THE EXTERNAL AFFAIRS POWER AND ENVIRONMENTAL PROTECTION IN AUSTRALIA

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INTRODUCTION

> The present threat to environmental resources world-wide, in terms of its significance for human survival, ranks second only to the dangers posed by a nuclear war ... Desertification, acidification of the environment, chemical pollution of air, water and soil resources, depletion of the ozone layer, the "greenhouse effect" of global warming, and the loss of genetic versatility are just a few of the phenomena that exemplify a growing imbalance between human enterprise and life-sustaining biosphere.[1]

Concern for the environment is undoubtedly a "significant social and political force" within the international community.[2] Where members of the international community once viewed environmental protection as a local or national issue, they have now been compelled to see many environmental problems as global in scope.[3] This change in attitude was exemplified in 1992 when the United Nations convened the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, attended by representatives from 170 nations, including 130 heads of state and government.[4] One of the outcomes of the conference was the adoption of the *Rio Declaration on Environment and Development*[5] (*Rio Declaration*). The *Rio Declaration* is a declaration of internationally accepted fundamental principles on development and environmental protection. It declares that all nations have a right to development.[6] However, this right must be exercised in such a manner as to "equitably meet developmental and environmental needs of present and future generations".[7] That is,

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1 G Handl, "Environmental Protection and Development in Third World Countries: Common Destiny — Common Responsibility" (1988) 20 *NYUJ Int'l L & Pol* 603 at 603.

2 R Eshbach, "A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interests" (1990) 4 *Temple Int'l & Comp LJ* 271 at 271.

3 R Hahn and K Richards, "The Internationalization of Environmental Regulation" (1989) 30 *Harv Int'l LJ* 421 at 421.

4 K Blay and R Piotrowicz, "Biodiversity and Conservation in the Twenty-First Century: A Critique of the Earth Summit 1992" (1993) 10 *EPLJ* 450 at 450.

5 (1992) 31 *ILM* 874.

6 Ibid, Principle 2.

7 Ibid, Principle 3.

all development must be sustainable. In order to achieve sustainable development, environmental protection must constitute "an integral part of the development process and cannot be considered in isolation from it".[8] In particular, Principle 11 of the *Rio Declaration* provides:

> States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental contexts to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Other steps to be taken by nations in the pursuit of sustainable development include:

(1) facilitating public participation in environmental decision-making;[9]

(2) applying the "precautionary approach";[10]

(3) promoting the "polluter pays principle";[11]

(4) undertaking "environmental impact assessment" for proposed activities that are "likely to have a significant adverse impact on the environment";[12] and

(5) developing national laws regarding liability and compensation for the victims of pollution and other environmental damage.[13]

The Rio conference also adopted *Agenda 21: Programme of Action for Sustainable Development*[14] (*Agenda 21*) to support the *Rio Declaration*. *Agenda 21* is "a programme of action for sustainable development worldwide".[15] It outlines a wide range of rudimentary activities that governments should undertake, at both international and national levels, for the purpose of achieving sustainable development, including the formulation of appropriate national strategies, plans, policies and processes.[16] *Agenda 21* covers virtually all aspects of the environment, including the atmosphere, land resources generally, forests, biological diversity, marine environments, the use of toxic chemicals and the disposal of hazardous wastes, highlighting various criteria which should be used for balancing environmental and developmental needs in each of these areas of environmental concern. *Agenda 21* again emphasises the need for effective

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8 Ibid, Principle 4.

9 Ibid, Principle 10

10 Ibid, Principle 15. That is, where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

11 Ibid, Principle 16. That is, polluters should bear the economic cost of the pollution that they cause.

12 Ibid, Principle 17.

13 Ibid, Principle 13.

14 Reproduced in UNCED, *Earth Summit: Agenda 21: the United Nations Programme of Action from Rio* (1993). Other significant instruments agreed upon at the Rio conference were the *Convention on Biological Diversity* (1992) 31 *ILM* 818, the *Framework Convention on Climate Change* (1992) 31 *ILM* 849 and the *Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests* (1992) 31 *ILM* 881.

15 UNCED, above n 14 at 3.

16 Ibid at 15, par 1.3.

environmental legislation[17] and in essence provides a synopsis of the issues one would expect to be dealt with by such legislation, although it in no way provides any precise formulations. Shortly after the Rio conference, the United Nations established a Commission on Sustainable Development (CSD) to "monitor progress in the implementation" of *Agenda 21*.[18] Information on this progress is to be provided by governments to the CSD in the form of periodic communications or national reports.[19]

The Australian Constitution does not directly grant to the Commonwealth any power to make laws with respect to "the environment". The framers of the Constitution apparently regarded the environment as "essentially a local issue, that is, one to be left to the States".[20] However, there can be little doubt that under its existing powers, the Commonwealth does have substantial scope to make environmental laws.[21] After all, where a law can be characterised as a law with respect to a particular subject-matter under s 51 of the Constitution, it is irrelevant that the law may have environmental purposes.[22] Yet the Commonwealth's use of its legislative powers for environmental purposes has not been without controversy, in particular, its use of the external affairs power.[23] During the 1980s, the High Court, in a series of decisions, sanctioned a significant widening of the scope of the external affairs power by allowing the Commonwealth to effectively wrest control of vast tracts of land from States for the purpose of implementing the terms of the *Convention for the Protection of World Cultural and Natural Heritage*[24] (*World Heritage Convention*) within Australia.[25] Australia was a keen participant at the Rio conference. The adoption of the *Rio Declaration* by the international community, with its commitment to sustainable development, provides a further opportunity to examine the scope of the external affairs power. To date, the Commonwealth has not sought to take full responsibility for environmental regulation in Australia. Yet, if Australia is to remain true to the commitments it made as a participant at the Rio conference, in particular, the commitment to enact "effective environmental legislation", it may be that at some time the Commonwealth will be called upon again to use its legislative powers to over-ride environmental and developmental policies of individual States.

The purpose of this article is to discuss the extent to which the Commonwealth would be able to rely upon the external affairs power to meet Australia's commitments under the *Rio Declaration*. First, there will be an examination of the framework of international law and relations and of where the international community's interest in environmental protection as expressed in the *Rio Declaration* (and *Agenda 21*) fits into

17 Ibid at 68-69, pars 8.13-8.22.
18 UNGA res 47/191 (1992), par 3(a).
19 Ibid, par 3(b).
20 J Crawford, "The Constitution" in T Bonyhady (ed), *Environmental Protection and Legal Change* (1992) 1 at 2.
21 G Bates, *Environmental Law in Australia* (3rd ed 1992) at 54-66; J Crawford, "The Constitution and the Environment" (1991) 13 *Syd LR* 11; D Anton, J Kohout and N Pain, "Nationalizing Environmental Protection in Australia: The International Dimensions" (1993) 23 *Envtl L* 763.
22 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 19-20 per Mason J.
23 Section 51(xxix).
24 (1972) 11 *ILM* 1358.
25 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261 and *Queensland v Commonwealth* (1989) 167 CLR 232.

it. Secondly, there will be a brief description of the evolution of international environmental law. Thirdly, High Court decisions on the external affairs power will be analysed and a conclusion drawn as to the extent to which the Commonwealth may utilise the external affairs power for environmental purposes.

