Commonwealth power and environmental management: Constitutional questions revisited

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The Australian Constitution does not provide the Commonwealth with an express power to regulate or spend money on environmental management. Despite this, it has been asserted that Commonwealth power is so extensive as to enable it to exercise control over almost any environmental subject. This article tests such claims. It does so by examining the ambit of the federal legislative and spending powers. It concludes that the potential scope of federal authority over environmental matters has been overstated, especially in light of recent High Court decisions.

INTRODUCTION

Australia faces a range of pressing public policy challenges related to the environment. Examples include climate change, management of water in the Murray-Darling Basin, environmental degradation and mitigating the effects of population and economic growth. In 2011, the independent experts comprising the State of the Environment Committee stressed that, to deal with such challenges, Australia must adopt an integrated approach to environmental management in which the Commonwealth assumes a leadership role:

[T]he Australian Government has an important role to play in environmental management. This role is leadership – partly through the government’s own actions and partly through national coordination. This leadership extends to priority setting, funding and handling of policy on national issues; information gathering and sharing; and coordination of programs, guidelines and standards … The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.3

Questions arise, however, as to the extent to which the Commonwealth is constitutionally capable of assuming such a role, let alone primary responsibility for environmental management.

Australia has a federal structure that fragments power between the Commonwealth and the States. The Australian Constitution outlines the powers of the federal legislature and Executive, and provides that laws made by the federal Parliament override inconsistent State laws.4 However, the Commonwealth cannot regulate matters that fall outside the scope of its authority. The States, on the other hand, possess a wide, general power to legislate on almost any subject within their borders.

This constitutional framework creates uncertainty about where the responsibilities of the respective Australian governments lie with respect to environmental management. The text of the Constitution does little to clarify matters. It does not confer an express power to make laws with

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3 State of the Environment 2011 Committee, p 9 (Summary).

4 Constitution, s 109.
respect to the environment on the Commonwealth. This reflects the fact that, in the lead-up to federation, environmental protection and conservation were not regarded as significant issues in the way that they are today.

Despite the absence of an express power over environmental matters, it is clear that the Commonwealth has extensive capacity to legislate and direct outcomes in the area because its powers over other matters can be directed to that end. Examples include the external affairs power in s 51(xxix), the corporations power in s 51(xx) and the taxation power in s 51(ii) of the Constitution. The High Court typically interprets these powers broadly. The result is that grants of Commonwealth power apparently having nothing to do with environmental management have come to confer greater law-making capacity on the federal Parliament than the text of the Constitution might suggest.3

In fact, following the landmark decision in Commonwealth v Tasmania (1983) 158 CLR 1 (Tasmanian Dam Case), commentators have tended to describe Commonwealth power over environmental regulation in very broad terms. For instance, in 1991, James Crawford argued that the Commonwealth had come to have “one way or another, legislative power over most large-scale mining and environmental matters”. More recently, others have suggested that “the Commonwealth’s capacity to engage in environmental protection and conservation is extensive almost to the point of being plenary”.7 It has been further suggested that Commonwealth powers are generally sufficient to enable it to deal with “matters of major environmental significance anywhere within the territory of Australia”.8 Where the Commonwealth has not sought to legislate for a subject by itself, but has dealt with environmental matters through cooperation with the States, it has been suggested that this is a consequence of politics rather than of insufficient constitutional power.9

This article tests claims that Commonwealth power over the environment is broad, and indeed sufficient to allow for national leadership with respect to the management of key challenges. The analysis proceeds in two parts. The first part of the analysis examines the powers that provide the broadest support for federal environmental regulation, as well as the most significant limitations on the exercise of those powers. The second part examines the extent to which the Commonwealth may assume a leading role in environmental management via the use of its spending powers.

COMMONWEALTH LEGISLATIVE POWERS
As many commentators have noted, the fact that the Australian Constitution makes no direct reference to the environment is unsurprising given that it was drafted over a century ago.10 As Peter Johnston states, “the concept of environmental protection and conservation, and indeed environmental law as a separate discipline, was unknown as a generic concept when federation of the colonies was being considered”.11 Despite this, the Australian constitutional framework has evolved in such a way that the federal government’s capacity to enter this field is now well-established.

Central to this evolution is the High Court’s landmark decision in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 (Engineers Case), which established that

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6 Crawford, n 5, p 30.
7 Johnston, n 5, p 102. In a similar vein, Jacqueline Peel and Lee Gordon have written that “the Commonwealth is only just shy of achieving a plenary environmental power”: Peel J and Gordon L, “Australian Environmental Management: A ‘Dams’ Story” (2005) 28 UNSWLJ 668 at 675.
11 Johnston, n 5, p 79.
the Commonwealth’s legislative powers in s 51 of the Constitution should be interpreted in a full and plenary fashion, without regard to any impact this may have on State jurisdiction. Consistent with this, the High Court has tended to adopt a generous approach to the scope of each head of power, stating for example that they should be construed “with all the generality which the words used admit”. This reflects the dicta of O’Connor J in Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309 that judges should remember that they are interpreting a Constitution that is “broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve”. The result of applying such approaches across a number of cases has been to effect a significant centralisation of legislative authority. This has allowed the Commonwealth to legislate on subjects that were thought at federation to have been the province of the States, including the topic of environmental management.

