From the Franklin to Berlin:

The Internationalisation of Australian Environmental Law and Policy

DONALD R ROTHWELL* and BEN BOER**

1. *Introduction*

A. Development of Australian Environmental Law

As in many countries, environmental law in Australia has undergone substantial development during the past two decades. Not only has there been the adoption of a wide range of environmental laws in the states, but the influence of Commonwealth environmental law has also increased significantly.[1] This has occurred despite the Commonwealth not possessing a distinctive power with respect to the environment.[2] Commonwealth and state environmental law has in turn been influenced by developments at a national level overseas, especially in the United States and Canada. That influence has been particularly strong in the areas of environmental impact assessment and pollution control law.

A further influence upon environmental law has been the development of international environmental law. This has affected all countries, whether developed or developing, or those whose economies are in transition.[3] Prior to the 1970s, international law dealt with the environment largely on a sectoral basis. Specific international responses were developed to deal with particular problems such as pollution of the sea by oil from shipping[4] or protection of the environment during times of armed conflict.[5] On the few occasions that claims arising from damage to the environment had actually come before international courts and tribunals, there had been a reliance upon traditional international law principles of State responsibility.[6] However, at the 1972 Stockholm Conference on the Human Environment, convened by the United Nations, a Declaration was adopted which for the first

* Senior Lecturer and Associate Dean (Postgraduate), Faculty of Law, University of Sydney.
** Corrs Chambers Westgarth Professor of Environmental Law, Faculty of Law, University of Sydney.

1 See Fisher, D E, *Environmental Law: Text and Materials* (1993); Bates, G M, *Environmental Law in Australia* (3rd edn, 1992).

2 Crawford, J, "The Constitution and the Environment" (1991) 13 *Syd LR* 11.

3 For example, the central European countries such as Poland, Hungary, the Czech Republic and Slovakia.

4 See 1954 International Convention for the Prevention of Pollution of the Sea by Oil, 327 *United Nations Treaty Series* (*UNTS*) 3.

5 See 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 *UNTS* 215.

6 See *Trail Smelter Arbitration Tribunal* — Decision (16 April 1938) (1939) 33 *AJIL* 182; Decision (11 March 1941) (1941) 35 *AJIL* 684.

time indicated the degree of global concern for the protection of the environment.[7] The Declaration, containing a preamble and 26 principles, was intended to "inspire and guide the peoples of the world in the preservation and enhancement of the human environment".[8] The Stockholm Conference and the Stockholm Declaration became a catalyst for the development of a wide range of international responses to global and regional environmental problems which have now made international environmental law one of the fastest growing areas of international law. The most recent manifestations of these developments are the Convention to Combat Desertification[9] and the draft International Covenant on Environment and Development.[10]

The purpose of this article is to consider the impact of international environmental law and policy in Australia and to appreciate how Australian environmental law has been shaped and influenced by the international regime. The article reviews the development of international environmental law, and then assesses recent Australian initiatives in international environmental law. Consideration is then given to legislative responses to these developments, plus the responses by the courts. In the conclusion, an assessment is made of the current and future issues that will arise over the next several years from the implementation of international environmental law in Australia.

B. Impact of International Law on Australian Law

Because the implementation of international environmental law in Australia directly raises for consideration the impact of international law on Australian domestic law, it is important to briefly consider the relationship between the two types of law and also the constitutional law issues which arise when international environmental law is being implemented. International environmental law has been characterised by the adoption of a great many treaties during the past two decades. Under Australia's federal system, the Commonwealth has the primary responsibility for representing Australia at international conferences convened to consider the adoption of international environmental instruments. The Commonwealth also has the responsibility of either accepting or rejecting these international initiatives. If Australia does become committed to accepting a newly created international treaty for the protection of the environment, the Commonwealth has the primary responsibility for ensuring that the terms of the treaty are fulfilled.

As a result of the provisions of the Intergovernmental Agreement on the Environment (IGAE),[11] the Commonwealth has agreed to consult with the states

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7 See Stockholm Declaration on the Human Environment (1972) 11 *International Legal Materials* (*ILM*) 1416.

8 See introduction to the preamble; see further Koester, V, "From Stockholm to Brundtland", (1990) 20 *Environmental Policy and Law* 14.

9 Convention on Combating Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (1994) 33 *ILM* 1328.

10 Draft International Covenant on Environment and Development, IUCN: the World Conservation Union and the International Council on Environmental Law (March 1995).

11 Intergovernmental Agreement on the Environment (IGAE) signed by the Commonwealth, the states and territories and the Local Government Association of Australia in May 1992. Western Australia withdrew from the Agreement in 1993.

prior to ratifying or acceding to, approving or accepting any international agreement with environmental significance.[12] In addition, when requested, the Commonwealth will in appropriate cases include a representative of the states on Australian delegations negotiating international agreements relating to the environment. Because of the Commonwealth's responsibility for accepting and implementing Australia's international commitments, it is important to appreciate the extent of the Commonwealth's constitutional power with respect to international environmental treaties. The principal constitutional power the Commonwealth has in this area is its section 51(xxix) power with respect to external affairs. During the 1980s the High Court considered various aspects of the external affairs power. [See Saunders above at 157–61.]

In each case the question at issue was whether the Constitution conferred power upon the Commonwealth to implement the terms of a treaty to which Australia had become a party. In *Koowarta v Bjelke-Petersen*,[13] the High Court failed to reach a common view on this issue. However, in 1983 the Court held in *Tasmania v Commonwealth (Tasmanian Dam)*[14] that the Commonwealth's power extended to the implementation of treaties to which Australia was a party without the need to demonstrate any particular international obligation upon Australia to legislate on the subject matter of the treaty.[15] In two subsequent decisions, *Richardson v Forestry Commission (Tasmanian Forests)*[16] and *Queensland v Commonwealth (Daintree Rainforest)*,[17] the High Court further expanded the scope of the external affairs power.[18]

The importance of these cases for the implementation of international environmental law in Australia was that they opened the way for the Commonwealth to take a more active role in legislating with respect to the environment. This was particularly the case when there existed an appropriate international convention dealing with the environment. In previous decisions the High Court had required that before a treaty could be relied upon as the

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12 IGAE cl 2.5.2; these processes are subject to the proviso that they do not result in unreasonable delays in the negotiation, joining or implementation of international agreements.

13 (1982) 153 CLR 168.

14 (1983) 158 CLR 1.

15 See Lane, P H, "The Federal Parliament's External Affairs Power: The Tasmanian Dam Case" (1983) 57 *ALJ* 554; Coper, M, *The Franklin Dam Case* (1983); Crock, M, "Federalism and the External Affairs Power" (1983) 14 *MULR* 238; Tighe, P, "Environmental Values, Legalism and Judicial Rationality: The Tasmanian Dam Case and Its Broader Political Significance" (1987) 4 *Environment & Planning LJ* 134; Sawer, G, "The External Affairs Power" (1984) 14 *Fed LR* 199; Sornarajah, S (ed), *The South West Dam Dispute: The Legal and Political Issues* (1983).

16 (1988) 164 CLR 261. See Starke, J G, "A Major Extension of the Commonwealth Parliament's External Affairs Power" (1988) 62 *ALJ* 319; Tsamenyi, B M and Bedding, J, "The World Heritage Convention in the High Court: A Commentary on the Tasmanian Forests Case" (1988) 5 *Environment & Planning LJ* 232; Rothwell, D R, "Dams, Forests and More External Affairs: A Case Note on Richardson v Forestry Commission (Tas)" (1988) 18 *Qld L Soc J* 507.

17 (1989) 167 CLR 232. See Rothwell, D R, "The Daintree Rainforest Decision and its Implications" (1990) 20 *Qld L Soc J* 19.

18 A common link in *Tasmanian Dam*, *Tasmanian Forests*, and *Daintree Rainforest* was that in each case the High Court was called upon to consider the terms of Commonwealth legislation giving effect to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 1037 *UNTS* 151.

basis for domestic legislation it had to be a treaty that was truly international in character or reflected substantial international concern.[19] In *Tasmanian Dam*, however, the majority judgments of Mason, Murphy, Brennan and Deane JJ accepted that any international obligation imposed upon Australia by a bona fide international treaty could form the basis for legislation under the external affairs power.[20] In subsequent decisions, the need for the treaty to impose an international obligation has been dispensed with.[21] Accordingly, the current position is that irrespective of whether or not a treaty is representative of international concern or places an international obligation upon the State Parties, the mere acceptance of the treaty by Australia is a sufficient basis for the Commonwealth to rely on the terms of the treaty to enact implementing legislation.[22] The political dimension of these decisions is that the Commonwealth and the states have been forced to rethink major aspects of the federal-state relationship with regard to environment protection and resource exploitation issues. The IGAE was one result of this rethinking. In any case, the knowledge that the Commonwealth has clear power to legislate for the implementation of international treaties, combined with the fact that the IGAE's provisions allow for appropriate consultations with the states and territories, gives some security to the Commonwealth that it will not in the future be undermined by the states and territories when negotiating international environmental agreements,[23] as has occurred in the past, particularly in relation to world heritage nominations.[24]

C. *Australian Involvement in Development of International Environmental Law*

If any justification is needed for Australia to take an active part in the negotiation and implementation of international environmental conventions on a regional and global basis, it can be found in a recent address by Penny Wensley,[25] Australia's current Ambassador for the Environment, who states that there are three reasons for such involvement: security, economics and ethics. In relation to security, she points to Principle 25 of the Rio Declaration, which

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19 See *R v Burgess; ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* above n3.

20 Hanks, P, *Constitutional Law in Australia* (1991) at 344.

21 This was the view of Mason, Murphy and Deane JJ in *Tasmanian Dam*, at 125–6 per Mason J, at 170–1 per Murphy J, at 257–9 per Deane J. For the views of other judges in the subsequent decisions, see *Tasmanian Forests* above n16, at 321 per Dawson J, at 332–3 per Toohey J, at 343 per Gaudron J; *Daintree Rainforest* above n17, at 245–9 per Dawson J.

22 Crawford, above n2 at 23: cf Lumb, R D, "The External Affairs Power and Constitutional Reform" (1988) 62 *ALJ* 679 at 681. It has been held, however, that the Commonwealth does not acquire a plenary power over the general subject matter of a treaty; rather, when enacting legislation to implement a treaty it must be "appropriate and adapted" to the purposes of the treaty in question: see *Airlines of NSW Pty Ltd v. New South Wales* [No 2] (1965) 113 CLR 54, at 87 per Barwick CJ; *Tasmanian Dam*, above n14, at 130 per Mason J, at 259 per Deane J; *Tasmanian Forests*, above n16, at 289 per Mason CJ and Brennan J, at 303 per Wilson J.