THE SOURCES OF INTERNATIONAL LAW

Since *Commonwealth v Tasmania* (*Tasmanian Dam* case), it has been accepted that a law of the Commonwealth, the purpose of which is to fulfil Australia's obligations under a treaty, is a law with respect to external affairs,[26] provided that the treaty has not been used as a mere device for attracting legislative power.[27] Essentially, treaties (also known as conventions) are agreements in any form between nations, or between nations and international organisations, which are intended by the parties to be governed by international law.[28] If this intention is manifest with respect to an agreement, international law requires the parties to the agreement to observe its terms and fulfil their obligations under it. Treaties are a "traditional" source of international law.[29] The other most common traditional source of international law is international custom. Where a particular international custom is repeatedly, uniformly and generally practised amongst nations (the "material element"),[30] and the nations practising the custom do so with a conviction that they are bound by international law to so do (the

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26 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 129-130 per Mason J, at 171 per Murphy J, at 219 per Brennan J, at 258 per Deane J. It has also been suggested that the external affairs power extends to the obtaining of benefits or the assertion of rights under a treaty. See ibid at 130 per Mason J, at 258 per Deane J. Some judges have simply asserted that the external affairs power extends to the implementation of treaties *per se*. See ibid at 171 per Murphy J and *Richardson v Forestry Commission* (1988) 164 CLR 261 at 342 per Gaudron J.

27 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 216 per Stephen J, at 231 per Mason J, at 260 per Brennan J. See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 259 per Deane J; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 342 per Gaudron J; *Horta v Commonwealth* (1994) 181 CLR 183 at 195-196. However, it is difficult to see how it could ever be proved in a particular case that a treaty has been so used. See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 200 per Gibbs CJ; L Zines, *The High Court and the Constitution* (3rd ed 1992) at 237-238; P Hanks, *Constitutional Law in Australia* (1991) at 351-352; H Lee, "The High Court and the External Affairs Power" in H Lee and P Winterton (eds), *Australian Constitutional Perspectives* (1992) 60 at 82.

28 P Birnie and A Boyle, *International Law and the Environment* (1992) at 11.

29 Article 38(1) of the Statute of the International Court of Justice has been generally regarded as a complete statement of the traditional sources of international law:
"The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilised nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."
See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 559 per Brennan J.

30 Netherlands National Committee for the IUCN, *Biodiversity and International Law* (1992) at 83.

"psychological element"),[31] the obligations entailed in the practice of the custom can be said to be rules of customary international law binding on all nations.[32]

The *Rio Declaration* is, however, not a treaty. It is essentially a political document not intended to be governed by international law. Therefore it does not create binding legal obligations under international law. Nor can it be said that the steps that the *Rio Declaration* requires nations to undertake with respect to environmental protection have the status of rules of customary international law. Rather, the *Rio Declaration* is "soft law". The term "soft law" is commonly used to denote international prescriptions for conduct which are not legally binding upon nations, but which, nevertheless, are capable of influencing the conduct of nations.[33] These prescriptions for conduct are to be found in a wide range of international "soft law" instruments. For example, one form of soft law instrument is that of a "directive recommendation" issued by an international organisation to its member nations.[34] When nations join an international organisation they generally accept legal obligations under the constitution of that organisation and under treaties subsequently brought into force under the auspices of the organisation.[35] In order to assist member nations to fulfil these legal obligations, the organisation's component organs will recommend specific policies or definite courses of action, which if adopted or carried out by member nations, will ensure that their conduct complies with the more generally expressed legal obligations.[36] For example, the Commonwealth has sought to fulfil Australia's legal obligations under various treaties entered into under the auspices of the International Labour Organisation by implementing in legislation various non-binding directive recommendations issued by that organisation.[37] Closely linked to directive recommendations are "programmes of action", such as *Agenda 21*. Whereas directive recommendations are addressed to member nations, programmes of action are primarily aimed at the international organisations which enunciate them, setting forth activities to be undertaken within a given period of time in order to achieve a certain goal.[38] However, the distinction

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31 Ibid. That is, nations must not be motivated to practise the custom merely by a sense of comity. See P Birnie and A Boyle, above n 28 at 15.

32 There are various High Court *dicta* which support the view that a law which fulfils an obligation imposed upon Australia by customary international law is a law with respect to external affairs. See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 234 per Mason J; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 171 per Murphy J, at 258 per Deane J; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 556-561 per Brennan J. However, one of the difficulties with relying upon customary international law is that establishing the existence of such law can be quite a formidable task. See D Rothwell, "The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits" (1993) 15 *Adel LR* 209 at 231.

33 G Handl, "Environmental Security and Global Change: The Challenge to International Law" in W Lang, H Neuhold and K Zemanek (eds), *Environmental Protection and International Law* (1991) 59 at 63.

34 A Kiss and D Shelton, *International Environmental Law* (1991) at 110.

35 Ibid.

36 Ibid.

37 Industrial Relations Act 1988 (Cth), Part VIA. For express judicial support of such use of the external affairs power, see *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 687 per Evatt and McTiernan JJ and *Commonwealth v Tasmania* (1983) 158 CLR 1 at 171-172 per Murphy J, at 258 per Deane J.

38 A Kiss and D Shelton, above n 34 at 111.

between programmes of action and directive recommendations is often blurred by the fact that the success of many of the former depends upon the participation of member nations, as well as that of the relevant international organisation itself (as is the case with *Agenda 21*).[39]

Another form of soft law instrument is a "declaration of principles". Such a soft law instrument is often issued after a major international conference.[40] It is into this category of soft law instrument that the *Rio Declaration* falls. Declarations of principles differ from directive recommendations and programmes of action in that they do not "envisage precise action to be undertaken".[41] Rather, they provide general guidelines for nations to follow:

> A fundamental objective of any legal system is to protect by direct or indirect means values recognised as essential within society. When society changes under the influence of philosophical, economic, political or social factors, values which were recognised as essential can diminish, become strengthened or become transformed. Recognition of the emergence of new values, their consecration by society and ultimately by law is a delicate operation which at an extreme can lead to social upheaval. In the evolution of every cause the formulation of new social values and their recognition are particularly important. This can be achieved through declarations adopted and proclaimed in the name of society at an international level by organisations or international conferences.[42]

A number of writers have also suggested that the concept of "soft law" encompasses legal obligations (for example, under treaties) which are expressed in exceptionally vague terms or "which leave the content of the obligations or the exigibility of the obligations" within the discretion of the nations which are bound, so that legally enforcing the obligations is not really feasible.[43] Whilst such obligations may be legally binding in a strict sense, the difficulties associated with legally enforcing them make them soft law rather than "hard law":

> [I]f a treaty is to be regarded as "hard", it must be precisely worded and specify the exact obligations undertaken or the rights granted. Where a treaty provides only for the gradual acquiring of standards or for general goals and programmed action it is itself soft "for what is apparently a treaty may be devoid of legal content".[44]

So, distinguishing soft law from hard law can be a matter of substance as well as form.

