Scheme, Atomic Energy Commission); | |
| 51(9) | Banking | to control the business of banks and domestic money flow; | |
| 51(10) | Currency | to regulate foreign exchange and import/export of capital; | |
| *51(20) | Corporations | by preventing a foreign or domestic company from mining, or by fixing prices; | Tasmanian Dam |
| *51(26) | Race | to protect aboriginal heritage, land use and relics; | |
| *51(29) | External Affairs | to protect offshore areas to comply with international treaties; | Tasmanian Dam |
| 51(31) | Acquisition of Property | compulsory acquisition by the Commonwealth of State lands, including minerals; | |

| <u>Section</u> | <u>Power</u> | <u>Application</u> | <u>Cases</u> |
|----------------|--------------------|--|--------------|
| 51(39) | Indicental Matters | to regulate activities with an "implied" national flavour; | |
| 81 | Appropriation | | |
| 90 | Customs and Excise | to levy duties; | |
| 96 | State Grants | by imposing conditions on grants of funds to the states; | |
| 109 | Concurrent | Commonwealth law overrides inconsistent State Law; | |
| 122 | Territories | used to control uranium mining in NT. | |

(* commonly used to control mining)