The Commonwealth has a diverse range of powers which it may draw on to provide support for legislation that pertains to the environment. Examples include: the external affairs power in s 51(xxxix); the corporations power in s 51(xx); the taxation power in s 51(ii); the trade and commerce power in s 51(i); the quarantine power in s 51(ix); the races power in s 51(xxvi); the power to acquire property on just terms in s 51(xxxi); the power to enact laws on matters referred by one or more States in s 51(xxxvii); and the territories power in s 122. Indeed, almost every one of the Commonwealth’s powers listed in ss 51 and 52 of the Constitution has the potential to touch upon issues of environmental concern.

Three of the most significant avenues by which the Commonwealth may exert control over the environment are examined below: the external affairs power, the corporations power and the taxation power. Each has the potential to support significant, wide-ranging federal legislation on environmental matters. However, these powers, while wide, are not unbounded, and their limitations affect the manner in which regulation of the environment may be achieved at a federal level. This article analyses, for each power, both the scope of Commonwealth authority as well as the limits that apply, with an emphasis on the practical ramifications of these limitations with respect to current environmental challenges.

**External affairs power**

The power in s 51(xxxix) of the Constitution over external affairs is perhaps the most obvious potential source of Commonwealth power with respect to the environment. The considerable breadth of the power was confirmed in the landmark Tasmanian Dam Case in 1983, in which the High Court upheld Commonwealth legislation that blocked the construction of the Franklin Dam in a World Heritage listed area.

There are four limbs to the external affairs power. It allows the Commonwealth to legislate with respect to: relations with other countries; matters external to Australia; the implementation of obligations incurred under treaties to which Australia is a signatory; and, potentially, the implementation of international law obligations other than those that arise through treaties.

The treaty implementation limb of the external affairs power is most relevant to the Commonwealth’s capacity for environmental regulation. It enables the federal Parliament to pass

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12 R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207 at 225.

13 Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309 at 367-368.

14 Kildea and Williams, n 1 at 602.

15 See, eg R v Sharkey (1949) 79 CLR 121; New South Wales v Commonwealth (1975) 135 CLR 337 (Seas and Submerged Lands Case).


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legislation for the implementation of any treaty entered into by the Executive. There are over 100 treaties currently in force relating to the environment to which Australia is a signatory. These treaties span a broad range of subjects, including: climate change; the conservation of particular natural resources;19 the protection of plants,20 wildlife21 and biodiversity;22 the protection of areas of cultural or natural heritage value;23 and the prevention of pollution.24 Thus, the capacity to implement treaties in reliance on the external affairs power considerably expands the scope of federal power over environmental regulation, allowing the Commonwealth to legislate on matters that otherwise would be outside its competence.

In the 1980s, the treaty implementation limb of s 51(xxxix) provided the foundation for three separate pieces of legislation implementing the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) 1037 UNTS 151; 11 ILM 1358; [1975] ATS 47 (World Heritage Convention), each of which faced – and withstood – constitutional challenge.25 This limb of the power also serves as a basis for a number of additional statutes relating to sites of World Heritage listing,26 as well as legislation such as parts of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (which establishes areas that have been the subject of treaties as matters of “national environmental significance” and places these areas within Commonwealth control) and the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) and other statutes27 aimed at reducing carbon emissions (thereby implementing obligations under the United Nations Framework Convention on Climate Change (1992) 1771 UNTS 107; 31 ILM 849; [1994] ATS 2 (UNFCCC)28 and its Kyoto Protocol).29

The external affairs power certainly provides significant scope for federal environmental regulation. On the other hand, its importance can be overstated, as the power also contains significant limits to its flexibility and utility. The first point worth noting is that use of this limb of the power depends upon the existence of a treaty that Australia has signed and ratified and that imposes binding obligations upon ratifying countries. The process of states reaching agreement on obligations they are prepared to be bound by can be time-consuming, and it is not uncommon for agreement on a treaty that is capable of implementation to be reached years after the problem at which it is directed has been identified. For example, the UNFCCC was opened for signature in 1992, and was signed by 152 states that year. However, the Convention itself imposes no binding obligations on state parties that are enforceable under international law, or constitutionally capable of implementation under s 51(xxxix). Instead, it establishes a framework for the future negotiation of specific protocols, which may set binding limits on the greenhouse gas emissions of signatories. The only protocol to have been made

23 See, eg Convention for the Protection of the World Cultural and Natural Heritage (1972) 1037 UNTS 151 (entered into force 17 December 1975).
27 See, eg Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth).
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pursuant to the UNFCCC – the Kyoto Protocol – was not adopted until 1997, and only entered into force in 2005. Prior to this point, the Commonwealth could not draw on the external affairs power to support a law directed at combating climate change.

In the case of climate change, it was not merely the time-consuming nature of arriving at a binding international agreement that delayed the availability of constitutional power to pass Commonwealth legislation. Although the Kyoto Protocol entered into force in 2005, Australia did not ratify the agreement until 2007, following the election of the Rudd government. This meant that for two years after the Kyoto Protocol entered into force, Australia was neither bound by the agreement’s obligations, nor constitutionally capable of implementing them in domestic law.