The concept of soft law within the framework of international law is a controversial one.[45] Many writers are uneasy about it:

> Generally, what distinguishes law from other social rules is that it is both authoritative and prescriptive and in that sense binding. In this strict sense law is necessarily "hard"; to describe it as "soft" is a contradiction in terms.[46]

Despite such jurisprudential objections, the increasing importance of soft law within the framework of international law cannot be denied. Traditional international law

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39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid at 112.
43 T Gruchalla-Wesierski, "A Framework for Understanding 'Soft Law'" (1984) 30 *McGill LJ* 37 at 46.
44 C Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 *ICLQ* 850 at 851.
45 P Birnie and A Boyle, above n 28 at 26.
46 Ibid. See also G Danilenko, *Law-Making in the International Community* (1993) at 20-21.

regarding treaties and custom initially developed in the context of nation-to-nation relations, encompassing a "limited number" of "fairly homogeneous" nations.[47] This homogeneity has now given way to a highly diverse and greatly enlarged international community, presenting obvious difficulties for traditional international law. With respect to customary international law, it has become "increasingly difficult" to identify universal practices.[48] With respect to treaties, it has become "increasingly difficult" to secure widespread consent to precisely-worded binding new rules:[49]

> [The] great advantage [of soft law] over "hard law" is that, as occasion demands, it can either enable states to take on obligations that otherwise they would not, because these are expressed in vaguer terms, or conversely, a "soft law" form may enable them to formulate the obligations in a precise and restrictive form that would not be acceptable in a binding treaty.[50]

In what way does soft law influence the conduct of nations? One way is through the "qualifying effect" that it may have on the subsequent conduct of nations.[51] That is, soft law gives subsequent conduct of nations a certain character which it might not otherwise have had. Thus, subsequent conduct which breaches or is inconsistent with soft law may draw a response from the international community which it might not otherwise have done. Of course this does not mean that the subsequent conduct gives rise to new legal consequences. Rather, the response is likely to be in the form of some political or moral censure.[52] In this way soft law can be said to internationalise the matters with which it is concerned:

> The fact that the states have entered into mutual engagements confers an entitlement on each party to make representations to the others on the execution of those engagements. It becomes immaterial whether the conduct in question was previously regarded as entirely discretionary or within the reserved domain of domestic jurisdiction. By entering into an international pact with other states, a party may be presumed to have agreed that the matters covered are no longer exclusively within its concern.[53]

Therefore a nation which is a party to a soft law instrument "may no longer complain of intervention in its internal affairs" if another nation which is also a party to the soft law instrument "accuses it of non-compliance or demands compliance" with the articulated soft law.[54]

Soft law, in particular a declaration of principles, may also be a step "on a longer journey" to the creation of hard law.[55] A soft law will often capture "emerging notions of international public order".[56] The creation of soft law can represent an early stage of the international law-making process whereby the principles articulated in the soft law

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47 Remarks by G Handl, "A Hard Look at Soft Law" (1988) 82 *ASIL Proceedings* 371 at 372.
48 P Birnie and A Boyle, above n 28 at 16.
49 Ibid at 26.
50 Ibid at 27.
51 T Gruchalla-Wesierski, above n 43 at 58.
52 Ibid.
53 O Schachter, "The Twilight Existence of Nonbinding International Agreements" (1977) 71 *AJIL* 296 at 304.
54 T Gruchalla-Wesierski, above n 43 at 59.
55 G Palmer, "New Ways to Make International Environmental Law" (1992) 86 *AJIL* 259 at 269.
56 G Handl, above n 33 at 63.

are eventually refined into hard law obligations for the purposes of treaties.[57] Further, principles articulated in soft law instruments may lead to the unfolding of rules of customary international law. Clearly if the requisite number of nations adheres to a certain soft law obligation, the material element for a rule of customary international law may well be satisfied.[58] There is some debate as to whether the articulation itself of a soft law principle can constitute the requisite psychological element for a rule of customary international law. The better view seems to be that this cannot be the case. This is because, in general, the requisite psychological element will be denied, either expressly by the words of the soft law instrument, or implicitly by the usage of soft law rather than hard law.[59] Nevertheless, articulations of soft law are often official acts of nations. Therefore they may be treated as evidence of the psychological element with respect to the principles articulated.[60] In this respect, soft law may be instrumental in the development of rules of customary international law.

In these senses, soft law influences the conduct of nations. Such influence means that soft law undoubtedly has a legitimate place within the framework of international law and relations. The role of soft law in the evolution of international environmental law is an ideal illustration of this.

THE EVOLUTION OF INTERNATIONAL ENVIRONMENTAL LAW

Originally international law was only relevant to environmental protection as a means for resolving bilateral conflict resulting from transboundary pollution.[61] In 1972 the United Nations convened the United Nations Conference on the Human Environment in Stockholm, Sweden. At that conference the international community made "the first major effort" to address global environmental problems.[62] The *Stockholm Declaration on the Human Environment* (*Stockholm Declaration*), adopted at the conference, proclaimed the "common conviction" that "man" has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.[63] Careful planning or management is required to safeguard the "natural resources of the earth".[64] The capacity of the earth to produce "vital" renewable resources must be maintained[65] and non-renewable resources must be employed in such a way "as to guard against the danger of their future exhaustion".[66]

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57 P Birnie and A Boyle, above n 28 at 27.

58 In this context it is important to note that the articulation itself of a principle as soft law in written form cannot satisfy the material element for a rule of customary international law based upon the articulated principle. While the articulation of a principle in written form is an act, it is only an act which establishes the material element for a custom which obliges nations to write words. The writing itself of words cannot establish the material element for a custom obliging nations to act in the ways which the writing describes. See T Gruchalla-Wesierski, above n 43 at 53.

59 C Chinkin, above n 44 at 857.

60 O Schachter, *International Law in Theory and Practice* (1991) at 99.

61 A Kiss and D Shelton, above n 34 at 115. Transboundary pollution is pollution originating in one nation which has harmful effects on the environment of another nation.

62 J Starke, *Introduction to International Law* (10th ed 1989) at 404.

63 *Stockholm Declaration on the Human Environment* (1972) 11 *ILM* 1416, Principle 1.