23 See Boer, B W, "Environmental and Resource Law in Australia" (1993) 31 (2) *Osgoode Hall LJ* 328 at 332–3.

24 See further, Boer, B W, "World Heritage Disputes in Australia" (1992) 7 *J Environmental Law and Litigation* 247.

25 Wensley, P A, "Keynote Address to the Australian Centre for Environmental Law Second Environmental Outlook Conference" 22 March 1995 (forthcoming).

states "peace, development and environmental protection are interdependent and indivisible" and that effective solutions can only result from concerted action by the international community. In relation to economics, she points out that the catalyst for the transformation of Australia's economy was the recognition that the country's future security and prosperity depended on the integration of our economy with the dynamic economies of the Asia-Pacific region, as well as ensuring that Australia was part of what she characterised as the accelerating and growing global currents of trade and investment. She cites evidence that Australia is becoming a leader in environmental technologies, but that it cannot protect its economic, commercial and trade interests unless it maintains its image as a country genuinely concerned about environmental problems and that it is willing to do its fair share of work to address them: "Clearly active involvement by Australia in the multilateral treaty-making process is essential to the protection and advancement of Australia's economic interests".[26] The third reason for Australia's involvement that Wensley cites is in relation to ethics. She argues that in addition to utilitarian notions of environment protection, the right to a healthy environment as a fundamental human right is fast becoming an accepted principle of international law. She states that human rights and environmental concerns affect not only national, but also transnational and global life, being based on the principle of universality. This, she argues, inevitably leads to the erosion of the doctrine of national sovereignty and the legitimisation of external concern about national activity.[27]

2. *The Framework of International Environmental Law*

A. *The Emergence of Principles of International Environmental Law*

The 20th century has seen the gradual emergence of international law principles dealing with the environment. Commencing with the 1938 and 1941 decisions in the *Trail Smelter Arbitration* between Canada and the United States[28] there has been a steady growth in international law focussing on environmental problems.[29] During this time new principles have emerged concerning State responsibility for protection of the environment, cooperation between States to deal with environmental problems, and the need for an "ecosystem" approach towards environmental protection. Together with an increased

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26 Id at 22.

27 The controversial question of national sovereignty and environmental concerns will need in time to be more directly addressed by the international community. Koester, for one, argues that states must accept that international regulation of the environment is necessary, even though this may turn traditional sovereignty notions upside down; Koester, above n8 at 18. For a further view on the question of sovereignty and environment, see Schrijver, N, "Dynamics of Sovereignty in a Changing World" in Ginthers, K, Denter, E and de Waart, P J I M (eds), *Sustainable Development and Good Governance* (1995) at 80–7.

28 Above n6.

29 Birnie, P W and Boyle, A E, *International Law and the Environment* (1992) at 10. In work conducted in preparation for the 1992 United Nations Conference on Environment and Development (UNCED), the UNCED Preparatory Committee surveyed a total of 124 multilateral environmental instruments, all of which had been adopted this century and 97 of which had been adopted since 1970: see Sand, P H (ed), *The Effectiveness of International Environmental Agreements* (1992).

global consciousness about the need to protect the environment,[30] these legal developments have placed State responsibility for protecting the local, regional and global environment high on the international agenda. As a result States have become increasingly concerned about meeting their international obligations in this area. There is also an increased willingness amongst States to assert claims for environmental damage.[31] It can now be said, therefore, that international environmental law has emerged as a distinct field of international law.[32]

The most rapid developments in international environmental law have taken place in the past 25 years.[33] Two factors have been responsible for this development: an increase in major environmental incidents which have had transboundary impact,[34] and the increased attention given to the problem at major international (particularly United Nations) fora. The most significant early decision concerning State responsibility for transboundary environmental impact was the *Trail Smelter Arbitration*. In this case, action was brought by the United States for air pollution caused by a Canadian smelter in British Columbia which, it was argued, emitted pollutants into the atmosphere which drifted across the border so as to cause harm to land and other interests in the state of Washington. It was held that no State had the right to use or permit the use of its territory so that emissions cause injury in or to the territory of another State or the properties or persons therein.[35] Canada, was therefore held responsible for the past and future conduct of the Trail Smelter, irrespective of whether it was a state-owned enterprise.[36] The *Trail Smelter* decision substantially advanced principles of State responsibility in regard to transfrontier pollution but uncertainty existed as to how far these principles

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30 See eg: Stockholm Declaration on the Human Environment, 16 June 1972, UN Doc A/Conf 48/141 Rev 1, reprinted in (1972) 11 *ILM* 1416; *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980); World Charter for Nature, UNGA Res 37/7 (9 November 1982), reprinted in (1983) 22 *ILM* 455; World Commission on Environment and Development, *Our Common Future* (1987); Hague Declaration on the Environment, done in The Hague, 11 March 1989, reprinted in (1989) 28 *ILM* 1308; International Union for the Conservation of Nature and Natural Resources, *Caring for the Earth; A Strategy for Sustainable Living* (1991); The Rio Declaration on Environment and Development, UN Doc A/CONF 151/5/Rev 1 (13 June 1992), reprinted in (1992) 31 *ILM* 876 (Rio Declaration).

31 This is exemplified by the increasing number of cases which have come before the International Court of Justice which raise environmental issues, and also the Court's recent decision to create a separate Chamber dealing with environmental disputes, see "Chamber for Environmental Matters" (1993) 23 (6) *Environmental Policy and Law* 243.

32 See Koester, above n8.

33 Palmer, G, "New Ways to Make International Environmental Law" (1992) 86 *AJIL* 259 at 262.

34 The Torrey Canyon tanker disaster in 1967 is credited with being the catalyst for the development of a number of International Maritime Organisation conventions dealing with marine pollution, intervention in the case of maritime incidents, and liability; likewise the 1986 accident at the Chernobyl nuclear power plant in the USSR resulted in a number of international instruments, see Boyle, A E, "Chernobyl and the Development of International Environmental Law" in Butler, W E (ed), *Perestroika and International Law* (1990) at 203.

35 *Trail Smelter*, above n6 1941 decision at 716 where the Tribunal noted: "... under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

36 Id at 717. See the discussion in Kiss, A and Shelton, D, *International Environmental Law* (1991) at 122–5.

could extend. The principle of State responsibility for injurious acts caused to another State was further developed in the *Corfu Channel Case*[37] where the International Court of Justice adopted the principle that every State had an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other states".[38] As a result of this decision, the potential now existed for the principle of *Trail Smelter* to be extended beyond air pollution to a wide variety of injurious acts.[39]

These decisions dealt with damage to the environment which had already occurred or which might occur at some time in the future. They did not address the issue of what responsibility existed upon States to protect the environment.[40] The principle that States were under an obligation to protect the environment in order to minimise the risk of environmental damage had begun to appear, however, in various international treaties. The 1946 International Convention for the Regulation of Whaling[41] sought for the first time to create a management regime in which whale stocks would be closely monitored and in which decisions regarding allowable catch levels would be based on scientific data. The 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL)[42] also sought to implement a management mechanism for international shipping to minimise the risk of oil pollution rather than merely to deal with liability for damage caused. The 1958 Geneva Conventions on the Law of the Sea also contained provisions seeking to protect the marine environment, especially in regard to the prevention of marine pollution and the need to implement conservation principles for living resources of the high seas.[43]

Through a combination of various decisions by tribunals and courts, plus bilateral and multilateral conventions, certain international law principles applicable to the environment slowly began to emerge.[44] However, these developments were disparate and as international concern began to rise over environmental issues it became obvious that a global conference was needed to discuss matters relating to the present state and future of the human environment. The result was the 1972 Stockholm Conference,[45] which agreed upon the Stockholm Declaration on the Human Environment.[46] The Declaration included a set of guiding principles for the future direction of activities which

37 *Corfu Channel Case* (United Kingdom v Albania) [1949] ICJ Reports 4.

38 [1949] *ICJ* Reports 22.

39 A further decision which confirmed the obligation in international law upon a State not to engage in acts which harmed the environment of another State came in the *Lake Lanoux Arbitration* (France v Spain), (1957) 12 RIAA 281; for an English translation see (1959) 53 *AJIL* 156–71.

40 For comment see Pisillo-Mazzeschi, R, "Forms of International Responsibility for Environmental Harm" in Francioni, F and Scovazzi, T (eds), *International Responsibility for Environmental Harm (1991) 15 at 31.*

41 161 *UNTS* 74.

42 Above n4.

43 See Convention on the High Seas, 450 *UNTS* 82, Arts 24, 25; Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 *UNTS* 285, Art 2.

44 For a brief history of the development of international environmental law see, Brown Weiss, E, "Global environmental change and international law: the introductory framework", in Brown Weiss, E (ed), *Environmental Change and International Law: New Challenges and Dimensions* (1992) at 3; see also Schachter, O "The Emergence of International Environmental Law" (1991) 44 *J Int'l Affairs* 457.

45 The Conference was convened pursuant to UNGA Res 2398 (XXIII) (3 December 1968).

46 Above n30.

impact upon the environment, especially economic development, and the need for States to take more coordinated action to deal with existing and emerging problems. Some provisions in the Stockholm Declaration were important for the development of international environmental law. Principle 21 has emerged as the most important of these. It provided:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The significance of this statement is that States had for the first time agreed that there was a universal notion of State responsibility for any environmental damage or harm not only to other States but also for areas beyond national jurisdiction. While the Stockholm Declaration was not an attempt to create legally binding principles regarding environment and development, the subsequent continued reference to Principle 21 in various fora and international instruments has seen it now commonly accepted as representing customary international law on the question of State responsibility.

B. The Transition to Global Environmental Protection

In the period following the Stockholm Conference many of the developments in international environmental law tended to be in response to specific sectoral problems such as marine and air pollution, and wildlife and habitat protection. With the publication of the World Conservation Strategy in 1980 and the generation of national conservation strategies or their equivalent in many countries, the subsequent establishment of the World Commission on Environment and Development and the publication in 1987 of its report *Our Common Future*, an awareness developed of the need for a comprehensive approach towards global environmental protection.[47] As a result of the recommendation of the World Commission on Environment and Development, it was decided in 1989 to convene a Conference on Environment and Development (UNCED) in 1992,[48] in the year of the twentieth anniversary of the Stockholm Conference. The purpose of the Conference was to devise various strategies to allow for the integration of environment and development by taking account of current global conditions and those of the future. Although UNCED did not achieve all of the goals initially expected of it, there were nevertheless some important achievements. Conventions dealing with biological diversity[49] and climate change[50] were agreed upon. Agenda 21 was also

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47 World Conservation Strategy, see above n30, was developed by the International Union for the Conservation of Nature and Natural Resources, now known as IUCN: World Conservation Union, in collaboration with the United Nations Environment Programme and the World Wildlife Fund, now known as Worldwide Fund for Nature; this was followed by the publication of *Caring for the Earth*, by the IUCN, the United Nations Environment Programme and the Worldwide Fund for Nature in 1991; see also Carew-Reid, J, Prescott-Allen, R, Bass, S and Dalal-Clayton, B, *Strategies for National Sustainable Development: A Handbook for their Implementation*, prepared through the IUCN and the International Institute for Environment and Development, 1994.

48 UNGA Res 44/228 (22 December 1989).

49 Convention on Biological Diversity (1992) 31 *ILM* 818; [1993] *ATS* 32.

50 Framework Convention on Climate Change (1992) 31 *ILM* 849; [1994] *ATS* 2. While this

adopted.[51] This document is intended to represent "an agreed programme of work by the international community addressing major environment and development priorities for the initial period 1993–2000 and leading into the twenty-first century".[52] Agenda 21 adopts a broad range of responses to existing and emerging environmental problems, setting out a range of important environmental initiatives for the global community. Some of these are intended to build upon existing legal regimes and others to develop new ones. Similarly to the Stockholm Conference, UNCED also adopted the Rio Declaration.[53] This reinforced some of the principles from Stockholm, (in particular Principle 21)[54] but also recognised principles which have emerged subsequently[55] and adopted new principles to deal with emerging and future issues.[56]

One specific response to Agenda 21 which has already been implemented is the Commission for Sustainable Development (CSD). The CSD is seen as the major institutional outcome of UNCED. Its function is to facilitate, monitor and evaluate implementation of the general commitments made by States at UNCED to integrate environmental concerns with aspirations for development, as spelled out in the Rio Declaration, Agenda 21 and the Statement of Principles on Forests.[57] The CSD relies in part on the process of voluntary reporting by States of their progress with environmental matters covered by the CSD.[58]

On the basis of these developments, it is possible to identify several fundamental principles of international environmental law.[59] At the least, they comprise:

(1) the obligation of all States to conserve the environment and its natural resources;

(2) the need for States to assess potential and monitor actual environmental impact;

(3) the need for international cooperation to conserve the environment both within and beyond areas of national jurisdiction.[60]

The first principle has been recognised in numerous international instruments since the Stockholm Conference. Perhaps the most significant of these, given the number of participating States, was the 1982 United Nations Convention on the

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Convention was formally adopted prior to UNCED it was first opened for signature at the Conference and had been negotiated as part of the UNCED process.