As this example illustrates, even if the political will to legislate proactively on the topic of climate change had existed, the external affairs power would not have provided an immediate basis for such legislation. Thus, while the treaty implementation limb of s 51(xxix) does often serve as a source of Commonwealth constitutional power to legislate on environmental matters, it may not serve as an early source of such power. Indeed, the power may be of limited utility in providing a foundation for the Commonwealth to assume a proactive, early leadership role in environmental management.

Second, the treaty that the statute seeks to implement must embody precise obligations that are capable of implementation. Thus, in Victoria v Commonwealth (1996) 187 CLR 416 (Industrial Relations Act Case), a joint judgment of five members of the High Court held that “there may be some treaties which do not enliven the legislative power conferred by s 51(xxix) even though their subject matter is of international concern”. 30 This means that international agreements that are purely aspirational in nature will not be candidates for implementation. As noted, an example is the UNFCCC, which has the objective of “stabilis[ing] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”, but which – in contrast to the later Kyoto Protocol – creates no binding limits on greenhouse gas emissions, and no enforcement mechanisms. Accordingly, while legislation such as the Carbon Credits (Carbon Farming Initiative) Act is presented as an implementation of both the UNFCCC and the Kyoto Protocol, 32 it is only the obligations in the latter treaty that enable the external affairs power to be applied as a source of constitutional support.

A related point is that in order to enliven the external affairs power a treaty must prescribe the obligations incumbent upon states with specificity. In the Industrial Relations Act Case, the joint judgment stated:

When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal.

The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states. 33 Precisely what level of specificity is required remains unclear. In Pape v Federal Commissioner of Taxation (2009) 238 CLR 1; [2009] HCA 23 (Pape), Heydon J held that an agreement reached by participating nations in the G-20 Declaration of the Summit on Financial Markets and the World Economy to “[u]se fiscal measures to stimulate domestic demand … as appropriate, while maintaining a policy framework conducive to fiscal responsibility” was “no more than aspirational”, and did not create specific obligations incumbent upon Australia. 34 However, Heydon J was one of only three judges in Pape who considered the external affairs power, so his comments do not form part of the

32 See Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth), s 3(2).
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ratio of the case. Moreover, Heydon J regarded the G-20 Declaration, in contrast to the “solemn treaty” examined in the *Tasmanian Dam Case*, as falling “more into the genre of public relations than the genre of treaties”.35

The requirement for “sufficient specificity” raises questions about whether a number of treaties relating to the environment that Australia has signed qualify as candidates for implementation in reliance on the external affairs power. Particular questions are raised, for instance, with respect to “cooperation agreements”, which are typically relatively non-specific in terms of obligations imposed upon state parties. For example, the *Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region* [1990] ATS 32 imposes broad and qualified obligations upon states parties, such as to “within their respective capabilities, cooperate in taking all necessary measures for the protection of the South Pacific region from the threat and effects of pollution incidents”,37 and to “within their respective capabilities, establish and maintain, or ensure the establishment and maintenance of, the means of preventing and combating pollution incidents, and reducing the risk thereof”.38

Third, as the joint judgment affirmed in the *Industrial Relations Act Case*, where a treaty does enliven the external affairs power, a law that seeks to implement it must be “reasonably capable of being considered appropriate and adapted to implementing the treaty”.39 The means via which the treaty is implemented may be chosen by Parliament. However, if those means are not able to be viewed in the required way – eg because they go beyond what is required by the treaty – the law will fall beyond the scope of what is authorised by s 51(xxix).40

The requirement that laws made under the treaty implementation limb of the external affairs power must be “reasonably capable of being considered appropriate and adapted” to implementing specific obligations in a treaty places an important limit on the manner in which the Commonwealth may assume responsibility for environmental management. It has the effect of significantly reducing the flexibility available to the Commonwealth when drawing on the external affairs power to support environmental legislation. This is particularly so where the obligations in the treaty in question are narrowly drafted.

For example, the Commonwealth enacted the *Water Act 2007* (Cth) – the most extensive Commonwealth intervention into water resource management since federation. The Act brought the Murray-Darling Basin under Commonwealth management, with the object of remediating the over-allocation of water from the Basin. It provided for the development of a Basin Plan imposing legal limits on the amount of water that could be taken from the Basin.

The Commonwealth government had hoped that the *Water Act* would be supported by a referral of power by all affected States to the Commonwealth. However, as Victoria initially refused to refer its powers, the Commonwealth was forced to enact the *Water Act* predominantly in reliance on the treaty implementation limb of s 51(xxix).41 This restricted the legislative choices available to the Commonwealth Parliament. For instance, while the Murray Darling Basin Authority – the body charged with managing the Basin’s water resources – was empowered to take into account social and

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38 *Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region* [1990] ATS 32, Art 3.2. Article 3.2 also provides that: “Such means shall include the enactment, as necessary, of relevant legislation, the preparation of contingency plans, the development or strengthening of the capability to respond to a pollution incident and the designation of a national authority responsible for the implementation of [the] Protocol.”
economic factors in conjunction with environmental factors, the environmental considerations had to take precedence. This was regarded as necessary to preserve a faithful implementation of the treaties which the legislation drew on for support.42

Had a referral of power taken place, the Commonwealth could have had the flexibility of attributing greater weight to the social and economic factors, and potentially other considerations. This illustrates that where the existence of an environmental protection treaty provides the source of Commonwealth power over an issue, the Commonwealth’s capacity to exercise its own judgment to determine what other factors warrant attention may be limited. This can leave Parliament with a relatively narrow window of discretion when it is seeking to pass legislation implementing a treaty. Indeed, if the treaty does not impose obligations that correspond with the policies of the government, then the power may not be of any assistance at all.