64 Ibid, Principle 2.

65 Ibid, Principle 3.

66 Ibid, Principle 5.

By virtue of the *Stockholm Declaration*, the international community accepted "responsibility for the preservation and improvement of the human environment"[67] and established a manifesto, "intended to govern and influence future action and programmes, both at the national and international levels".[68]

Since 1972, hard law has evolved to regulate conduct by nations which affects the global environment. Numerous treaties now provide for the protection of the global commons, including the atmosphere and the high seas.[69] The treaties have been extensively complemented by soft law in the form of directive recommendations and programmes of action.[70] Yet the *Stockholm Declaration*, as soft law in the form of a declaration of principles, went further than this:

> No state can claim an absolute right to ruin its environment in order to obtain transient benefits. It should think not only of the effect on other peoples but also about the future of its own people. It should not ruin the soil of its country in order to get a few extra crops or to sell more wood or pulp. Destruction and depletion of irreplaceable resources are clearly condemned by the Declaration, even where there is no effect abroad.[71]

A nation which does not conserve and protect its own environment (as well as the global environment) will, therefore, leave itself open to international censure.[72] Likewise, the *Rio Declaration* (with *Agenda 21*), as soft law, emphasises that all resources, wherever they are located, must be managed in a sustainable manner by making environmental protection an integral part of development processes:

> The essence of modern international environmental law is that even though states retain sovereignty over their natural resources and may exploit them in accordance with their own policies, it is also the case that the global environment is one integrated unit. The unsustainable developmental policies of a country can no longer be justified simply on the basis of sovereignty over natural resources. Today, the right of each state to exploit its own natural resources is undoubtedly qualified by genuine international interest in its environmental implications.[73]

Herein lies the rationalisation for the use of soft law in international environmental law. Few, if any, nations would disagree with the proposition that all development must be sustainable and that nations must implement effective environmental legislation.[74] However, it has not been practicable to attempt to impose comprehensive hard law obligations on all nations with respect to sustainable development within

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67 L Sohn, "The Stockholm Declaration on the Human Environment" (1973) 14 *Harv Int'l LJ* 423 at 515.

68 J Starke, above n 62 at 406.

69 For example, the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (1972) 11 *ILM* 1294; the *United Nations Convention on the Law of the Sea* (1982) 21 *ILM* 1261; the *Convention for the Protection of the Ozone Layer* (1987) 26 *ILM* 1529; the *Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (1989) 28 *ILM* 657.

70 See generally, P Birnie and A Boyle, above n 28 at 28-30.

71 L Sohn, above n 67 at 492.

72 This is not to say that there is no hard law concerned with the protection of environments located solely within the jurisdiction of one nation. For example, the *Convention on Biological Diversity* (1992) 31 *ILM* 818 imposes obligations with respect to the preservation of biodiversity, even though "its habitat, and for that matter its control", is within the national jurisdiction of individual nations. See K Blay and R Piotrowicz, above n 4 at 451.

73 Ibid at 462.

74 P Birnie and A Boyle, above n 28 at 123.

their own jurisdictions. There has been a significant lack of any "comparable consensus" on the meaning of sustainable development.[75] Each nation and culture has its own subjective standard that it will apply to the term "sustainable".[76] Climatic, geographical, political and economic differences among nations must have a role in dictating the final form of local environmental regulation.[77] Nevertheless, through the *Rio Declaration*, the international community has indicated that it expects its members to engage in the practice of sustainable development, even though this may have different implications for different nations. Progress will be monitored by the CSD and nations which do not follow the path of sustainable development will be liable to international censure. In this way nations will be persuaded to practise sustainable development. Over time, a body of state practice will become apparent, enabling one to make more "confident" generalisations as to the meaning of sustainable development,[78] thereby facilitating the articulation of obligations with "a harder edge".[79]

Through the *Rio Declaration*, the international community has expressed an interest in all environmental protection whether it be global or domestic. Australia is under a soft law obligation to make environmental protection an integral part of development processes within Australia. In particular, this soft law requires the enactment of effective environmental legislation within Australia. The issue to be discussed now is whether the Commonwealth, if it judges it to be necessary or desirable to do so, will be able to use the external affairs power to enact such legislation throughout Australia.

THE CONCEPT OF INTERNATIONAL CONCERN, THE *RIO DECLARATION* AND ENVIRONMENTAL PROTECTION

In the *Tasmanian Dam* case, Mason J made the following observation as to the scope of the external affairs power:

> [I]t conforms to established principle to say that section 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900.[80]

Given this, there is no logical reason why the scope of the external affairs power should be limited to the fulfilment of Australia's legal obligations under treaties. Treaties are only one means by which modern international relations are conducted.[81] Indeed there is much judicial support for the proposition that a law with respect to a particular matter which affects Australia's relations with other nations is a law with respect to

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75 Ibid.

76 H Endre, "Legal Regulation of Sustainable Development in Australia: Politics, Economics or Ethics?" (1992) 32 *Nat Res J* 487 at 511.

77 Ibid. Economic differences are particularly significant in the environmental context. For a discussion on the relationship between developed and developing nations with respect to sustainable development, see M Sanwal, "Sustainable Development, the Rio Declaration and Multilateral Cooperation" (1993) 4 *Colo J Int'l Envtl L & Pol'y* 45.

78 P Birnie and A Boyle, above n 28 at 124.

79 G Palmer, above n 55 at 269.

80 (1983) 158 CLR 1 at 127.

81 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 237 per Murphy J.

external affairs even though it may not be the subject of an obligation under a treaty.[82] The term often employed to describe such matters is "international concern". A matter of international concern is one possessing "the capacity to affect a country's relations with other nations".[83]

How is a particular matter characterised as one of international concern? In *Koowarta v Bjelke-Petersen* (*Koowarta*), Mason J discussed the relationship between treaties and the concept of international concern:

> It is difficult to perceive why a genuine treaty, especially when it is multilateral and brought into existence under the auspices of the United Nations or an international agency, does not in itself relate to a matter of international concern and is not in itself an external affair. It is scarcely sensible to say that when Australia and other nations enter into a treaty the subject-matter of the treaty is not a matter of international concern — obviously it is a matter of concern to all the parties ...
>
> Agreement by nations to take common action in pursuit of a common objective evidences the existence of international concern and gives the subject-matter of the treaty a character which is international.[84]

In the *Tasmanian Dam* case, Mason J stated:

> [I]f a topic becomes the subject of international cooperation or an international convention it is necessarily international in character — the existence of co-operation and the making of a convention establish that the subject-matter is an appropriate vehicle for the creation of international relationships ... The existence of international character or international concern is established by entry by Australia into the convention or treaty.[85]

Why should this reasoning be limited to situations where the international co-operation takes the form of a treaty? A soft law instrument which is the product of multilateral co-operation, whether it be at a major international conference or through a prominent international organisation, must surely be cogent, if not conclusive, evidence that the subject-matter of the instrument is one of international concern. Such a soft law instrument establishes that its subject-matter has become internationalised and that political or moral pressure may be placed upon members of the international community which do not conduct themselves in accordance with any soft law obligations articulated therein. That is, the subject-matter has the potential to affect nations' relations with one another.

In *Koowarta*, Brennan J put forward the following view:

> Where a particular aspect of the internal legal order of a nation is made the subject of a treaty obligation, there is a powerful indication that that subject does affect the parties to the treaty and their relations one with another. They select that aspect as an element of their relationship, the obligee nations expecting and being entitled in international law to action by the obligor nation in performance of the treaty. And therefore to subject an

82 For example, *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131-132 per Mason J, at 171-172 per Murphy J, at 222 per Brennan J, at 258-259 per Deane J; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 322 per Dawson J; *Queensland v Commonwealth* (1989) 167 CLR 232 at 237-239; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 560-562 per Brennan J, at 657 per Toohey J. See also L Zines, above n 27 at 252-253.

83 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 217 per Stephen J.

84 Ibid at 229-231.

85 (1983) 158 CLR 1 at 125.