51 Reprinted in *Agenda 21: The United Nations Programme of Action from Rio* (1993).

52 "UNCED: Rio Conference on Environment and Development" (1992) 22 (4) *Environmental Policy and Law* 204 at 208.

53 Above n30.

54 Id, Principle 2.

55 In particular, id, Principle 15 recognises the "precautionary approach", while Principle 17 emphasises the need for "Environmental impact assessment" to be undertaken at a national level for ctivities likely to have a significant adverse impact on the environment.

56 This is reflected in the number of principles which refer to the need for sustainable development, see id, Principles 1, 4, 8, 21, 22, 27.

57 Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (1992) 31 *ILM* 882.

58 Australia has submitted one report to date, with another due in 1995: see *Australia's National Report 1994: For the United Nations Commission on Sustainable Development*, (1994) Department of the Environment, Sport and Territories, Canberra.

59 Birnie and Boyle, above n29 at 9–26.

60 Kiss and Shelton, above n36 at 145–54.

Law of the Sea (UNCLOS).[61] As a result of these provisions, it can be said that generally throughout international environmental law it is now recognised that States have an obligation to prevent environmental harm.[62] Second, there is a duty to monitor the environment and to assess the risk of potential transboundary environmental damage from proposed or existing activities. States need to be aware of the state of the environment and the potential that their activities may have for environmental damage. This is especially the case with new activities which may not be considered environmentally harmful when first initiated.[63] The third general principle of international environmental law, the need for greater environmental cooperation to deal with environmental problems both within and beyond areas of national jurisdiction, also has its roots in the *Trail Smelter* decision and Principle 21 of the Stockholm Declaration.[64] The United Nations has played an important role in implementing this principle. Through bodies such as the United Nations Environment Programme (UNEP) it has facilitated and sponsored a number of international conventions dealing with a range of specific regional and global environmental problems.[65] This principle has found expression in a number of bilateral and multilateral conventions [66] and also Agenda 21. The latest expression of the principle of cooperation is found in the Desertification Convention.[67]

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61 (1982) 21 *ILM* 1261, [1994] *ATS* 31: UNCLOS Part XII — Protection and Preservation of the Marine Environment. A succinct example is Art 192, which provides: "States have the obligation to protect and preserve the marine environment".

62 Birnie and Boyle, above n29 at 98–9. Handl, G "Environmental Security and Global Change: The Challenge to International Law" (1990) 1 *Ybk Int'l Environmental L* 3 at 23 lists three notions which underlie the principle: (1) the application of the principle is not limited to transboundary risks of harm but reaches environmentally sensitive activities generally; (2) restraint is advocated not only in the face of clear and present danger but because of the limited knowledge of ecological implications of human activities; (3) the principle implies a broad systemic approach to global environmental management in which the "react and correct" model must be complemented by "forecast and prevent".

63 An example of such an activity which may not have been considered environmentally harmful when it first developed was the use of CFCs and Halons which have subsequently been found to have a detrimental impact upon the ozone layer.

64 Birnie and Boyle, above n29 at 102–4. The *Lake Lanoux* decision, above n39 was also influential in the development of this principle.

65 See eg UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, (1978) 17 *ILM* 1097. See Birnie and Boyle, above n29 at 102–3.

66 See eg Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, (1987) 26 *ILM* 38; Convention on Early Notification of a Nuclear Accident, done in Vienna, (1986) 25 *ILM* 1370.

67 Above n9, preamble, where it recognises: the importance and necessity of international cooperation and partnership in combating desertification and mitigating the effects of drought. It may be noted here that Koester goes further than the above, to argue that there are some 12 general principles, of environmental law, including the three examined above, which can be considered to have the validity of international customary law; they include the controversial right to a healthy and well-functioning environment, an obligation to prevent domestic activities from harming the environment of other countries to a significant degree, the rule of "equitable utilisation", an obligation to inform other countries about potential harm, an obligation to warn other States in the event of an environmental disaster, the principle of non-discrimination in relation to recovery for environmental damage; a general obligation to supervise the condition of the environment through monitoring (which he argues is a logical accessory to the other obligations), obligations to pay compensation for substantial environmental damage inflicted in other countries, and finally,

C. *Principles of Sustainable Development*

Sustainable development involves the integration of environmental concerns and aspirations for development at all levels of decision-making. Over the past several years, a number of principles or concepts have been identified as assisting in the achievement of sustainable development. They include the concepts of intragenerational and intergenerational equity, the precautionary principle, the conservation of biological diversity and integrity, and the internalisation of environmental costs.[68]

Intergenerational equity embraces the idea that the present human generation holds the earth's resources in trust for future generations.[69] The IGAE of 1992 recognises the concept by declaring that "the present generation should ensure that health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations".[70] Intragenerational equity means that people within a single generation have equal rights to benefit both from the exploitation of resources and from the enjoyment of a clean and healthy environment at a national and international level. The IGAE defines the precautionary principle as follows: "Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation".[71] The definition is identical to that found in the Rio Declaration, except that the latter refers to "cost-effective measures". The IGAE goes on to say that in the application of the principle, public and private decisions should be guided by careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and an assessment of the risk-weighted consequences of various options.

The conservation of biological diversity is seen as a key element of sustainable development. As stated in the draft National Strategy for the Conservation of Australia's Biological Diversity: "Biological diversity refers to the variety of all life forms — the different plants, animals and micro-organisms, the genes they contain and the ecosystems of which they form part".[72] This definition is similar to that found in the Convention on Biological Diversity.[73] The fifth principle is the internalisation of environmental costs. Internalisation of environmental costs is said to mean "the creation of economic environments so that social and private views of economic efficiency coincide. It is concerned with structures, reporting mechanisms and tools to achieve this end".[74]

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the principle of peaceful settlement of disputes; see Koester, above n8 at 17–8.

68 For discussion of these principles see Boer, B W, "Institutionalising Ecologically Sustainable Development: The Roles of National, State and Local Governments in Translating Grand Strategy into Action" (1995) *Willamette LR* (forthcoming).

69 See further Brown Weiss, E, "Intergenerational equity: A legal framework for global environmental change" in Brown Weiss (ed), above n44 at 385.

70 Above n11, cl 3.5.2 at 14.

71 Id, cl 3.5.1 at 13–4.

72 Biological Diversity Advisory Committee: *National Strategy for the Conservation of Australia's Biological Diversity* (draft; 1994), 1. The Strategy considers biological diversity at three levels: genetic diversity, species diversity and ecosystem diversity.

73 Above n48, Art 2.

74 Harding, R, Young, M, and Fisher, E, "Interpretation of the Principles for the Fenner Conference: Sustainability — Principles to Practice" *Unisearch*, UNSW (1994) at 47.

In essence, the principle requires that all burdens placed on the environment by a particular activity be taken into account in the decision-making process. It also means that previously unquantified costs (for example, loss of "free" or "public" goods such as clean air or clean water) should be quantified as far as possible, and included in economic calculations about the financial viability of a particular proposed or ongoing activity.[75]

The principles of international environmental law and the principles of sustainable development as generated through the UNCED process have also found expression in the draft International Covenant on Environment and Development sponsored by the World Conservation Union's Environmental Law Commission, which is now briefly dealt with.

D. International Covenant on Environment and Development

When all the new international treaties on environment are taken together, there is still arguably a substantial gap in international environmental law, particularly in terms of ensuring that the various principles of sustainable development have some guarantee of being adequately implemented. In 1985, the Brundtland Commission commissioned a Group of Experts in Environmental Law to draft the legal principles that would be needed to guide sustainable development. This resulted in a report in 1986 which recommended an international instrument on the implementation of sustainable development.[76] The task of developing this instrument was taken up by the IUCN Commission on Environmental Law, and is presently known as the International Covenant on Environment and Development. The covenant seeks to be an umbrella instrument, to provide the legal framework to support the further integration of the various aspects of environment and development.[77] The Covenant takes inspiration from and develops further the concepts found in the Rio Declaration, Agenda 21, the UNCED conventions as well as the Statement of Principles on Forests. One of the members of the IUCN Environmental Law Commission has described the Covenant thus:

> The covenant presents for the first time in the history of international environmental law making, the results of a spirited attempt to produce a multilateral treaty, seeking to address all aspects of sustainable development in a single instrument. This is an appreciable departure from the traditional approach to international environmental law making, which has taken place in a piece-meal and sectoral way, eg marine environment, pollution, biodiversity and so on.
>
> ... the draft covenant is the only instrument that contains all the core provisions of all the sectoral conventions in a single document. The result is a

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75 For a detailed discussion of these principles, see id.

76 Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development adopted by the WCED Experts on Environmental Law, in Annex 1, *Our Common Future*, 1987; full text in *Legal Principles for Environmental Protection and Sustainable Development* (1986).

77 An extensive rationale for the Covenant is set out by Burhenne, W E and Hassan P, in the foreword to the Draft International Covenant on Environment and Development, as presented to the United Nations Congress on Public International Law in March 1995.

mosaic of treaty obligations to encourage states and other actors (including individuals) to pursue the goal of sustainable development.[78]

The objective of the draft Covenant is "to establish integrated obligations to achieve the environmental conservation and sustainable development necessary for humans to enjoy a healthy and productive life within nature".[79]

The Covenant establishes nine fundamental principles which it recommends for guiding the conduct of states in their implementation of the obligations in the Covenant. It incorporates the following specific principles:

- the concept of a common concern for humanity;
- the concept of intergenerational equity;
- the precautionary principle;
- recognition of the right to development (though appropriately circumscribed);
- the need to balance obligations relating to consumption patterns with those relating to demographic policies.

The Covenant also incorporates some general obligations which relate to both the responsibilities of States and individuals. There was a good deal of debate in the negotiations about the ability of an international convention to bind individuals. Fundamentally this is impossible however, the resolution is to place obligations on the States to ensure that laws and policies are put in place so that individual behaviour can be regulated. In this sense, there is little difference from any domestic pollution or other environmental management legislation.

The following concepts are also recognised and given legal underpinning in the Covenant:

- the integration of environment and development;
- prevention of and responses to accidents;
- protection of the global commons; that is, areas outside national jurisdiction;
- "polluter pays" principle (through the obligation to internalise costs);
- the role of local and indigenous communities, concerned individuals, groups and organisations.

The Covenant also contains a range of specific obligations on sustainability in relation to individual sectors pollution control; waste management; trade and the environment; military and hostile activities; introduction of alien and modified species; ozone; sustainable use of biological resources; cultural and natural heritage. The Covenant also pays special attention to the needs of developing countries and those in economic transition. Finally, the Covenant includes a range of detailed articles relating to implementation, through cooperation, financial mechanisms, transfer of environmentally sound technologies and capacity building. The final draft of the Covenant was presented to the United Nations Public International Law Congress in New York in

78 Adede, A, (Deputy Director, United Nations Office of Legal Affairs, Codification Division) Address to Workshop on the International Covenant on Environment and Development, IUCN General Assembly, Buenos Aires, January 1994.

79 Article 1.

March 1995. After further negotiation and drafting, it is expected to acquire the status of a treaty and be open for signature in the next year or two.

3. *Australian Initiatives in International Environmental Law*

Australia has taken an active role in the development and implementation of international environmental law and this has impacted upon the internationalisation of Australian environmental law. [80] Many of Australia's principal efforts concerning developments in this field have been with respect to regional issues and concerns. The most prominent have been in regard to Antarctica and the Southern Ocean, and the Southwest Pacific.