Corporations power

Another broad power that the Commonwealth may draw on to enact legislation with respect to the environment is the corporations power in s 51(xx) of the Constitution. Section 51(xx) provides that the Parliament may make laws with respect to foreign corporations and “trading and financial corporations formed within the limits of the Commonwealth”. Together, these three types of corporations are known as “constitutional corporations”.

The modern incarnation of the corporations power began with Strickland v Rocla Concrete Pipes Pty Ltd (1971) 124 CLR 468, in which the High Court recognised that s 51(xx) at least gives the Commonwealth the power to regulate the trading and financial activities of corporations formed under Australian law, as well as all the activities within Australia of foreign corporations. A series of broad, but inconclusive, readings of this head of power followed, culminating in the High Court’s decision in New South Wales v Commonwealth (2006) 229 CLR 1; [2006] HCA 52 (Work Choices Case). In that decision, the High Court held that the scope of s 51(xx) is extremely wide in extending to:

- the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.43

The decision in the Work Choices Case confirmed that the corporations power could be used to regulate industrial matters insofar as they are related to constitutional corporations. There is nothing special about industrial relations that limits the ambit of the power to that context. The wide scope of the power could equally be applied to regulate constitutional corporations in regard to environmental issues, such as where those corporations engage in irrigation, or where they generate carbon emissions. The power could be used, for example, to require corporations to adopt certain land management practices or to desist from behaviours that pollute the environment.

The Commonwealth can also apply s 51(xx) to regulate some State government authorities on the basis that they would be classified as trading corporations (eg the Tasmanian Hydro-Electric Commission was so classified in the Tasmanian Dam Case). This increases its capacity to regulate some environmental issues. For instance, in the case of water management, the implementation of the National Competition Policy in the 1990s saw the restructuring of many State monopoly agencies, with responsibility for water resources management given to regulatory bodies, and responsibility for waters services delivery given to newly corporatised government enterprises. The latter would be considered constitutional corporations, and thus be subject to Commonwealth regulation. In his dissenting judgment in the Work Choices Case, Kirby J identified land and water conservation as areas

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42 Kildea and Williams, n 41.
that might, following the majority’s decision, fall under federal control.\(^{44}\) Entities potentially subject to Commonwealth regulation include the Sydney Water Board, Melbourne Water and the South Australian Water Corporation.

The corporations power can provide a supplementary source of power for laws passed in reliance on the other powers. For example, in the Tasmanian Dam Case the corporations power was held, by a majority of the High Court, to provide support for the World Heritage Properties Conservation Act 1983 (Cth) on the grounds that the Hydro-Electric Commission – the Tasmanian statutory body in charge of building the Franklin Dam – was a constitutional corporation that could be regulated under s 51(xx). The corporations power also provided supplementary support for provisions in the Water Act that required constitutional corporations to comply with the Basin Plan and a water resource plan, to observe the water charge rules and the water market rules, to provide water information, and to permit officials of the Murray-Darling Basin Authority to access their premises.\(^{45}\)

Section 51(xx) is also capable of serving as the primary source of power for environmental regulation. Examples of this include the National Greenhouse and Energy Reporting Act 2007 (Cth), which imposes reporting requirements on constitutional corporations that exceed prescribed emissions thresholds, and the Fuel Quality Standards Act 2000 (Cth), which makes it an offence for a constitutional corporation to supply fuel that does not meet a prescribed quality standard,\(^{46}\) or to alter fuel that has been made the subject of a quality standard.\(^{47}\)

While s 51(xx) is undoubtedly very wide in scope, there are uncertainties about its application that could affect the scope of the federal environment legislation enacted in reliance on the power. The greatest area of uncertainty surrounding s 51(xx) relates to the meaning of the term “trading or financial corporation”.\(^{48}\) Currently, courts decide this issue by looking at the activities in which a corporation engages. If it engages in trading or financial activities to a significant or substantial extent, the corporation will fall within the scope of the power.\(^{49}\) In the past, many not-for-profit corporations have been found to qualify as trading corporations by lower courts, including universities, private schools, local councils, public hospitals and utilities, childcare centres, community service providers and benevolent or charitable bodies such as the Red Cross or the RSPCA.\(^{50}\)

This might suggest, for example, that the water supply activities of local councils might be regulated by the Commonwealth under the corporations power. However, the status of local councils under s 51(xx) has recently been called into question,\(^{51}\) and certainty in this area can only follow a definitive statement by the High Court.