> aspect of the internal legal order to treaty obligation stamps the subject of the obligation with the character of an external affair.[86]

In the *Tasmanian Dam* case, Brennan J stated:

> It is difficult to imagine a case where a failure by Australia to fulfil an express obligation owed to other countries to deal with the subject-matter of a treaty in accordance with the terms of the treaty would not be a matter of international concern, a matter capable of affecting Australia's external relations.[87]

Again, why should not this reasoning apply to obligations under multilateral soft law instruments? Nations may decide to adopt a soft law instrument to synthesise their relations with respect to a particular subject-matter. Surely any obligation articulated therein would "stamp" the subject-matter of the obligation with the character of an external affair. Obligee nations may not be entitled to any legal redress if an obligor nation does not fulfil the obligation, but they will have a political or moral authority to press for its fulfilment. Surely it would be a matter of international concern if Australia were to disregard its political or moral obligations under a multilateral soft law instrument.

A related point acknowledged by both Mason and Brennan JJ is that the Court would be undertaking an "invidious task" if it were to review whether the subject-matter of a treaty was indeed a matter of international concern:

> On a question of this kind the Court cannot substitute its judgment for that of the executive government and Parliament. The fact of entry into, and of ratification of, an international convention, evidences the judgment of the executive and of Parliament that the subject matter of the convention is of international character and concern and that its implementation will be a benefit to Australia. Whether the subject matter as dealt with by the convention is of international concern, whether it will yield, or is capable of yielding, a benefit to Australia, whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the executive government for determination.[88]

Why should this attitude of deference to executive and legislative judgment not also apply to situations where soft law instruments are concerned?

It follows from this that a law of the Commonwealth which fulfils obligations under a multilateral soft law instrument may well be a law with respect to external affairs, in the sense that the soft law instrument articulates a matter of international concern. This is not to say that every soft law instrument may form the basis for legislation under the external affairs power. There may in some cases be an understandable degree of doubt as to whether a particular soft law instrument represents sufficient evidence on its own to establish that its subject-matter is one of international concern:

> [For example, w]ould it be sufficient for two states to issue a Joint Declaration expressing concern over an international issue, or would it be necessary for an international organisation to do so?[89]

Nevertheless, no such doubt should exist where the soft law instrument is the product of indubitable multilateral co-operation involving a substantial number of nations.

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86 (1982) 153 CLR 168 at 258-259.
87 (1983) 158 CLR 1 at 219.
88 Ibid at 125 per Mason J. See also ibid at 219 per Brennan J.
89 D Rothwell, above n 32 at 229-230.

Further, if there is doubt as to whether the existence of a particular soft law instrument is enough on its own to establish that its subject-matter is one of international concern, this doubt may be dispelled by an analysis of other international instruments referring to that subject-matter. In *Koowarta*, Stephen and Murphy JJ both examined the post-war history of international human rights concerns, making reference to numerous international instruments. On the basis of their examinations, their Honours concluded that the matter of racial discrimination was one of international concern.[90] In the *Tasmanian Dam* case, Murphy J conducted a similar exercise with respect to the matter of the protection of world natural heritage, concluding that it was a matter of international concern even without the *World Heritage Convention*.[91]

Applying this reasoning to the *Rio Declaration*, the very fact that 170 nations co-operated to negotiate, draft and adopt the *Rio Declaration* at an international conference under the auspices of the United Nations must surely be cogent evidence that its subject-matter, namely sustainable development and environmental protection, is a matter of international concern. It is "scarcely sensible" to say that the international community would have adopted the *Rio Declaration* if sustainable development was not such a matter. Other international instruments, such as the *Stockholm Declaration*, *Agenda 21* and the many treaties and other soft law instruments regarding environmental protection that are in existence can also be cited as evidence of the internationalisation of environmental issues.

The *Rio Declaration* represents agreement by the members of the international community "to take common action in pursuit of a common objective". The common objective is the protection of "the integrity of the global environmental and developmental system".[92] The common action is for all nations to ensure that environmental protection becomes an integral part of development processes by undertaking certain steps within their own territories. This is reinforced by the terms of *Agenda 21*. From Australia's point of view, Australia's adoption of the *Rio Declaration* signals Australia's agreement that the subject-matter of the *Rio Declaration* is no longer a matter over which Australia can claim to have exclusive jurisdiction, so far as it is concerned with activities conducted solely within Australia's territory. Australia cannot complain if it is censured by the international community for not undertaking the steps with respect to environmental protection which are required by the *Rio Declaration*. The subject-matter of the *Rio Declaration* has the clear potential to affect Australia's relations with other nations. To conclude otherwise would be to attribute "hypocrisy and cynicism to the international community".[93]

However, this is not a complete answer to the question as to whether the Commonwealth can rely upon the *Rio Declaration* to enact environmental laws. In *Polyukhovich v Commonwealth*, Brennan J warned against giving the "imprecise" phrase

90 (1982) 153 CLR 168 at 218-220 per Stephen J, at 238-242 per Murphy J. It should be noted, however, that it appears that the existence of the *International Convention on the Elimination of all Forms of Racial Discrimination* (1967) 6 *ILM* 360 was essential to Stephen J's conclusion, whereas Murphy J was prepared to state that the matter of racial discrimination was one of international concern "even in the absence of the Convention".

91 (1983) 158 CLR 1 at 174-177.

92 *Rio Declaration on Environment and Development* (1992) 31 ILM 874, Preamble.

93 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 226 per Brennan J.

"international concern" its "broadest meaning".[94] In order to "enliven" the external affairs power, a matter of international concern must reflect "standards expected of and by the international community" which are "broadly adhered to or are likely to be broadly adhered to in international practice" and which are defined with "some precision".[95] Where does this leave the terms of the *Rio Declaration*? Principle 11 provides no specific or precise guidance as to what constitutes "effective" environmental legislation. Whilst elaborating on some of the requirements of "effective" environmental legislation, *Agenda 21* arguably lacks the requisite precision, in the sense that it acknowledges that nations "will develop their own priorities" with respect to sustainable development "in accordance with their prevailing conditions, needs, national plans, policies and programmes"[96] and that environmental laws and regulations will be "country-specific".[97]

However, this view of Brennan J should be contrasted with that of Deane J in the *Tasmanian Dam* case. Deane J expressed the view that Australia's external affairs could well encompass the "pursuit of international objectives".[98] Deane J made no reference to any requirement that the means for attaining those objectives be articulated with any precision. It was a feature of the obligations assumed by Australia under the *World Heritage Convention* that the manner in which these obligations were to be fulfilled was left largely to the discretion of individual nations. It was the existence of this vast discretion in the treaty obligations which was the rationale for the dissenting judgment of Dawson J. His Honour reasoned that the vast discretion evidenced insufficient international concern to attract the external affairs power:

> [The *World Heritage Convention*] is at pains to restrict the degree of concern which it shows so that there can be no suggestion of international invasion of the sovereign right of nations to determine for themselves the manner in which they will exploit their resources, notwithstanding the threat of impoverishment of the heritage of the world.[99]