In the case of Antarctica, Australia is an original party to the 1959 Antarctic Treaty[81], the 1972 Convention on the Conservation of Antarctic Seals,[82] and the 1980 Convention on the Conservation of Antarctic Marine Living Resources;[83] the secretariat of the latter is located in Hobart.[84] During the 1980s, Australia took an active role in the negotiation of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).[85] However, in May 1989, Australia and France declared that they would not sign the Convention and instead would campaign for the creation of a "comprehensive environmental protection" regime for Antarctica. At the Antarctic Treaty Consultative Meeting XV held in Paris during 1989, Australia and France, with the support of a number of international environmental organisations (which had long been campaigning for the declaration of Antarctica as a "world park"), proposed that the Antarctic Treaty parties should seriously consider the negotiation and implementation of a comprehensive environmental protection regime for Antarctica.[86] A central feature of these proposals was that mining activities in Antarctica be prohibited either permanently or for many years. Following substantial discussion amongst the Antarctic Treaty parties, a modified version of the Australia/France proposal was accepted and agreement was reached in October 1991 on the Protocol on Environment Protection

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80 It should be noted that the internationalisation of Australian environmental law has become more evident since the appointment and creation of the post of an "Ambassador for the Environment". Ninian Stephen, a former High Court judge and Governor-General, held the position during the preliminary stages of the UNCED negotiations as well as through the conference itself. Penny Wensley has held the position since 1993. Both incumbents have achieved very significant results in a wide range of international and national fora, and have through their work contributed in particular to the development of international environmental law, especially in the negotiation of conventions, as well as in their involvement in the meetings of conferences of the parties to conventions.

81 (1961) 402 *UNTS* 71.

82 (1972) 11 *ILM* 251.

83 (1980) 19 *ILM* 841.

84 For more background to these provisions and the role of Antarctic Treaty System, see Rothwell, D R, "The Antarctic Treaty: 1961-1991 and Beyond" (1992) 14 *SydLR* 62; Rothwell, D R, "Environmental Regulation of the Southern Ocean" in Crawford, J and Rothwell, D R (eds), *The Law of the Sea in the Asian Pacific Region* (1995) at 93.

85 (1988) 27 *ILM* 868.

86 For a discussion of Australian policy towards CRAMRA see Blay, S K N and Tsamenyi, B M, "Australia and the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA)" (1990) 26 *Polar Record* 195.

to the Antarctic Treaty (also known as the "Madrid Protocol").[87] The Protocol creates a moratorium on mining in Antarctica for at least 50 years.[88] However, by far its most significant provisions are those dealing with protection of the Antarctic environment. The parties commit themselves to the goal of "comprehensive protection of the Antarctic environment and dependent and associated ecosystems" and designate Antarctica as a "natural reserve, devoted to peace and science".[89] The level of this commitment is demonstrated in Article 3 where a series of fundamental principles dealing with the Antarctic environment are accepted for the "planning and conduct of all activities in the Antarctic Treaty area". Australia has ratified the Protocol; however, it has not yet entered into force. Australian legislation which applies in the Australian Antarctic Territory is predominantly based on the various international instruments which have been adopted by the Antarctic Treaty parties.[90] Australia was also an active supporter of a French proposal to have the Southern Ocean declared a sanctuary for whales by the International Whaling Commission. Within the Southern Ocean Whale Sanctuary commercial whaling activities are prohibited. The Sanctuary area covers almost all the migration routes of the whales which are found in Australia's region and complements an already existing Indian Ocean Whale Sanctuary.[91]

In the Southwest Pacific, Australia has been a strong supporter of the various initiatives which have been adopted in the region for the protection of the environment. These initiatives have concentrated on protection of the marine environment, the most important of which has been the 1986 Convention for the Protection of the Natural Resources and Environment of the Southwest Pacific Region and its associated Protocols.[92] Australia has also been an active supporter in the implementation of regional initiatives to make the Southwest Pacific a nuclear free zone,[93] to rid the region of driftnet fishing,[94] and more recently the negotiation of a convention to regulate the export of hazardous wastes within the region.[95] Deforestation has also been an issue of regional concern, and Australia has been active in programmes to assist the

87 (1991) 30 *ILM* 1461 (Protocol).

88 Protocol, Art 7

89 Protocol, Art 2.

90 See *Antarctic Treaty (Environment Protection) Act* 1980 (Cth); *Antarctic Marine Living Resources Act* 1981 (Cth); *Antarctic (Environment Protection) Legislation Act* 1992 (Cth).

91 See amendments to Schedule, International Convention for the Regulation of Whaling, Paragraph 7(b), adopted at International Whaling Commission Meeting, 23–27 May 1994, Puerto Vallarta, Mexico; see also Boer, B W and Lawrence, P, Regional Report "Australia" (1994) *Ybk Int'l Environmental L* (forthcoming).

92 (1987) 26 *ILM* 38; supplemented by the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, and the Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region; see the discussion in Boer, B W, "Environmental Law and the South Pacific: Law of the Sea Issues" in Crawford and Rothwell, above n84 at 67.

93 South Pacific Nuclear Free Zone Treaty (1985) 24 *ILM* 1442; implemented in Australia by the *South Pacific Nuclear Free Zone Treaty Act* 1986 (Cth), see the discussion in Brown, J (ed), "Australian Practice in International Law 1984–1987" (1991) 11 *Aust Ybk Int'l L* at 579.

94 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (1990) 29 *ILM* 1454; see the discussion in Miller, B, "Combating Drift-Net Fishing in the Pacific" in Crawford and Rothwell above n84 at 155.

95 It is anticipated that the South Pacific Hazardous Wastes Convention (Waigani Convention) will be adopted in late 1995; see Boer and Lawrence above n91.

developing island States of the region to respond to threats posed to their rainforests and indigenous tropical timbers. Through Australia's extensive aid program within the Southwest Pacific it has also been possible to assist island States to gain the necessary expertise to implement international environmental obligations.[96]

In addition to these regional initiatives, Australia has also played a key role in the negotiation of several global environmental regimes. Australia has long been a strong supporter of the International Maritime Organisation's (IMO) initiatives to protect the marine environment. Australian delegations have been a party to all the major IMO negotiations since the 1970s dealing with pollution of the sea by oil and the dumping of other substances at sea. Because of the extremely sensitive nature of the marine environment adjacent to parts of the Australian coastline, especially the Great Barrier Reef, Australia has taken a special interest in proposals to develop responses to deal with the protection of these "special areas". One particular Australian response was to have adopted at the IMO a compulsory pilotage regime for certain waters of the Great Barrier Reef.[97] Australia has recently announced that it will be seeking to have a similar regime adopted for the waters of Torres Strait.[98] Australia has also taken an active role in international fora with respect to initiatives to regulate the transboundary movement of hazardous wastes,[99] the protection of natural and cultural heritage, ozone depletion and a wide range of measures dealing with fisheries.[100] Of particular interest to Australia has been the recent negotiation of the 1994 Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification.[101] As one of the few industrialised countries to experience severe drought and also desertification, Australia played a key role in the drafting of the Convention, and is looked to by other countries as an example. The Australian Government is keen to promote Australian expertise in areas relevant to the Convention.[102] A key provision of the Convention, the elaboration of national action programs by developing countries to combat desertification, was based largely on an Australian proposal. In addition to Australia's interest and role in the UNCED

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96 For example, Australia has sponsored a national forest inventory in the Solomon Islands for some years; at the 1994 meeting of the South Pacific Forum, Australia initiated a forestry programme in which the Prime Ministers of Australia, Fiji, New Zetland, Papua New Guinea, Solomon Islands and Vanuatu agreed to prepare a common Code of Conduct to govern the logging of indigenous forests, to which companies logging in those countries will be required to adhere; see Rose, G, "Australia's Environmental Initiatives in the Asia Pacific Region", Australian Centre for Environmental Law Second Environmental Outlook Conference, 22 March 1995 (forthcoming).

97 See IMO Resolutions MEPC 44(30) and 45(3) adopted 16 November 1990; for further background see the discussion in Brown, J (ed), "Australian Practice in International Law 1990 and 1991" (1992) 13 *Aust Ybk Int'l L* 298.

98 Department of Transport, *Great Barrier Reef and Torres Strait Shipping Study*, Vol 1 (1995) 32 — Recommendation 5.

99 For example, Australia has provided the chairperson for the meetings of the parties of the Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) (1989) 28 *ILM* 657.

100 The most recent Australian initiative in this area was the 1993 Convention for the Conservation of Southern Bluefin Tuna, between Australia, New Zealand and Japan, [1994] *ATS* 16.

101 Above n9.

102 Above n25.

process which is discussed in more detail below, Australia has also taken a role in the development of international regimes which have a related impact upon protection of the environment, the best example of which is the recent Chemical Weapons Convention.[103] Australia was also centrally involved in the Conference on Small Island States, which took place in Barbados in March 1994. Australia's Ambassador for the Environment, Penny Wensley, was appointed chair of the preparatory meeting for the Conference, as well as the main committee of the Conference itself.

4. *Legislative and Policy Responses to International Environmental Law*

A. World Heritage

The earliest legal and policy responses of the Commonwealth to the developing field of international environmental law occurred in relation to a number of controversies over the nomination, listing and management of potential world heritage areas. The attempt to stop the flooding of Lake Pedder for the purposes of a hydro-electric scheme in the early 1970s[104] was the precursor of the fight for the Franklin River, also threatened by a hydro-electric scheme. The battle for the Franklin galvanised the conservation movement in Australia, and was the catalyst for the first national legislation in the world specifically enacted for the protection of world heritage properties.[105]

Conflict continued in 1986 when the Commonwealth's nomination of Stage Two of Kakadu National Park in the Northern Territory was declared void because of a flaw in the consultative process between the Government and interested parties over the consequences of nomination, especially in regard to the interests of mining companies.[106] Though this decision was subsequently reversed by a Full Court of the Federal Court,[107] the potential for a world heritage nomination to be contested in the courts because of a flaw in the nomination processes within Australia caused a change in government policy.[108] When the world heritage values of the Tasmanian forests were subsequently considered by the Commonwealth Government, a different approach was adopted. Instead of nominating the area for the World Heritage List unilaterally, an independent Commission of Inquiry was established to investigate whether the identified property was suitable for nomination. The Commission, headed by Helsham J, published a report[109] which generated

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103 See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) 32 *ILM* 800.

104 See Toyne, P, *The Reluctant Nation* (1994); the campaign to restore the lake to its original water level began in earnest in 1994, with a target date of 2000; see Brown, B, Address to 13th National Environmental Law Association Conference, Melbourne, November 1994.

105 *World Heritage Properties Conservation Act* 1983 (Cth); see further above n24.

106 *Peko-Wallsend v Minister for Arts, Heritage and Environment* (1986) 70 ALR 523.

107 *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 75 ALR 218. See also above n24 at 270–2.

108 See Boer, B W, "Natural Resources and the National Estate" (1989) 6 *Environment and Planning LJ* 134 at 144.

109 *Report of the Commission of Inquiry into the Lemonthyme and Southern Forests,* Vol 1

further political debate between conservationists, the Commonwealth and the Tasmanian Government, and ensured that the nomination process was canvassed in public.[110] However, the Commonwealth retreated from initiating an inquiry in the case of the Queensland Wet Tropics nomination, and unilaterally put forward the nomination against the wishes of the Queensland Government. It was this act which sparked the Queensland challenge in the *Daintree Rainforest* case (see 5 (A) (iii) below). The query raised in that decision as to the bona fides of a federal executive decision to nominate or protect an area under the World Heritage Convention contributed to the realisation that there was a need for more rational arrangements between the Commonwealth, the states and the territories over environmental and resource matters.