Even if such certainty is achieved, it will only mean that the power extends to bodies that are incorporated. This can affect policy outcomes with respect to environmental issues. For instance, there seems to be no policy reason why the reporting requirements imposed under the National Greenhouse and Energy Reporting Act, which was designed to target large scale emitters of greenhouse gases, should be confined to entities that qualify as constitutional corporations. If the Commonwealth had a more flexible source of legislative power with respect to the environment, it could pass legislation imposing the requirements in the Act on all entities that exceed the prescribed emissions threshold. Similarly, a more flexible power would allow the offences in the Fuel Quality Standards Act to apply

\(^{44}\) New South Wales v Commonwealth (2006) 229 CLR 1; [2006] HCA 52 (Work Choices Case) at 224 (Kirby J).


\(^{46}\) See Fuel Quality Standards Act 2000 (Cth), s 12.

\(^{47}\) See Fuel Quality Standards Act 2000 (Cth), s 20.


\(^{51}\) Australian Workers’ Union of Employees, Queensland v Etheridge Shire Council (2008) 171 FCR 102; [2008] FCA 1268.
to all persons, rather than only constitutional corporations. In each case, the inherent limitations of s 51(xx) preclude more comprehensive ways of pursuing the policy objectives underpinning the legislation.

A further complication is that it remains possible for businesses and other bodies that qualify as constitutional corporations to escape the reach of laws passed under s 51(xx) by changing their legal status. For example, in order to escape the coverage of federal industrial law upheld in the Work Choices Case, the Queensland Parliament removed the corporate status of local government bodies in Queensland (with the exception of the Brisbane City Council) by enacting the Local Government and Industrial Relations Act 2008 (Qld). A similar scheme could be applied to enable State corporations to escape the reach of environmental protection legislation applicable to constitutional corporations. Similarly, businesses may choose not to incorporate so as to avoid having to comply with federal environmental legislation enacted under the corporations power.

**Taxation power**

The taxation power in s 51(ii) of the Constitution is another power that provides a broad potential base for Commonwealth regulation of environmental issues. In many ways, the taxation power provides the most flexible source of constitutional power for federal legislation pertaining to the environment. In contrast to the external affairs power, it affords Parliament an open-ended discretion as to which environmental matters might be targeted. Unlike the corporations power, the power is not restricted to applying to constitutional corporations. The only pertinent restriction in s 51(ii) is that the power to make laws with respect to taxation cannot be used to “discriminate between States or parts of States”.

The flexibility inherent in s 51(ii) is demonstrated by the approach the High Court has taken to determining the meaning of “taxation” for the purposes of the power. The term has been broadly defined. There are various indicia which suggest that a particular scheme may qualify as a tax. These are not complete or exhaustive, and there is no definitive test that a scheme must meet in order to constitute taxation. While on one reading of the authorities, a tax must be collected for “public purposes”, it seems unlikely that such a requirement would prove problematic in the case of laws enacted to secure environmental regulation, given that the environment is, by and large, a public resource. Cases such as *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 suggest that the High Court would adopt a permissive approach to such questions.

In *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, the court made it clear that a law made under s 51(ii) may even be used to achieve purposes unrelated to taxation. That case involved a challenge to the *Training Guarantee (Administration) Act 1990* (Cth), which set out a minimum level of expenditure (calculated as a percentage of an employer’s annual national payroll) that employers should spend on employment-related training. The Act provided that an employer’s “training guarantee shortfall” in any year equalled the amount that an employer was required by the Act to spend on employment-related training, less the amount actually spent. Under the *Training Guarantee Act 1990* (Cth), the employer was liable to pay the amount of the “training guarantee shortfall” to the Commonwealth. It was clear that the scheme was not designed to raise revenue, as might be expected of a tax, but to provide an inescapable incentive for employers to spend a certain amount on training. The High Court upheld the law, indicating that the taxation power may be relied upon even where a non-revenue raising purpose is the primary objective of the law. In a joint judgment, Mason CJ and Deane, Toohey and Gaudron JJ stated that “the fact that revenue raising is merely secondary to the attainment of some other object or objects is not a reason for treating the

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52 In *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, Latham CJ held that a tax “is a compulsory exaction of money by a public authority for public purposes enforceable by law, and is not a payment for services rendered”. Later cases have affirmed the relevance of these indicia, but have not treated Latham CJ’s statement as a definitive test for determining whether a particular legislative scheme amounts to taxation: see, eg *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 466; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 500 (Mason, Brennan, Deane and Gaudron JJ).
charge otherwise than as a tax”.

The combination of these factors makes s 51(ii) a potentially very powerful source of Commonwealth legislative competence with respect to the environment. Despite this, the power is not used as extensively as might be thought. The barrier to its use is more political than legal: laws that impose new taxes are typically unpopular with electors. This is evidenced by the public reaction to the Gillard government’s Clean Energy Act 2011 (Cth), commonly known as the “carbon tax” law. It is, in fact, unlikely that the scheme in the Clean Energy Act – which imposed a price on carbon units, while also establishing such units as transferrable personal property – would have qualified as a tax under the Constitution. Nonetheless, it was widely referred to as a tax, and, following a change in government, it was repealed in 2014.

The Commonwealth has had greater success in invoking the taxation power to provide tax concessions to create an incentive for individuals and businesses to engage in environmentally protective behaviour. For instance, a person can obtain income tax deductions or capital gains tax concessions where they have made certain substantial environmental or heritage donations of property, or where they have entered into a “conservation covenant”. Such concessions can be effective in changing behaviour, but they represent only a small amount of what might be achieved if the full scope of the taxation power were to be invoked.