Dawson J was therefore more concerned with the actual terms of the *World Heritage Convention* and the vagueness of its obligations than he was with the fact that the *World Heritage Convention* was the product of multilateral co-operation. On the other hand, the majority judges placed more emphasis upon the fact that members of the international community had co-operated under the auspices of the United Nations to address the issue of the protection of world cultural and natural heritage. Their Honours all acknowledged that Australia did retain considerable discretion as to the manner in which it was to fulfil its obligations.[100] However, this was not a bar to the subject-matter of the *World Heritage Convention* being one of international concern. Mason J made the following observation:

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94 (1991) 172 CLR 501 at 562.
95 Ibid at 561.
96 UNCED, above n 14 at 65, par 8.3.
97 Ibid at 68, par 8.13.
98 (1983) 158 CLR 1 at 258.
99 Ibid at 310. Unlike the other dissenting judges, (Gibbs CJ and Wilson J), Dawson J was prepared to assume that the treaty obligations were effectively hard law obligations. On the other hand, Gibbs CJ and Wilson J effectively treated the obligations as being soft law and therefore outside the scope of the external affairs power as their Honours understood that scope to be. See ibid at 87-92 and 102 per Gibbs CJ, at 188-196 and 199 per Wilson J.
100 Ibid at 132-133 per Mason J, at 178 per Murphy J, at 225 per Brennan J, at 261 per Deane J.

> By what other means [than by the *World Heritage Convention*], one might ask, could the objective [of protecting world cultural and natural heritage] be realistically achieved? No doubt, in the end, the success of the enterprise will largely depend on the extent to which each nation discharges its primary responsibility for preserving the heritage in its territory, but the formulation of the Convention, its adoption by so many nations resulting in co-operative international action and the assumption by the parties to it of obligations to preserve the heritage will enhance the likelihood of a party discharging its primary responsibility.[101]

Applying this reasoning to the *Rio Declaration*, given that it was not practicable to impose precise obligations upon nations regarding the practice of sustainable development at the Rio conference, how else could the international community have achieved its objective of establishing sustainable development as an international norm of conduct, other than by a broad declaration of principles accompanied by a general programme of action? Certainly the success of the *Rio Declaration* (and *Agenda 21*) will depend upon the "extent to which each nation discharges its primary responsibility" to engage in sustainable development. But the formulation and the adoption of the *Rio Declaration* by virtually all the members of the international community will certainly "enhance the likelihood" of individual members discharging that primary responsibility.

Another difficulty with the requirement of precision in international obligations is that such a requirement seems to assume that the degree of precision of some international obligation necessarily reflects the degree of international concern with respect to the subject-matter of the obligation. That is, a lack of precision reflects a lack of international concern. But this assumption ignores the point that, as discussed above, in the complex, modern international community, it has become increasingly difficult to achieve precise agreements with respect to many matters.[102] Failure to agree upon precise standards for international conduct with respect to a particular matter does not necessarily mean that the international community is not at all concerned with the matter and that the matter cannot affect Australia's relations with other nations. It is submitted that the lack of precision evident in the *Rio Declaration* is a reflection on the complexity of the issues which it addresses, rather than any lack of international concern with respect to those issues.

It must also be recalled that the *Rio Declaration* is a critical part of the international law-making process with respect to the environment.[103] It lays down fundamental principles which, it is expected, will over time be refined into hard law obligations. This will only occur, however, if nations are willing to refer regularly to these principles and to show commitment to them by conforming their own actions to them.[104] The most obvious way to do this is for nations to incorporate them in domestic laws. Therefore by fulfilling its soft law obligation under the *Rio Declaration* through domestic laws, Australia will be participating in the international law-making process with respect to the environment. However, there seems to be underlying the view of Brennan J an assumption that the external affairs power is concerned only with

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101 Ibid at 135. See also at 226 per Brennan J, at 263 per Deane J.

102 See, for example, J Kovar, "A Short Guide to the Rio Declaration" (1993) 4 *Colo J Int'l Envtl L & Pol'y* 119, for an account of the intricate negotiations leading up to the adoption of the *Rio Declaration*.

103 See *Rio Declaration on Environment and Development* (1992) 31 ILM 874, Principle 27.

104 J Kovar, above n 102 at 120.

compliance by Australia with existing international standards. It does not encompass any role which Australia may adopt in the actual setting of the international standards. The view of Brennan J seems to envisage a purely reactive role for Australia in international affairs rather than a pro-active one. Yet surely Australia's participation in the international law-making process has the potential to affect its relations with other nations.

None of this is to say that the precision, or the lack thereof, with which an international obligation is formulated, can never be relevant to the issue of whether such an obligation addresses a matter of international concern. To illustrate where it can be so relevant, Zines refers to Article 55(a) of the *United Nations Charter*, which provides that the United Nations shall promote "higher standards of living, full employment and conditions of economic and social progress and development".[105] Article 56 provides:

> All members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.

The point is then made that Article 55(a) is expressed so broadly in the form of goals or "desired" ends that "quite opposite and contradictory means might be adopted" in order to achieve them.[106] That is, the means by which nations may seek to achieve the goals set out in Article 55(a) can "vary from one extreme to the other".[107] For example, with respect to the goals of higher standards of living and full employment, one nation might place total reliance upon market forces and private enterprise, while another nation might place total reliance upon public sector ownership and control of economic activity:

> Accepting, as Mason J and others have said, that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which common action can be taken. Admittedly, this raises questions of degree; but a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description.[108]

Therefore, Zines concludes, a law which purported to fulfil Australia's obligations under Articles 55(a) and 56 would not be a law with respect to external affairs. However, it is submitted that the steps with respect to environmental protection which nations are required to undertake in accordance with the *Rio Declaration* are distinguishable from the provisions of Articles 55(a) and 56. The steps are not ends in themselves. Rather, they are a means to an end, namely sustainable development. The *Rio Declaration* and *Agenda 21* clearly envisage that a primary means by which sustainable development is to be achieved is through government regulation and standard-setting. Nations are to enact effective environmental legislation and to oversee environmental impact assessment. The level of the standards and order of environmental priorities will vary from nation to nation. However, such variance will reflect differing environmental and developmental contexts,[109] rather than "opposite and contradictory" approaches to the attainment of sustainable development.

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105 See L Zines, above n 27 at 250.
106 Ibid.
107 Ibid.
108 Ibid.
109 *Rio Declaration on Environment and Development* (1992) 31 ILM 874, Principle 11.

It is submitted therefore that the requirement of precision as put forward by Brennan J should not be an impediment to the Commonwealth making laws which undertake the steps with respect to environmental protection required by the *Rio Declaration* and that therefore the Commonwealth does have the power to make laws that fulfil Australia's soft law obligation to ensure that environmental protection is an integral part of development processes in Australia.