Following the political and legal debates of the 1980s over the nomination and protection of World Heritage areas, a more cooperative approach towards World Heritage management has emerged. The process of nomination has been revised to ensure greater participation by State governments in assessing the obligations that flow from world heritage listing. For example, after prompting by the Commonwealth Government, Western Australia established a Ministerial Committee to consider whether the state should proceed with listing of Shark Bay.[111] After a positive response from the Committee to possible listing, the Western Australian and Commonwealth governments entered into detailed discussions concerning legislative and administrative arrangements for Shark Bay in preparation for nomination and listing. An inter-governmental agreement was signed in October 1990, in which the future management of the area was detailed, and the nomination process commenced soon after.[112] In the case of Fraser Island, located off the Queensland coastline, a similar cooperative approach was taken. This process was facilitated by a change of government in Queensland, which undertook a comprehensive study of the environmental and heritage values of the area[113] and assisted in the nomination process. This cooperative approach has continued with the recent nomination of "Australian Fossil Sites", two of which are located in Queensland and one of which is in South Australia.[114] The New South Wales Government has also recently enthusiastically endorsed the nomination of the Sydney Opera House as a cultural heritage site, with the state's Department of Urban Affairs and Planning closely involved in the assessment process.[115]

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and 2 (1988).

110 See Tsamenyi, M, Bedding, J and Wall, L, "Determining the World Heritage Values of the Lemonthyme and Southern Forests: Lessons from the Helsham Inquiry" (1989) 6 *Environment & Planning LJ* 79.

111 Suter, K, "Shark Bay, Western Australia: A Case Study of UNESCO World Heritage Listing" (1994) 11 *Environment & Planning LJ* 31 at 36.

112 Id at 37.

113 Commission of Inquiry into the Conservation and Use of Fraser Island and the Great Sandy Bay Region, *Report* (1991); see further, Boer, B W, "Public Inquiries in Resource Use Decisions" [1992] *Aust Mining and Petroleum L Assoc Ybk* 1 at 29–35.

114 Department of the Environment, Sport and Territories, *Nomination of Australian Fossil Sites by the Government of Australia for Inscription on the World Heritage List* (1993); Cribb, J, "Fossil Sites Aim for Heritage Listing", *Australian* 19 May 1993 18; at the December 1994 meeting of the World Heritage Committee, two of these sites were accepted for listing.

115 See Woodford, J, "Opera House builds its case for World Heritage listing" *Sydney Morn-*

Another area of change in relation to world heritage sites in Australia is that the Commonwealth has adopted a more cooperative approach towards management of the listed areas. However, it has not abdicated responsibility for protecting the listed areas.[116] A number of Commonwealth-state management plans have now been adopted for the various world heritage sites, and in some instances state legislation controls certain activities within the areas.

B. Marine Environment

Australia has long taken a keen interest in international initiatives to protect and preserve the marine environment. Around the Australian coastline there are a number of environmentally fragile areas that are particularly susceptible to the effects of marine pollution. Australia's marine living resources found in the exclusive economic zone are an important economic resource that is also susceptible to the effects of marine pollution. Australia is also a maritime State that has a large number of foreign-flagged vessels operating within its waters and consequently it has been to Australia's advantage to rely upon international law to ensure that these vessels meet accepted international standards. This concern was highlighted in 1991 when the Greek-owned *Kirki* spilt oil off the Western Australian coast following the loss of its bow.[117] A subsequent Parliamentary Inquiry further identified the threat posed to the Australian marine environment posed by sub-standard foreign-flagged vessels operating in Australian waters.[118]

Any regulation of activities in Australia's offshore areas immediately raises constitutional issues. Prior to the High Court's decision in *New South Wales v Commonwealth* (*Seas and Submerged Lands Act* Case),[119] the ability of the Commonwealth to legislate for the Australian offshore was uncertain. The effect of this decision, which confirmed that the Commonwealth had power to deal with matters physically external to Australia,[120] was to confer extensive power upon the Commonwealth to legislate for the control of marine

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ing Herald 1 March 1995 at 2; however, not all nominations of world heritage sites receive complete support from state governments see Marr, A, "Green Light for World Heritage Assessments" (Aug/Sept 1994) *Wilderness News* 15 discussing a campaign in Tasmania for more areas to be nominated for World Heritage Listing despite the opposition of the Tasmanian State Government.

116 For example, in 1992 the Commonwealth acted under the *World Heritage Properties Conservation Act* 1983 (Cth) to curtail the activities of a limestone quarry in Tasmania, which was considered to be having a harmful impact on the Exit Cave system within the Tasmanian Wilderness World Heritage Property; see Department of the Environment, Sport and Territories, *Monitoring Report on Australia's World Heritage Properties June 1992 — June 1993* (1993); in 1994, a declaration was made under the *World Heritage Properties Conservation Act* to render unlawful certain activities in relation to resort development which were considered to damage world heritage property in the area of Hinchinbrook Island in Queensland; see Richardson, B J, "A Study of Australian Practice Pursuant to the World Heritage Convention" (1990) 20 *Environmental Policy and Law* 143 at 151–3.

117 See discussion in White, M, "The Kirki Oil Spill: Pollution in Western Australia" (1992) 22 *WALR* 168.

118 See Report from the House of Representatives Standing Committee on Transport, Communications and Infrastructure, *Inquiry into Ship Safety* (1992).

119 (1975) 135 CLR 337.

120 This decision was subsequently confirmed in *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Horta v Commonwealth* (1994) 68 ALJR 620.

pollution. Notwithstanding the constitutional power which the Commonwealth possessed following the decision in the *Seas and Submerged Lands Act* Case, the Commonwealth and the states in 1979–1980 agreed upon the Offshore Constitutional Settlement which gave back to the states certain powers over activities occurring within the then three mile territorial sea.[121] The state and territorial governments therefore have powers and title over so-called "coastal waters" of the territorial sea, which extends from the low-water mark to the three mile limit. Commonwealth laws generally apply beyond this limit. The effect of this development has been that the states have retained an interest in legislating for the protection of the marine environment and in many cases have cooperated with the Commonwealth in implementing relevant international conventions.

The first global initiative to respond to ship-sourced pollution at sea was the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), which was implemented in Australia by the Commonwealth under the *Pollution of the Sea by Oil Act* 1960 (Cth).[122] The states and the Northern Territory also adopted complementary legislation.[123] OILPOL was not a particularly successful convention and a number of amendments were made to its provisions before it was finally replaced by the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL).[124] However, because of difficulties associated with obtaining the required ratifications for the entry into force of the Convention, it was amended by a Protocol in 1978.[125] MARPOL eventually entered into force in 1983.[126] As was the case with OILPOL, MARPOL has been subject to joint implementation by the Commonwealth and states. The *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) is the principal Commonwealth Act giving effect to MARPOL.[127] In order to ensure that the Commonwealth met its international obligations under MARPOL, a feature of the Commonwealth implementing legislation is that it includes a "roll-back" provision which ensures

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121 Haward, M, "The Australian offshore constitutional settlement" (1989) 13 *Marine Policy* 334; Cullen, R, *Federalism in Action: The Australian and Canadian Offshore Disputes* (1990) 104.

122 See discussion in White, M W D, *Marine Pollution Laws of the Australasian Region* (1994) at 177–9.

123 See *Pollution of Waters by Oil Act* 1960 (Qld); *Prevention of Oil Pollution of Navigable Waters Act* 1960 (NSW); *Navigable Waters (Oil Pollution) Act* 1960 (Vic); *Oil Pollution Act* 1961 (Tas); *Prevention of Pollution of Waters by Oil Act* 1961 (SA); *Prevention of Pollution of Waters by Oil Act* 1960 (WA); *Prevention of Pollution of Waters by Oil Act* 1962 (NT).

124 (1973) 12 *ILM* 1319.

125 Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, (1978) 17 *ILM* 546.

126 MARPOL has five Annexes under which specific regulations deal with: the prevention of pollution by oil (Annex I), the control of pollution by noxious liquid substances in bulk (Annex II), the prevention of pollution by harmful substances carried by sea in packaged forms, or in freight containers, portable tanks or road and rail tank wagons (Annex III), the prevention of pollution by sewage from ships (Annex IV), and the prevention of pollution by garbage from ships (Annex V).

127 Other relevant supporting Acts are the *Navigation Act* 1912 (Cth); *Navigation (Protection of the Sea) Amendment Act* 1983 (Cth); *Statute Law (Miscellaneous Provisions) Act (No 1)* 1985 (Cth); *Protection of the Sea (Prevention of Pollution from Ships) Amendment Act* 1986 (Cth); *Protection of the Sea Legislation Amendment Act* 1986 (Cth).

the Commonwealth MARPOL-based legislation applies in all Australian waters until such time as the states and the Northern Territory have enacted legislation which complements MARPOL.[128] This has not yet occurred with the result that MARPOL is currently given effect to by a combination of Commonwealth and state law.[129]

The Commonwealth has also enacted legislation to give effect to a range of other conventions which confer upon States a variety of powers with respect to marine pollution. The 1969 International Convention on Civil Liability for Oil Pollution Damage creates a regime of strict liability for the owner of any vessel that is responsible for oil pollution damage.[130] Australia has also enacted legislation to give effect to the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, which operates in addition to 1969 Civil Liability Convention and provides a further avenue for compensation for States that have suffered pollution damage.[131] Australia is also a party to the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, which allows a coastal State to intervene in instances where a maritime accident occurring on the high seas poses a threat to the coastline of the State. Australia relied upon this convention in the *Kirki* case.[132] Australia is also a party to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.[133] The principal Commonwealth legislation is the *Environment Protection (Sea Dumping) Act* 1981 (Cth). However, as has been noted above there is scope under Australia's offshore arrangements for state or territorial laws to apply within three nautical miles from the low-water mark. Consequently, while the above Act applies essentially to the territorial sea, there is scope under section 9 of the Act for relevant state and territorial legislation to apply within the first three nautical miles of the territorial sea. Four states have enacted legislation dealing with dumping at sea, however, not all have been accepted by the Commonwealth as meeting the extent of Australia's obligations under the convention.[134]

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128 See above n116 at 175, 186–7.

129 Legislation which gives effect to MARPOL is the *Marine Pollution Act* 1987 (NSW); *Pollution of Waters by Oil and Noxious Substances Act* 1986 (Vic); *Pollution of Waters by Oil and Noxious Substances Act* 1987 (Tas); *Pollution of Waters by Oil and Noxious Substances Act* 1987 (SA); *Pollution of Waters by Oil and Noxious Substances Act* 1987 (WA); Queensland and the Northern Territory have yet to enact legislation based on MARPOL standards.

130 973 *UNTS* 3; implemented by the *Protection of the Sea (Civil Liability) Act* 1981 (Cth).

131 (1972) 11 *ILM* 284; implemented by *Protection of the Sea (Oil Pollution Compensation Fund) Act* 1993 (Cth), *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund - Customs) Act* 1993 (Cth), *Protection of the Sea (Imposition of Contributions to Oil Pollution Fund - Excise) Act* 1993 (Cth), and *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund - General) Act* 1993 (Cth).

132 (1970) 9 *ILM* 25; implemented by *Protection of the Sea (Powers of Intervention) Act* 1981 (Cth).

133 (1972) 11 *ILM* 1294

134 To date the following state legislation has been enacted dealing with dumping at sea: *Environment Protection (Sea Dumping) Act* 1984 (SA); *Western Australia Marine (Sea Dumping) Act* 1981 (WA); *Environment Protection (Sea Dumping) Act* 1987 (Tasmania); *Queensland Marine (Sea Dumping) Act* 1985 (Qld).