Limitations on power

The above powers are, individually and collectively, potentially significant sources of federal legislative capacity in regard to environmental regulation. However, as the analysis above has shown, their utility is subject to a range of legal and political constraints. In addition, each power is subject to the constitutional limitations that apply generally to the exercise of federal legislative powers. Examples include: the requirement in s 92 of the Constitution that “trade, commerce and intercourse among the States … shall be absolutely free”; the prohibition in s 99 against Commonwealth trade, commerce or revenue laws that give preference to one State over another; and the Melbourne Corporation doctrine, which provides that there is an implied prohibition against Commonwealth laws that operate to curtail the capacity of the States to constitutionally function as governments. Here, the focus is on the two most pertinent limitations in regard to the Commonwealth’s capacity to shape the direction of environmental law: the prohibition on abridging State rights to reasonable use of river waters in s 100, and the requirement in s 51(xxi) that any Commonwealth acquisition of property be made on just terms.

The inclusion of s 100 in the Constitution stemmed from disagreement, in the lead-up to federation, about which tier of government should govern water and river use. Colonies held different views about how to utilise the cross-jurisdictional river systems: South Australia wished to maintain sufficient flows in the Murray-Darling river to protect its developing river trade, while Victoria and New South Wales were interested in irrigating from the Murray River and its tributaries as a solution to the shortage of arable land. These competing preferences were reflected in ss 98 and 100 of the Constitution – the only two provisions that relate specifically to Australia’s environmental resources.

Section 98 provides that the Commonwealth Parliament’s “power to make laws with respect to trade and commerce extends to navigation and shipping”. As such, it invested the Commonwealth with the power to protect South Australian interests in the river boat trade. To allay concerns in New South Wales and Victoria that the insertion of s 98 could result in Commonwealth laws superseding their interests in irrigation, s 100 was inserted into the Constitution. It provides:

54 See Income Tax Assessment Act 1997 (Cth), Subdiv 30-DB.
56 See Kildea and Williams, n 1 at 601.
57 Kildea and Williams, n 1 at 601.
The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Section 100 potentially imposes a significant limitation on the Commonwealth’s capacity to legislate for environmental management at a national level. The application of the provision, however, remains uncertain in a number of respects, as the High Court has not considered the provision in detail. What attention it has given to the section has led to a narrow construction.

In the Tasmanian Dam Case, it was argued by Tasmania that the Commonwealth legislation preventing the construction of the Franklin Dam abridged the right of Tasmania and its residents to the reasonable use of the waters of the Franklin River, in contravention of s 100. A four-judge majority – Mason, Murphy, Brennan and Deane JJ – dismissed this argument. In doing so, Murphy and Brennan JJ regarded s 100 as only applying to laws made under the Commonwealth’s trade and commerce powers in ss 51(i) and 98, while Mason J suggested that it might apply slightly more widely to laws “capable of being made” under these powers. The same interpretation had previously been reached in 1947 in Morgan v Commonwealth (1947) 74 CLR 421. Deane J did not expressly endorse the reasoning in Morgan, but agreed that the relevant law in the Tasmanian Dam Case was not a law of trade and commerce.

In Arnold v Minister Administering the Water Management Act 2000 (2010) 240 CLR 242; [2010] HCA 3 (Arnold) – a 2010 case regarding groundwater extraction entitlements in New South Wales – the High Court was invited to revisit the finding that s 100 is restricted in application to laws passed under the trade and commerce powers. It declined to do so, on the grounds that the section would not apply in the case at hand, as the reference to “the waters of rivers” in s 100 did not encompass groundwater. The reasoning in Morgan and the Tasmanian Dam Case has subsequently been applied by the Federal Court in Campisi v Commonwealth [2010] FCA 379 and Lee v Commonwealth (2014) 315 ALR 427; [2014] FCAFC 174.

As s 100 has never been successfully applied as a limit on Commonwealth power, a number of questions about its scope remain open. For instance, it is not clear whether the provision amounts to a positive right to access the waters of rivers for States and their residents, or whether it merely serves as a limit on Commonwealth power. Further, the meaning of “reasonable use” and “conservation” in the context of the section remains unresolved.

A more certain limitation on federal power over the environment can be found in s 51(xxxi) of the Constitution. In allowing the Commonwealth to make laws with respect to the “acquisition of property on just terms”, the section serves both as a source of Commonwealth power to make laws relating to the environment and as a limitation on that power. The provision has been the subject of litigation in the context of environmental regulation in recent years. In ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140; [2009] HCA 51 (ICM Agriculture), the High Court considered whether the reduction of access rights to groundwater constituted an “acquisition of property”. By majority, the Court found that it did not. A similar question was raised, with a similar result, in Arnold. In both ICM Agriculture and Arnold, the reduction in access rights stemmed from a funding agreement between the Commonwealth and New South Wales, and related Commonwealth and New South Wales legislation. The High Court’s reasoning with respect to s 51(xxxi) hinged in part on the fact that, on the facts of each case, no Commonwealth or State benefit was accrued by virtue of the limitation placed on access rights, and so no “acquisition” had been effected. The decisions demonstrate how the mere regulation of environmental matters may well not fall under this section so as to require the granting of compensation to affected property holders.