LAWS REFERABLE TO THE *RIO DECLARATION*

The above conclusion does not necessarily mean that every environmental law which purports to fulfil Australia's soft law obligation under the *Rio Declaration* will be a valid exercise of the external affairs power. It has never been the case that, once Australia enters into a treaty, the Commonwealth may legislate with respect to the subject-matter of the treaty as if that subject-matter were a new and independent head of legislative power.[110] Although it is primarily for the Commonwealth to choose the means by which treaty obligations are to be fulfilled, the means selected must be "capable of being reasonably considered appropriate and adapted to that end".[111] In the *Tasmanian Dam* case, Deane J refined this constitutional safeguard into a test of "reasonable proportionality":

> Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.[112]

Nevertheless, the cases suggest that the Commonwealth does have "substantial" discretion in selecting the means by which a treaty obligation is to be fulfilled.[113]

Presumably the Court would adopt the same approach with respect to laws purporting to fulfil soft law obligations. That is, a law, the purpose of which is to fulfil particular soft law obligations, must be one which is capable of being reasonably considered appropriate and adapted to the fulfilment of those obligations.[114] However, with respect to a law purporting to fulfil Australia's soft law obligation under the *Rio Declaration*, the application of this constitutional safeguard may be problematic. At first glance, it is difficult to see how the Court could properly review an environmental law for reasonable proportionality *vis-a-vis* the soft law obligation. The fulfilment of the soft law obligation, in particular the enactment of effective environmental legislation, will surely involve the making of complex judgments to resolve multifarious conflicts between developmental and environmental concerns. Such judgments will involve

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110 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131 per Mason J, at 172 per Murphy J. See also *Richardson v Forestry Commission* (1988) 164 CLR 261 at 310 per Deane J, at 347-348 per Gaudron J.

111 Ibid at 289 per Mason CJ and Brennan J. See also ibid at 300 per Wilson J, at 311 per Deane J, at 336 per Toohey J, at 342 per Gaudron J.

112 (1983) 158 CLR 1 at 260. See also *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312 per Deane J, at 346 per Gaudron J. The "reasonable proportionality" test has been applied by the Court in other contexts. See *South Australia v Tanner* (1989) 166 CLR 161; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

113 P Hanks, above n 27 at 350. See also L Zines, above n 27 at 248; H Lee, above n 27 at 82-83.

114 L Zines, above n 27 at 253.

consideration of a diverse range of scientific, economic and social issues, as well as philosophical ones, such as the rights of other species or the inherent value of environmental features.[115] Therefore when the Commonwealth makes a judgment as to how to resolve a particular conflict between developmental and environmental concerns, one would think that the Court, given the nature of that judgment, should be disinclined to question it. Such questioning may be "tantamount to an imputation of mala fides".[116]

It follows that the Commonwealth would effectively have a plenary power with respect to the environment. However, some judges have displayed a determined reluctance to accept what are, in their views, "mere" legislative assertions, unsupported by sufficient evidence, that a law is reasonably proportionate to its purpose.[117] Deane J in his dissenting judgment in *Richardson v Forestry Commission* expressed the view that, in applying the reasonable proportionality test, where the direct operation of a law is with respect to purely domestic matters, the onus lies upon those "who would sustain the validity of the law" (usually the Commonwealth), to show that there is reasonable proportionality.[118] In that case, his Honour held that the Commonwealth had made "no real attempt" to demonstrate that a scheme established by the impugned law for the interim protection of areas with the potential to be classified as areas of world natural heritage was capable of being reasonably considered appropriate and adapted to achieving the discharge of Australia's obligations under the *World Heritage Convention*:

> On the material before the Court, it is impossible to say that it appears that there is reasonable proportionality between ... [the] overall restrictive regime and the designated intention, purpose or object.[119]

The dissent of Gaudron J was upon similar lines.[120] Importantly, however, Deane and Gaudron JJ did not question the proposition that the Commonwealth has substantial discretion in legislating for the fulfilment of obligations; rather, their Honours chose to attack what, in their opinions, was the dearth of evidence placed before the Court by the Commonwealth to justify its legislative judgments. With respect to laws fulfilling Australia's soft law obligation under the *Rio Declaration*, however, this evidentiary burden placed upon the Commonwealth should not pose too many difficulties. Since the soft law obligation is concerned with general environmental protection, rather than the protection of world natural heritage, the Commonwealth should really, with respect to a particular law, only need to produce evidence showing that the law in some way contributes to environmental protection, in

115 See H Wootten, "Environmental Dispute Resolution" (1993) 15 *Adel LR* 33 at 66. This point is brought out in *Agenda 21*, see UNCED above n 14 at 66, par 8.4.

116 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 327 per Dawson J.

117 Ibid at 310 per Deane J.

118 Ibid at 312. Compare this with the following statement of Murphy J in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 161: "An Act of Parliament is the authentic expression of the will of the people through their elected representatives. There is a strong presumption of the constitutionality or validity of every Act." Murphy J went on to note however, at 167, that this presumption "has often been overlooked" in Australia: "[This] may help to explain the considerable number of laws, extraordinary by the standards of other national courts, which have been held by this Court to be beyond the powers of Parliament."

119 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 317.

120 Ibid at 347-348. See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 236-237 per Brennan J, at 266-267 per Deane J.

order to establish that the law is capable of being reasonably considered appropriate and adapted to its purpose. Further, in cases where an environmental law does seem on its face to be disproportionate to its environmental purpose, one must not lose sight of the character of the *Rio Declaration*. For example, a law may prohibit all development in a particular geographic area even though some forms of development would pose no immediate threat to the environment. This law would arguably lack reasonable proportionality. However, such an argument would ignore the character of the *Rio Declaration*, for it is not merely concerned with immediate environmental problems. The *Rio Declaration* is also concerned with the long-term sustainability of development. Simply because a development may not pose an immediate environmental threat does not mean that it should be permitted to proceed. The long-term benefits flowing to present and future generations from the development must be weighed against the potential for environmental damage to be caused both in the short-term and the long-term.

It is therefore submitted that the reasonable proportionality test will only have a very limited application to laws, the purpose of which is to fulfil Australia's soft law obligation under the *Rio Declaration*. This means that the Commonwealth, subject to one outstanding matter to be discussed below, has effectively a plenary power with which to make laws with respect to the environment.

One further aspect must be addressed. Through the *Rio Declaration* as a soft law instrument, the international community has expressed an international concern with respect to all aspects of environmental protection, both global and domestic. This provides the Commonwealth with the legislative competence pursuant to the external affairs power to make laws with respect to all aspects of environmental protection within Australia. From the principles articulated in the *Rio Declaration*, the international community intends to eventually derive hard law, together with further soft law, in the form of directive recommendations, to support the hard law.[121] These subsequent instruments will undoubtedly incorporate obligations expressed in more precise terms than those used to express the obligation present in the *Rio Declaration* (as complemented by *Agenda 21*) that nations must make environmental protection an integral part of development processes. In *Richardson v Forestry Commission*, Dawson J made the point that the scope of an international concern may, "at least theoretically, contract from time to time".[122] It may be argued that the subsequent adoption of these more precise obligations will have the effect of narrowing the perceived scope of international concern with respect to environmental protection.[123] Therefore will the Commonwealth still be able to rely upon the international concern as articulated in the *Rio Declaration* to enact laws with respect to environmental protection or will it need to ensure that any laws with respect to environmental protection are capable of being reasonably considered appropriate and adapted to the fulfilment of the subsequent, more precise international obligations? Presumably the ultimate question as to the validity of any Commonwealth legislation must be whether it is capable of being reasonably considered appropriate and adapted to the prevailing international concern

121 Rules of customary international law may also evolve.
122 (1988) 164 CLR 261 at 327.
123 See D Rothwell, above n 32 at 229.

with respect to environmental protection.[124] Yet how is the prevailing international concern to be ascertained?