Australia's international legal obligations concerning the protection and preservation of the marine environment are also supplemented by the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and associated Protocols, to which domestic legislation has sought to give partial effect.[135] More recently, international law dealing with protection of the marine environment has been supplemented by UNCLOS. The Convention has a range of provisions dealing with the protection, conservation and preservation of the marine environment, particularly Part XII. Article 192 is a good illustration of the obligation the Convention places upon States with respect to protection of the marine environment.[136] This obligation allows States either jointly or individually to take measures to prevent, reduce and control pollution of the marine environment from any source.[137] UNCLOS also establishes certain fundamental principles for States in dealing with pollution.[138] Australia ratified UNCLOS in 1994 and was an original party when the Convention entered into force. To date, there has been no specific response by the Commonwealth to the particular marine environmental provisions of the Convention. No doubt it can be argued that the very extensive Commonwealth legislation accompanied by state and territorial legislation meets many of Australia's obligations under UNCLOS to protect and preserve the marine environment. One area where there is certainly a gap, however, is with respect to land-based marine pollution.

C. *United Nations Conference on Environment and Development*

The 1992 United Nations Conference on Environment and Development (UNCED) was first mooted by the World Commission on Environment and Development in its 1987 report, *Our Common Future*.[139] The intergovernmental conference, held in Rio de Janeiro, attracted representatives from 178 countries. The conference and the processes which followed it have had a significant impact on the development of international environmental law. A range of consultations were held throughout Australia in the lead-up to Rio to determine what goals and objectives Australians sought from the conference.[140] Not only was Australia represented at UNCED by government delegates, but there were also a large number of representatives from industry, the conservation movement and academia. UNCED has also had a significant influence on Australia's environmental law and policy at national, state and local government level. The most direct of these influences have been the Rio

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135 See *Environment Protection (Sea Dumping) Amendment Act* 1993 (Cth), amending the *Environment Protection (Sea Dumping) Act* 1981 (Cth).

136 Article 192, UNCLOS provides: "States have the obligation to protect and preserve the marine environment".

137 UNCLOS, Art 194.

138 See UNCLOS, Art 207 — land-based pollution; Art 208 — sea-bed activities subject to national jurisdiction; Art 209 — activities being conducted in the deep sea-bed; Art 210 — dumping at sea; Art 211 — pollution from vessels; Art 212 — pollution from the atmosphere.

139 Above n30.

140 The Faculty of Law at the University of Sydney was a sponsor of the Eco 92 Public Forum, one of nine that were held around the world in 1991 and 1992; the forums were an attempt to ensure the broadest possible participation in the UNCED process, by involving representatives from a wide range of community, environmental and industry organisations.

Declaration on Environment and Development and Agenda 21. Australia has also become a party to both the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity.

These instruments all have in common the incorporation of the concept of sustainable development. The influence of these instruments is most clearly seen in the development of the IGAE, signed by the Commonwealth, the states, the territories and the Local Government Association of Australia in 1992. The Agreement includes "Principles of Environmental Policy", which are intended to "inform policy making and program implementation". The principles reflect closely the Rio Declaration and various provisions of both the Climate Change and Biodiversity Convention. These principles have been incorporated into various pieces of domestic legislation.[141]

In 1990, as part of its response to UNCED, the Commonwealth commenced the development of a comprehensive National Strategy on Ecologically Sustainable Development, published in December 1992, some six months after UNCED. It presented a proposed intergovernmental response to the recommendations (numbering over 500) of the ESD Working Groups.[142] On the basis of these reports a National Strategy for Ecologically Sustainable Development was published in December 1992.[143] This strategy has been accepted by the Commonwealth, state and territory governments as a response to the need to implement a coordinated national approach to ESD in Australia.

The Goal, Core Objectives and Guiding Principles of the Strategy reflect a close adherence to the internationally accepted principles of sustainable development. The Strategy states that its goal is: "Development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends." The Core Objectives are:

- to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations;
- to provide for equity within and between generations;

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141 See eg, s6, *Protection of the Environment Administration Act* 1991 (NSW), which specifically incorporates ecologically sustainable development into its provisions, and sets out the basic principles by which it is to be achieved. The Act recognises that for the purposes of maintaining ecologically sustainable development, the effective integration of economic and environmental considerations in decision making processes is required. The Act states that this can be achieved through the following principles and programmes: the precautionary principle, inter-generational equity, the conservation of biological diversity and ecological integrity and the improved valuation and pricing of environmental resources; see also Environmental Planning and Assessment Regulations 1994 (NSW) which includes mandatory consideration of principles of ecologically sustainable development in environmental impact assessment; further: *State Policies and Projects Act* 1993 (Tas). This Act is directed at the generation of Sustainable Development Policies; see in particular the schedule to the Act, which sets out the objectives of the Resource Management and Planning System of Tasmania; see further, Boer, above n68; Fowler, R J, "New National Directions in Environmental Protection and Conservation" in Boer, B W, Fowler, R J and Gunningham, N (eds), *Environmental Outlook: Law and Policy* (1994) at 114–5.

142 Ecologically Sustainable Development Steering Committee, *Draft National Strategy for Ecologically Sustainable Development* (1992) at ix.

143 *National Strategy for Ecologically Sustainable Development* (1992).

- to protect biological diversity and maintain essential ecological processes and life-support systems.

The Core Objectives and the Guiding Principles[144] broadly reflect the prescriptions as well as the sentiments of the Rio Declaration and Agenda 21.[145] Further, partly in response to Australia's ratification and the entry into force of the Biodiversity Convention, in 1994 the Commonwealth published a draft National Strategy on the Conservation of Australia's Biological Diversity. This Strategy also embodies principles of ecologically sustainable development.

It is thus clear that the concept of ecologically sustainable development has had, and will continue to have a very significant influence on the development of Australia's environmental law and policy, at a national, state, territory and local government level, both in terms of new legislative enactments as well as through administrative guidelines and local government codes.

5. *Response of the Courts to International Environmental Law*

A. *High Court of Australia*

Until 1980, the High Court of Australia was singularly devoid of significant environmental jurisprudence.[146] However, beginning with the case of the *Australian Conservation Foundation v The Commonwealth of Australia*,[147] the Court has heard a number of cases which have significantly contributed to a recognition of the breadth of Commonwealth power over environmental matters. These cases have in the main dealt with the interpretation of legislation relating to environmental matters enacted by the Commonwealth in the past 20 years and particularly, but not exclusively, the legislation in relation to Australia's obligations under the World Heritage Convention.

i. *Tasmanian Dam* Case

In 1982 the Commonwealth Government, in cooperation with the Tasmanian Government, successfully nominated an area in south-west Tasmania, known as the Western Tasmanian Wilderness National Parks, for inclusion on the World Heritage List. The Commonwealth did not immediately move to protect the area, but preferred to allow continued management by Tasmania.[148] However, not long thereafter it was announced that the Tasmanian Hydro-Electric Commission, an instrumentality of the Tasmanian Government, planned to build a dam in an area of the Franklin River which fell within the world heritage site. This resulted in considerable political controversy both

144 The Guiding Principles are not quoted here.

145 For further discussion, see Boer, above n68.

146 The one exception to this is the decision in *Murphyores v Commonwealth* (1976) 136 CLR 1 where the High Court relied upon the Commonwealth's trade and commerce power under s51(i) of the Constitution to uphold legislation which sought to control the export of mineral sands mined from Fraser Island in Queensland, which indirectly imposed certain environmental standards upon the mining industry on the island.

147 (1980) 146 CLR 493.

148 At the time, some of the areas that fell within the site were Tasmanian National Parks.

within Tasmania and at national level. The protection of the area became a campaign issue during the 1983 federal election. The Australian Labor Party (ALP) promised that, if elected, it would halt construction of the dam by exercising the Commonwealth's power over external affairs — a previously untested power in relation to environmental issues. Following its victory, the new ALP government enacted the *World Heritage Properties Conservation Act* 1983 (Cth). The Act was specifically aimed at halting construction of the dam.[149] The legislation was subjected to immediate challenge by Tasmania on the ground, inter alia, that it was beyond the Commonwealth Parliament's constitutional competence over external affairs to legislate on this matter.[150] By a majority of four to three, the Court held that the *World Heritage Properties Conservation Act* 1983 was a valid exercise of the external affairs power. In doing so, the majority judges discarded the test adopted in *Koowarta* that a treaty had to be a matter of "international concern" before it could be used to support domestic implementing legislation.[151] The majority took the view that the external affairs power conferred authority on the Commonwealth to implement by legislation any international treaty to which Australia was a party. As noted by Brennan J:

> a treaty obligation stamps the subject of the obligation with the character of an external affair unless there is some reason to think that the treaty had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament ... Applying the test ... the acceptance by Australia of an obligation under the Convention suffices to establish the power of the Commonwealth to make a law to fulfil the obligation.[152]

The decision in *Tasmanian Dam* is now the pivotal decision by the High Court in regard to the extent of the treaties aspect of the external affairs power. In that context it is also the key High Court decision regarding the ability of the Commonwealth to implement treaties dealing with international environmental law. Any understanding of the Commonwealth's power to implement international environmental law in Australia rests with this decision. The impact of the decision upon domestic environmental law is therefore considerable.

ii. *Tasmanian Forests* Case

In 1987, as a result of a dispute involving the Commonwealth Government, conservation groups and the Tasmanian Government over the world heritage nomination of a further stage of South West Tasmania, the Commonwealth enacted the *Lemonthyme and Southern Forests (Commission of Inquiry) Act* 1987 (Cth) for the purpose of establishing a Commission of Inquiry into the

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149 See above n24 at 260.

150 The Commonwealth argued that the legislation was also supported by other powers, namely s51(xx) — the power over trading corporations formed within the limits of the Commonwealth; and s51(xxvi) — the power to make laws for the people of any race for whom it is deemed necessary to make special laws. In this instance it was argued that there were sites within the area of significance to Aboriginal Australians.

151 *Koowarta* above n13 at 216 per Stephen J.

152 *Tasmanian Dam* above n14 at 218–9 per Brennan J. Some of the other majority judges took a more expansive view of whether or not there was a need to demonstrate the existence of an international obligation; at 127 per Mason J, at 170–1 per Murphy J, at 258 per Deane J.

world heritage values of the Lemonthyme and Southern Forests. The Commission was established as a result of concern over logging in the forests, and uncertainty over whether the areas were eligible for protection under the World Heritage Convention.[153] The Act also established an interim protection regime over those forests while the inquiry was being conducted. Litigation resulted after the relevant Commonwealth Minister sought to enforce the protective provisions of the Act against the Tasmanian Forestry Commission and a private timber operator, who had refused to cease logging in the relevant area. A constitutional question was immediately raised and the matter went before the High Court.[154] The two major issues were whether the Commonwealth could rely on the World Heritage Convention to establish the Commission of Inquiry, and whether the terms of the Convention extended to the provision of interim protection while the inquiry was taking place.