58 Commonwealth v Tasmania (1983) 158 CLR 1 at 153-155 (Mason J); 182 (Murphy J); 248-249 (Brennan J).
61 Kildea and Williams, n 1 at 609-610.
COMMONWEALTH SPENDING POWERS

The Commonwealth can appropriate and spend money on a wide variety of subjects. Such appropriations are provided for by s 81 of the Constitution, which states that the federal Parliament may appropriate money out of the Consolidated Revenue Fund “for the purposes of the Commonwealth”. The Commonwealth has asserted that this power is effectively unlimited, such that it can appropriate and then spend money on any project or activity that it chooses, irrespective of whether or not the activity falls within a federal head of power. If this interpretation of the power were adopted, it would present a potent means of environmental regulation, given the potential to direct conduct by financial incentives and related other means. However, this view has not proved to be correct. In recent cases, the High Court has significantly narrowed the scope of the Commonwealth’s spending powers.

In 2009, in Pape, the High Court held that an appropriation made under s 81 is not itself sufficient to confer validity on proposed expenditure. Instead, the actual spending of the money must be supported by other some other grant of power in the Constitution. This was a clear rejection of the Commonwealth’s wide view of its own spending power. The result means that the Commonwealth can spend money in areas that are listed in the Constitution as being a federal responsibility, but not in other areas in which the Commonwealth has no constitutional mandate.

In Williams v Commonwealth (2012) 248 CLR 156; [2012] HCA 23 (Williams (No 1)), three years later, the High Court built upon this reasoning. The case concerned the validity of the National Chaplaincy Program. The plaintiff argued that the program was invalid because it involved the expenditure of money, in the absence of a head of power and parliamentary authorisation for the expenditure. In response, the Commonwealth argued that the Executive had “capacities” similar to that of any legal person – including a capacity to spend money on any topic. In the alternative, the Commonwealth argued that while executive spending may be restricted to subjects within Commonwealth constitutional power, no legislation needed to be enacted authorising particular instances of executive expenditure.

The Commonwealth lost on both counts. As a consequence of Pape and Williams (No 1), Commonwealth executive power to enter into contracts or spend public money is in most cases limited to subjects over which it has legislative power and where that legislative power has been applied to authorise the expenditure. Exceptions arise when Commonwealth expenditure can be supported by some other recognised aspect of executive power, such as the “nationhood power”, or the prerogative powers inherited from the common law powers of the Crown.

In other areas, Commonwealth spending must be authorised by legislation, and so supported by a source of federal legislative power. The High Court has made clear that the mere earmarking of expenditure by way of an appropriation Act will not suffice for this purpose. The effect of Pape and

62 See, eg Crawford, n 5.
63 This was the position of four members of the Court in Williams v Commonwealth (2012) 248 CLR 156; [2012] HCA 23 at [27], [36]-[37], [83] (French CJ); [150]-[159] (Gummow and Bell JJ); [524] (Crennan J). On this point, the other two members of the majority did not reach a view: see [288] (Hayne J); [569] (Kiefel J).
65 New South Wales v Barndolph (1934) 52 CLR 455 at 508 (Dixon J), 493 (Gavin Duffy CJ), which may be analogous to the Commonwealth power to contract in the administration of government departments in s 64 of the Constitution: Williams v Commonwealth (2012) 248 CLR 156; [2012] HCA 23 at [74] (French CJ).
Commonwealth power and environmental management: Constitutional questions revisited

Williams (No 1) was to raise questions about the constitutionality of a wide range of government spending projects – amounting to somewhere between 5%-10% of all government spending, or between 18.5 and 37 billion dollars.

In response, the federal Parliament enacted, within the space of a few days, new legislation designed to provide legislative authority for executive commitments to spend money from the consolidated revenue fund. It passed the Financial Framework Legislation Amendment Act (No 3) 2012 (Cth), which inserted a new s 32B into the Financial Management and Accountability Act 1997 (Cth) (later renamed the Financial Framework (Supplementary Powers) Act 1997 (Cth)) (Financial Framework Act). Section 32B(1) provides that the Commonwealth has the power to make, vary or administer an arrangement to pay money or a grant of financial assistance, where the arrangement or grant concerned is specified (or part of a class of arrangements or grants specified) in the Financial Framework (Supplementary Powers) Regulations 1997 (Cth) (Financial Framework Regulations), or where it is for the purposes of a program specified in these regulations. The provision applies when Commonwealth power to make a qualifying financial arrangement or grant is not available via any other source.

The Commonwealth then inserted a new Sch 1AA into the Financial Framework Regulations, listing over 400 different arrangements, grants to States and Territories and other persons, and programs in relation to which the Commonwealth sought spending authority by virtue of s 32B. The list of programs in Sch 1AA includes a large and diverse number of programs related to environmental matters. Examples include payments to assist the transition to lower-emission energy sources, the financing of the Cairns Institute Tropical Research Hub, and a variety of programs directed at addressing climate change and protecting biodiversity. A challenge for the Commonwealth, however, is that, following Pape and Williams (No 1), the Commonwealth needs to possess the legislative authority to pass legislation authorising spending on each of these subjects. The mere passage of legislation is not sufficient. This was dramatically illustrated in Williams v Commonwealth (2014) 252 CLR 416; [2014] HCA 23 (Williams No 2), where the High Court unanimously struck down the listing of the National Schools Chaplaincy Program in this legislation on the basis that it did not correspond with any head of federal power.