In *Koowarta*, Murphy J was of the view that it was "immaterial" that the impugned Act did not "precisely" conform with the provisions of the *International Convention on the Elimination of all Forms of Racial Discrimination*[125] since, in his Honour's view, the subject-matter of racial discrimination had been established, independently of the Convention, to be one of international concern.[126] Of course there is now no requirement that an Act conform "precisely" with a treaty anyway. However, the significant point here is that Murphy J acknowledged that the mere adoption of hard law by the international community with respect to a particular subject-matter does not necessarily mean that that hard law represents the sole expression of prevailing international concern with respect to that subject-matter.

In the *Tasmanian Dam* case, however, Mason J seemed to suggest that a Commonwealth law with respect to a particular subject-matter, which is not referable to a treaty when it is enacted, may not in some circumstances be valid if subsequently a treaty with respect to that subject-matter is adopted by the international community:

> The law must conform to the treaty and carry its provisions into effect. The fact that the [external affairs] power may extend to the subject-matter of the treaty before it is made or adopted by Australia, because the subject-matter has become a matter of international concern to Australia, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it.[127]

This statement has been described as "somewhat ambiguous".[128] It was queried by Dawson J in *Richardson v Forestry Commission*:

> I must confess that I have some difficulty with those remarks. I cannot see why, if it is international concern which gives a subject-matter the character to bring it within the description of external affairs, the conclusion of a limited treaty upon that subject matter should place outside the external affairs power that part of the subject-matter which is beyond the limits of the treaty.[129]

Certainly if a treaty deals with only one part of a matter of international concern, "it is difficult in principle to see why that part of the matter not covered by the treaty could not be the subject of valid legislation".[130] Therefore if subsequent obligations adopted by the international community deal with an environmental subject-matter distinct from that dealt with by a Commonwealth law based upon the *Rio Declaration*, there is no reason for that law's validity to be impugned. Yet what if the subsequent obligations and the Commonwealth law deal with virtually the same environmental subject-matter? This appears to be the type of situation that Mason J was contemplating in the *Tasmanian Dam* case. That is, in this situation, the subsequent obligations set "the

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124 See L Zines, above n 27 at 253. See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 556-562 per Brennan J, where his Honour examines prevailing international concern with respect to the seeking out and bringing to trial of persons alleged to have committed war crimes in Europe during World War II.

125 (1967) 6 *ILM* 360.

126 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 242.

127 (1983) 158 CLR 1 at 131-132.

128 L Zines, above n 27 at 253.

129 (1988) 164 CLR 261 at 325.

130 L Zines, above n 27 at 253.

limits of valid Commonwealth legislation".[131] This argument is attractive in the sense that, logically speaking, the prevailing international concern with respect to a subject-matter should be determined by reference to the most recent articulation of such concern on that matter. The difficulty, however, with the argument is that it ignores the point that, simply because the Commonwealth enacts legislation fulfilling some hard law obligation with respect to some subject-matter, does not necessarily mean that Australia's relations with other nations cannot still be adversely affected in a political or moral sense by that subject-matter. As Rothwell points out, the hard law obligation may not necessarily articulate the full extent of prevailing international concern:

> [T]o achieve consensus amongst the delegates of many states [at an international conference] and produce an acceptable and workable international treaty, the resulting legal instrument may not always address every matter of existing genuine international concern on the topic. It cannot always be said, therefore, that international treaties truly represent existing international concern on certain subject-matters.[132]

Perhaps this was what Deane J had in mind when, in the *Tasmanian Dam* case, his Honour indicated that Australia's external affairs could well include the "observance of the spirit as well as the letter of international agreements".[133] How does one determine the "spirit" of an international agreement? Obviously one can do so by referring to the declaration of principles from which the international agreement derives. The *Rio Declaration* is, of course, such a declaration with respect to the environment. It will provide the "spirit" of any subsequent hard law concerned with the environment. Therefore it is arguable that, on the basis of what Deane J has indicated, it will be quite in order to make reference to the *Rio Declaration* in establishing whether an Act is capable of being reasonably considered appropriate and adapted to prevailing international concern with respect to the environment, even though the international community has subsequently adopted more precise hard law. For example, if the Commonwealth made the legislative judgment that a particular international environmental standard laid down in a subsequent treaty was not stringent enough to be an "effective" standard for Australian conditions, the "spirit" of the treaty deriving from the *Rio Declaration* would surely oblige the Commonwealth to incorporate a more stringent standard in Australian domestic law. The law would be valid even though it would be going "beyond the treaty".

It is therefore submitted that the Commonwealth will still be able to rely upon the international concern as articulated in the *Rio Declaration* to enact laws with respect to environmental protection even in the event of the international community adopting more precise international obligations with respect to the environment. The one exception to this may be where a Commonwealth law based upon the *Rio Declaration* is found to be entirely inconsistent or irreconcilable with subsequent hard law. Such

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131 Ibid.

132 D Rothwell, above n 32 at 229. See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 261 per Deane J. International agreements with respect to the environment usually involve considerable compromise. For example, internationally agreed environmental standards are often a compromise between standards advocated by developed nations and those advocated by developing nations. See K Price, "Linking Global Environmental Protection and International Trade: What are the Options after the US-Mexico GATT Panel Decision?" (1993) 27 *UBC L Rev* 313 at 320.

133 (1983) 158 CLR 1 at 258.

inconsistency or irreconcilability would perhaps indicate that the Commonwealth has misjudged the prevailing international concern, and the law would thus be invalid.

CONCLUSION

While at first it may seem startling that the Commonwealth through the external affairs power could be provided with what is effectively a plenary power with respect to "the environment", it should not be so. In the early case of *R v Burgess; ex parte Henry*, Evatt and McTiernan JJ, somewhat prophetically, proclaimed the external affairs power to be "a great and important one".[134] It is doubtful whether their Honours would have foreseen the devastating environmental damage and degradation that is prevalent throughout the world today. However what Evatt and McTiernan JJ did anticipate was the increasing internationalisation of many topics and "the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters".[135]

In 1972 the international community through the *Stockholm Declaration* recognised that the protection of the environment is a matter affecting the welfare of all peoples. In 1992 through the *Rio Declaration* it called upon its members to ensure that environmental protection becomes an integral part of development processes. Once it is accepted that the external affairs power permits the Commonwealth to make laws with respect to matters which are the subjects of international co-operation or concern, it is not particularly difficult, given the international community's acute interest in environmental protection, to see how the Commonwealth can have what is effectively a plenary power with respect to the environment.

What makes such a result more compelling, or even irresistible, is that it represents a recognition of the changes that have occurred within the framework of international law and international relations generally. Within the international community the homogeneity of the past has given way to diversity. The traditional sources of international law can no longer be relied upon to accurately reflect prevailing international concerns and interests. Rather, it is through the medium of soft law that the international community is increasingly expressing such concerns and interests. If the external affairs power is to be "a great and important one" in the future, the recognition of the role of soft law within the international community is critical.

134 (1936) 55 CLR 608 at 687.
135 Ibid at 681.