On the first issue, the Court had no difficulty in finding that the Commonwealth was justified in establishing the Commission. As the Convention placed Australia under an obligation to protect areas of world heritage value, it was necessary for a process to be established by which such areas could be identified and recommended for World Heritage listing and subsequent protection by the Commonwealth. The establishment of the Commission was one such process, and it was justified under the incidental aspect of the external affairs power.[155] On the second question the Court held by a five to two majority that the legislation was valid under the external affairs power in so far as the Act relied on the World Heritage Convention.[156] The majority judges emphasised that the interim protection measures could be "supported as action which can reasonably be considered appropriate and adapted to the attainment of the object of the Convention, namely the protection of the heritage".[157] In this instance, the activities that were prohibited during the interim period were also those that the forestry industry was likely to engage in (that is, road making and logging), with resultant damage to potential areas of world heritage. Consequently, the majority considered that there was a sufficient connection between interim protection of the forests while World Heritage Listing was under consideration and the international obligations imposed on Australia by the terms of the Convention.[158]

iii. *Daintree Rainforest* Case

During the 1980s the future of the Daintree rainforest in Queensland was the subject of considerable debate. The timber industry was keen to exploit the area, while conservationists argued for protection.[159] The Commonwealth

153 Above n110 at 80–1.

154 Mason CJ considered the case at first instance: *Richardson v Forestry Commission and Anor* (1987) 73 ALR 589.

155 (1988) 164 CLR 261 at 286–7 per Mason CJ and Brennan J, 313 per Deane J, 333–4 per Toohey J, 343–4 per Gaudron J.

156 The majority justices were Mason CJ, Brennan, Wilson, Dawson, and Toohey JJ; Deane and Gaudron JJ in dissent.

157 Above n155 at 291 per Mason CJ and Brennan J; see also 336 per Toohey J, 303 per Wilson J.

158 Id at 291–2 per Mason CJ and Brennan J, 336 per Toohey J; some of the subsequent history of the inquiry is dealt with in Boer above n24 at 263–70; see also, Boer, B W, "Lemonthyme Inquiry Act Valid" (1988) 5 *Environment & Planning LJ* 173.

159 See Tarlo, H, "The Cape Tribulation Affair" (1984) 1 *Environment & Planning LJ* 106;

Government finally intervened in 1987.[160] Relying on its previous successful use of the World Heritage Convention to protect certain wilderness areas in Tasmania, the Commonwealth decided to nominate the "Wet Tropics of Queensland" for World Heritage listing. Queensland opposed the nomination and claimed that the decision would have a devastating impact upon the timber industry.[161] Notwithstanding this objection, Australia's nomination of the area for World Heritage Listing was submitted at the end of 1987,[162] and acceptance of the listing occurred on 9 December 1988. The formal response of the Commonwealth to the listing was a Proclamation on 15 December which placed the area under the protection of the *World Heritage Properties Conservation Act* 1983. Amendments made on the following day to the World Heritage Properties Conservation Regulations[163] gave legislative effect to the Proclamation.[164] Later that month Queensland commenced legal proceedings in the High Court in which it sought a declaration that the 15 December Proclamation was invalid. Queensland questioned whether the protected area was truly an area to which the *World Heritage Properties Conservation Act* applied. In essence Queensland was contesting the world heritage value of the area. The High Court dismissed the application, holding that for the purposes of the Act the listing of the area by the World Heritage Committee was conclusive evidence of Australia's international obligation to protect the area under the World Heritage Convention. The Court declared that the Commonwealth's nomination of the area for inclusion on the World Heritage List, and the subsequent acceptance by the World Heritage Committee, was not subject to judicial review. Consequently, the Proclamation protecting the area was valid.

Lipman, Z M, "Cape Tribulation: The Legal Issues" (1985) 2 *Environment & Planning LJ* 131 and 206; Keto, A, "Australia's Tropical Rainforests: The Case for World Heritage" (1987) 15(4) *Habitat* 3.

160 See Davis, B, "Federal-State Tensions in Australian Environmental Management: The World Heritage Issue" (1989) 6 *Environment & Planning LJ* 66 at 71–3.

161 See Seccombe, M, "Stage Set for Legal Duel Over Logging" *Sydney Morning Herald* 21 January 1988 at 3.

162 Queensland responded by challenging the Commonwealth's decision to nominate the area for World Heritage listing, and sought an injunction from the High Court on 24 December 1987, to restrain the Commonwealth from continuing with the nomination process. The injunction was refused on the ground that Queensland had not made out a sufficient case to demonstrate that the area under consideration did not possess world heritage characteristics: *Queensland v Commonwealth* (1988) 62 ALJR 143 per Mason CJ. In the view of Mason CJ, the remedy was inappropriate because the question of world heritage status could still be litigated after nomination rather than a few days before the 1987 nomination deadline.

163 Statutory Rules 1983, No 65 as amended.

164 The Proclamation was made pursuant to s6(3) of the *World Heritage Properties Conservation Act* 1983 (Cth). Schedule 2B of the Regulations defined the Wet Tropics of Queensland as being two sections of land that fell within the Cape Tribulation region of north Queensland. These areas were respectively 8990 and 7.5 square kilometres in size, and included the Daintree Rainforest. It is important to appreciate the process followed in order for the Commonwealth legislation to become operative. Before the Proclamation could be made it was necessary for the area to be considered "identified property" under the Act; if the property met this requirement, the Governor-General's Proclamation could be made only if the requirements of s6(2) of the Act were fulfilled. These conditions relate back to Australia's obligations to protect property under the World Heritage Convention. By this mechanism the necessary connection is made in the legislation between the Commonwealth's power over external affairs and the international obligations imposed by the Convention.

The provisions of the *World Heritage Properties Conservation Act* were reviewed by the Court in some detail and it was noted how it provided a legislative framework for the implementation of the World Heritage Convention.[165] In this case, at the time the Proclamation was made, the property met the criteria for "identified property" under section 3A(1)(a)[166] of the Act because it had been included on the World Heritage List.[167] The judges then turned their attention to subsections (b), (c) and (d) of section 6(2) and noted that the protection or conservation of such an identified property fell within Australia's international obligations under the World Heritage Convention. In response to Queensland's argument that the inclusion of the property on the World Heritage List was not conclusive of the Proclamation's validity, the judges saw this as an issue of whether the protection or conservation of the property gave rise to an international duty.[168] Citing *Tasmanian Forests*[169] as authority for the Court's power to determine whether or not a fact upon which a law is based exists, the judges set out to determine whether international law created an international duty to protect this property. After analysing the relevant provisions of the Convention with respect to the nomination of properties for the World Heritage List, the judges were convinced that:

> the status of a particular property as one of outstanding universal value forming part of the cultural heritage or natural heritage is an objective fact, ascertainable by reference to its qualities; but, as evaluation involves matters of judgment and degree, an evaluation of the property made by competent authorities under the Convention is the best evidence of its status available to the international community.[170]

While the nomination of property for World Heritage Listing was some evidence of the property's status, the decision by the World Heritage Committee to list the property was conclusive for international purposes, and it followed that this was conclusive of Australia's international duty to protect and conserve that property.[171] In the opinion of the Court the basis for the Proclamation could not be reviewed, and the Queensland case therefore failed. It was acknowledged that, irrespective of what the High Court decided as to the eligibility of the area for inclusion on the World Heritage List, the international community had already decided the matter conclusively. This created an international

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165 *Queensland v The Commonwealth* (1989) 167 CLR 232 at 235–6.

166 The definition of what constituted world heritage property under the *World Heritage Properties Conservation Act* 1983 (Cth) had been amended in 1988, partly to address the doubt raised by the *Tasmanian Forests* case (above) in relation to whether the Government had the power to protect properties which had not yet been listed; see further, Boer, B W, "Amendments to World Heritage Act and Environment Protection (Impact of Proposals) Act" (1988) 5 *Environment & Planning LJ* 175; the Act now allows properties which are subject to an inquiry to determine their world heritage status, which are subject to World Heritage List nomination, which have been included on the World Heritage List or which form part of the cultural heritage or the natural heritage and are so declared by regulation, to be protected under the Act.

167 Above n165 at 237.

168 Id at 239.

169 Above n155 at 294 and 341.

170 Above n165 at 240.

171 Ibid.

obligation for Australia under the World Heritage Convention, which prevailed over the decision of any municipal court.[172]

B. *State Courts*

The influence of international environmental law can also be seen in litigation that has taken place before state courts. This is particularly the case with respect to the acceptance by state courts of core concepts of international environmental law such as the precautionary principle and sustainable development. It can generally be observed that the state courts are more familiar with key concepts associated with domestic environmental law, such as the need for environmental impact assessment prior to a development activity commencing, than the High Court. This is especially the case with some state courts which have specific jurisdiction in environment and planning matters, such as the New South Wales Land and Environment Court. However, state courts are not often called upon to implement or interpret state legislation, parts of which may be based upon international environmental conventions or agreements. This, however, has not prevented reliance being placed upon the principles found in these instruments. A number of examples are discussed below.

i. *Leatch v National Parks and Wildlife Service*

Public interest litigators have for several years sought to have recognised the precautionary principle in the New South Wales Land and Environment Court. In the 1993 decision by the Court in *Leatch v National Parks and Wildlife Service and Shoalhaven City Council*,[173] Stein J referred to the precautionary principle, as embodied in the 1992 Convention on Biological Diversity, in the context of deciding whether to overturn a licence to "take or kill" endangered fauna. In this case it was proposed to build a road through the habitat of the Giant Burrowing Frog, listed under the *National Parks and Wildlife Act* 1974 (NSW) as an endangered species. It was noted that the precautionary principle had been referred to "in almost every recent international environmental agreement" including the 1992 Convention on Biological Diversity, the 1992 United Nations Framework Convention on Climate Change, and the 1992 Rio Declaration on Environment and Development.[174] There were also a number of examples of where the principle had been adopted in both Commonwealth and state legislation. [175] Despite the existence of this international

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172 Dawson J wrote a separate but concurring judgment. After a thorough review of the Convention, he noted that the initial obligation to identify properties as forming part of the world's cultural or natural heritage fell on State Parties to the Convention and not on the World Heritage Committee. However, the obligation to protect identified property under Arts 4 and 5 was not dependent on the property being included on the World Heritage List, as such identified property "does not cease to be part of the cultural or natural heritage and the obligations imposed by the Convention in relation to it remain in force": above n165 at 245. Once the property had been included on the World Heritage List, the provisions of s3A became operative, and this justified the making of the Proclamation to protect the property: id at 248.

173 (1993) 81 LGERA 270.

174 Id at 281 per Stein J.

175 See s175, *Endangered Species Protection Act* 1992 (Cth); s6(2)(a), *Protection of the Environment Administration Act* 1991 (NSW). See also the 1992 IGAE, the Endangered Species Advisory Committee, *Australian National Strategy for the Conservation of Australian Species and Communities Threatened with Extinction*, 1992, and the National Strategy for

and domestic practice implementing the precautionary principle, Stein J found that for the purposes of his decision he did not need to determine whether the Court was bound by the provisions of the Convention on Biological Diversity. He stated that the precautionary principle was simply a principle of commonsense.[176] The principle was interpreted as one which:

> is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm, decision-makers should be cautious.[177]

In this case, it was held that as there was some doubt as to the population, habitat and behavioural patterns of the Giant Burrowing Frog, it was not possible to conclude with any degree of certainty what impact the granting of a licence would have on the species. Accordingly, a licence, insofar as it sought to permit the taking or killing of the species, was refused. While the decision is not an unambiguous acceptance of the precautionary principle into domestic law, it is nevertheless a significant endorsement of the principle.

In a 1994 decision by Talbot J sitting in the New South Wales Land and Environment Court, a more restricted approach was taken to the application of the precautionary principle. In *Nicholls v Director-General of National Parks and Wildlife and Ors*,[178] citing *Leatch*, Talbot J noted that there was "[n]o binding imperative" for the Director-General of the National Parks and Wildlife Service to take into account these international standards.[179] The Court did not find a need to strictly apply the principle because there existed adequate evidence before the Court on which it could make an informed decision regarding the proposed development activity.[180] Given that New South Wales is not formally bound by any of the relevant conventions it is significant that the Land and Environment Court has been prepared to consider the international practice concerning the precautionary principle and took notice of the relevant international conventions which have adopted the principle.

ii. *Greenpeace Australia v Redbank Power Company and Singleton Council*

A further decision by the New South Wales Land and Environment Court also deals with the potential application of an international convention to which Australia is a party, but which does not formally bind a State. In the 1994 decision of Pearlman J in *Greenpeace Australia Limited v Redbank Power Company Pty Limited and Singleton Council*,[181] the Court was asked to take into account the principles found in the Framework Convention on Climate Change with respect to harmful emissions into the atmosphere. In this case Greenpeace Australia sought to challenge the development application given by a local council in relation to the establishment and operation of a coal-fired power station. The case was brought in the knowledge that Australia's carbon

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the Conservation of Australia's Biological Diversity of 1994 (above n72).