It is by no means clear that the requisite legislative authority exists for all of the environmental programs in Sch 1AA. For example, it is doubtful whether programs such as the Home Insulation Program, which aims “to assist with energy efficiency in Australian homes through supporting the installation of insulation and the associated safety and industry assistance measures”, or the Carbon Farming Initiative – Non-Kyoto Fund and Carbon Farming Skills program, which aims to “purchase CFI credits that are not Kyoto-eligible and to promote the integrity of the CFI and ensure that landholders have access to high quality carbon services”, are referable to a head of legislative power. If no head of power can be identified, these expenditure schemes could be struck down by the High Court in the event of a challenge.

Where the Commonwealth lacks the power to spend money on a program, it may instead seek to spend money in the area by way of making a grant to one or more States under s 96 of the Constitution. Section 96 provides that “the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit”. The Commonwealth has a broad, almost unlimited discretion over what terms and conditions are attached to the grant. Accordingly, it can make a “specific purpose” grant to any State on condition that the money is spent on a program that the Commonwealth wishes to finance, or on condition that the State implements a particular environment-related policy. This can allow the Commonwealth to exercise, subject to the consent of

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68 Section 32B(1) applies to agreements under which “relevant money” or “other CRF [Consolidated Revenue Fund] money becomes payable by the Commonwealth”.


70 See, eg Deput Commissioner of Taxation (NSW) v WR Moran Pty Ltd (1939) 61 CLR 735; South Australia v Commonwealth (1942) 65 CLR 373 (First Uniform Tax Case); Victoria v Commonwealth (1957) 99 CLR 575 (Second Uniform Tax Case).
the State concerned, a considerable degree of control over the direction of environmental policy in areas that fall beyond the scope of its legislative and direct spending powers.

An example of a recent use of s 96 is the funding agreement between the Commonwealth and New South Wales considered in the ICM Agriculture and Arnold cases. In the agreement, the Commonwealth committed to provide funding to New South Wales on the condition that the State implemented water sharing plans that, over a 10-year period, reduced the water entitlements of licence holders so as to ensure the sustainable future use of groundwater systems. A question raised in ICM Agriculture was whether the Commonwealth could bypass the “just terms” requirement for acquisitions of property in s 51(xxxi) by using s 96 to provide a grant to a State on the condition that it implement the desired acquisition. The issue did not need to be determined in ICM Agriculture due to the High Court’s finding that, on the facts, no acquisition of property had taken place. However, four judges concluded that it would not be within the scope of s 96 for the Commonwealth to extend a grant of financial assistance to a State with a condition requiring the State to acquire property on other than just terms.\footnote{ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140; [2009] HCA 51 at [46] (French CJ, Gummow and Crennan J); [174] (Heydon J). Hayne, Kiefel and Bell JJ thought it unnecessary to decide this issue: see [141].} This dicta indicates the willingness of the High Court to impose new restrictions on grants made under s 96, including in the context of environmental management.

This analysis illustrates that although the Commonwealth’s spending powers provide significant capacity to influence and direct environmental regulation, they are not as extensive as once was thought. Its power to spend money is now constrained by the terms of its other powers in the Constitution, most particularly its legislative powers. Section 96 does provide an alternate path by way of grants to the States, but even this new is subject to the possibility of further restrictions, at least in regard to grants that relate to acquisitions of property.

**CONCLUSION**

Despite the lack of express authority in the Constitution to make laws or otherwise lead in regard to environmental management, the extensive scope of Commonwealth power in the area has often been asserted. The goal of this article has been to assess such affirmations in light of recent High Court jurisprudence. The analysis demonstrates that while federal legislative powers do offer significant scope to make laws on environmental matters, the Commonwealth is far more constrained than might have been thought. This is demonstrated most dramatically by recent High Court decisions that have overturned the idea that the Commonwealth has an unfettered capacity to spend money. This power can now generally only be exercised in respect of programs that are supported by legislation and are referable to another source of Commonwealth power. As a result, a number of environmental spending programs appear to be susceptible to constitutional challenge.

These findings help explain an inconsistency between views as to the broad scope of federal power over the environment, and the more limited exercise of such power in practice. Despite statements that Commonwealth power is very broad in scope, many federal policies relating to environmental management have not been pursued by unilateral action, but by adopting a cooperative approach with the States. These typically involve intergovernmental agreements under which the Commonwealth and the States undertake to adopt a joint approach to a topic of environmental regulation. Examples include the 1992 Intergovernmental Agreement on the Environment (implemented in the Environment Protection and Biodiversity Conservation Act) and the Murray-Darling Basin Plan, made under the Water Act. In the absence of a comprehensive power over the environment, the Commonwealth will often have no choice but to take part in such schemes in order to ensure a national approach to environmental management.