176 Above n173 at 282.

177 Ibid.

178 (1994) 84 LGERA 397.

179 Id at 419.

180 Ibid.

181 Unreported, NSW Land and Environment Court, 10 November 1994.

dioxide (CO_2) emissions represent approximately 1.4 per cent of the world total emission of greenhouse gases, and that on a per capita basis, Australia was estimated to be the world's fourth-largest contributor. Greenpeace argued that the granting of the consent in this case was inconsistent with the objective of the National Greenhouse Response Strategy, a document formulated in response to Australia's obligations under the Convention. It was argued that the evidence indicated that the emissions from the proposed development would increase the total quantity of CO_2 emitted and that there was no demonstrated demand for a further energy supply to justify the project. In response to these arguments, Redbank Power indicated that the principal reason for the project was to implement an environmentally responsible method of tailing disposal and that the fluidised-bed combustion system proposed had the environmentally beneficial effect of reducing emissions of sulphur dioxide (SO_2) and oxides of nitrogen (NOx) in comparison with conventional power stations.

Pearlman J held that the various instruments relied on by Greenpeace, including the Convention, the IGAE, and the National Greenhouse Response Strategy, stopped short of expressly prohibiting any energy development that would emit greenhouse gases, nor did they constrain individual action, or contain specific directives or obligations on individual operators in the energy field. It was noted that these instruments and documents were "policy documents only, and they expressly provide that they do not bind local government. There is nothing in those documents ... which requires the Court to refuse to grant consent or which would prohibit the development of power stations per se".[182] Pearlman J recognised that to date, Australia's response to these international initiatives was the development of an appropriate national policy which did not create legal standards:

> It is for state and national governments to take into account the competing economic and environmental issues raised by the enhanced greenhouse effect and to set policy in the light of those issues. Thus far, governmental policy has been to set first phase responses, and more response measures are intended to be developed over time by national and international policy-makers.[183]

Reference was also made to the precautionary principle. The Court considered the formulation adopted in the IGAE as being the relevant test for this case,[184] while also adopting the "cautious approach" test put forward by Stein J

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182 Id at 16 per Pearlman J.

183 Ibid; cf the decision of Currothers J in the Supreme of Court of British Columbia on December 7 1994, in a case alleging that clearfelling practices breached Canada's obligations under the Convention on the Conservation of Biological Diversity, wherein it was stated: "I have not been shown, and I have been quite unable to discern or identify any pertinent or applicable principle of international law, whether developed by custom or usage, treaty or convention, legislative or judicial determination, which falls within the judicial capacity and function of the courts of this province." *Bloedel v Russow*, Court of Appeal, British Columbia, 6 December, 1994.

184 The relevant formulation is found in cl 3.5.1 of the IGAE, above n11; it provides: "Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. ... In the application of the precautionary principle, public and private decisions should be guided by: (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and (ii) an assessment of the risk-weighted conse-

in *Leatch*. However, it was considered that in applying this approach, "it does not require that the greenhouse issue should outweigh all other issues".[185] It was emphasised, however, that the greenhouse issue was one which the Court had to take into account in its overall assessment of the project.[186]

6. *Future Directions for International Environmental Law in Australia*

A. *Meeting International Obligations*

This article has primarily sought to deal with the impact of international environmental law upon Australian law. These impacts have already been extensive. Some of the most significant legal and political debates that have occurred in Australia during the past 20 years have concerned the protection of the environment and how Australia should meet its international obligations. This debate does not seem likely to end in the near future. In the years immediately following UNCED and leading up to the beginning of the 21st century, international legal measures to protect the environment will continue to have an important influence on Australian law and our society and economy. Recently, there has been much discussion over the ability of the Commonwealth to set appropriate standards that meet Australia's obligations under the Climate Change Convention. These initiatives have not been favourably received by either industry or the environmentalists. The reluctance of the Commonwealth to take a strong stand on this issue demonstrates the difficulty that any government faces when implementing international obligations which can have a sensitive economic impact. It seems inevitable, despite a period of relative calm, that further disputes will also arise between the Commonwealth and states over Australian world heritage sites. The Commonwealth's 1994 action to halt development activity on Hinchinbrook Island in Queensland is an example of how suddenly good federal relations over world heritage sites can rapidly deteriorate. In Tasmania, the position remains as tense as ever with the state government adamant that no further world heritage listings will be accepted. There also remain concerns over the protection that is being afforded to existing sites.

In addition to these existing issues, there are others emerging which have the potential to create further controversy. Although land-based sources are estimated to account for at least 70 per cent of all marine pollution, it is still the least regulated of all pollution. The effect that this form of pollution is having on Australia's coastal, estuarine and marine environment was recognised in the *State of the Marine Environment Report* released in early 1995.[187] The Commonwealth now has at its disposal a number of options under which it could seek to take action to reduce this environmental problem. However, despite the very clear power conferred upon the Commonwealth, and indeed

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quences of various options."

185 Above n181 at 18.

186 Ibid.

187 Zann, L P (ed), *Our Sea, Our Future. Major Findings of the State of the Marine Environment Report for Australia* (1995).

the obligation that it has to take action,[188] no real effort has yet been made to deal with the problem. Similarly to how the Commonwealth has sought to confer some obligations with respect to combating other forms of marine pollution, it may be that in this area, more than some others, the Commonwealth will need to negotiate a federal compromise if substantial reforms are to be implemented. The continued implementation of principles of sustainable development and Agenda 21 will also continue to test Australia's commitment to implementing international standards, environmental law and policy.

B. *The Changing Nature of International Environmental Law and its Impact on Australia*

It is clear that international environmental law is in a state of transition on a number of levels. With some hundreds of international legal instruments relating to the environment, most of which have been generated in the past three decades, the area has become increasingly complex. Edith Brown Weiss, in a recent address,[189] summarised the new directions in which international environmental law is heading.

First she noted that in the new model of international environmental law, non-government organisations and industry associations play an increasingly important role in the negotiation, implementation, monitoring and enforcement of international environmental agreements. In addition, there is an increasing use of non-government organisations by governments to convey government positions to the public, as well as non-government organisations providing intergovernmental organisations with independent communication links with governments. On the other hand, Brown Weiss notes that non-government organisations also rely on intergovernmental organisations to provide information that is useful in influencing national governments.[190]

Brown Weiss also points to the problem of "treaty-congestion" as more agreements are made; the symptoms of this syndrome are said to be the severe straining of physical and organisational capacity of individual States to handle treaties. It applies particularly to developing countries and countries whose economies are in transition. In the Pacific island countries in Australia's region this problem can be particularly acute, because of lack of financial and administrative resources and professional staff.[191] One of the solutions to the

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188 See Article 207, UNCLOS, above n6, Art 7, Noumea Convention for the Protection of the Natural Resources and Environment of the Southwest Pacific Region, above text at n92.

189 Brown Weiss, E, "New Directions in International Environmental Law", United Nations Congress on Public International Law, New York, 15 March 1995; Professor Brown Weiss is currently the President of the American Society of International Law.

190 In Australian delegations and negotiations it is becoming increasingly common for non-government organisations and industry bodies to be invited onto official delegations for the negotiation of treaties and at meetings of the conference of parties; see Wensley, P, "Global Trends: the Emergence of International Environmental Law", in Boer, Fowler and Gunningham (eds), above n141 at 11. The views of the non-government sector are now also being taken into account in Australia's annual report to the United Nations Commission on Sustainable Development, see *Australia's Report to the UNCSD on the Implementation of Agenda 21* (1995) at 1 and 60.

191 See eg Lawrence, P, "Regional Strategies for the Implementation of Environmental Conventions: Lessons from the South Pacific" (1994) *Aust Ybk Int'l L* (forthcoming).

problem of treaty congestion where there are similar obligations under various treaties is to promote as much cooperation as possible between convention secretariats and, at national level, cooperation between implementing agencies, as well as between countries.[192] Brown Weiss suggests that it may be time to consider the establishment of a new organisation which would be the environmental counterpart to the World Intellectual Property Organisation, which consolidated the administration of separate intellectual property conventions. It appears that this is a role that UNEP should play, as spelled out in Agenda 21. That document calls for an enhanced and strengthened role for UNEP and provides that a priority area on which UNEP is required to concentrate is the "[f]urther development of international environmental law, in particular conventions and guidelines, promotion of its implementation and coordinating functions arising from an increasing number of international legal agreements ...".[193]

The question of compliance with international environmental treaties is a further area on which a great deal more emphasis is being placed than in the past. For compliance to become a priority, Brown Weiss argues that the link between international and national environmental law must be recognised, as well as the role of non-State actors, the need to build administrative capacity and the central role of monitoring and information flows. Finally, Brown Weiss points to the emerging interaction between "international intergovernmental environmental law and transnational environmental law developed primarily by the private sector and nongovernmental institutions".[194] She points to the fact that there is an increasing emphasis on industrial associations, multinational companies and coalitions of business and private interests being the driving force behind the development of common transnational standards and environmentally sound business practices. This trend is particularly evident in the European community, but is also manifested in Australia itself, for example in relation to processes behind the development of the National Strategy on Ecologically Sustainable Development of 1992. In addition, industrial interests are having a significant effect on the development of national environment protection measures being generated under the IGAE. These standards will be increasingly influenced by overseas developments.[195]

C. *Challenges for the Future*

Australia will face a continuing series of challenges as it adapts to these and other changes in international environmental law. During the development of international environmental treaties over the past 20 years, the focus has primarily been

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192 In the context of biodiversity-related conventions, Timoshenko argues that the issue of synergy between conventions is a complex one, but that it needs to be addressed in view of the need for coordinated action in the field of conservation of biodiversity and the sustainable use of its components; see Timoshenko, A, "Institutional Instruments for Conservation and Sustainable Use of Natural resources", paper to Global training Programme on Environmental Law and Policy, March-April 1995, Nairobi (forthcoming).

193 Above n51, chapter 38.22. The Programme adopted by UNEP's Governing Council in May 1993 specifically envisaged a major role in the development of international law in the field of environment and sustainable development.

194 Above n187.

195 See generally, Gunningham, N, "Beyond Compliance: Management of Environmental Risk" in Boer, Fowler and Gunningham (eds) above n141 at 254.

on ensuring that States are prepared to make an international commitment to a new regime for the protection of the international environment. However, these regimes will only be effective if the States themselves take action to implement their international obligations domestically.[196] It is therefore probable that States will increasingly be called upon to account for their record in implementing their international environmental commitments and this will put under the spotlight their domestic record.[197] This is of particular significance because of the establishment of the Commission on Sustainable Development with its attendant obligations for reporting on Australia's progress with its international environmental commitments. This will create new challenges for Australia and may force the Commonwealth in some instances to take a tougher approach towards domestic implementation of international environmental law lest Australia be found in breach of its international obligations. Such an approach could also test the extent of Commonwealth constitutional powers, especially with respect to the implementation of so-called "soft law", which has become so much more important in the last few years, particularly in relation to environmental matters, as typified by the Rio Declaration, Agenda 21 and the Statement of Principles on Forests.[198] It is inevitable that non-binding international instruments will continue to play an important role in initiatives to protect the environment. This is because the adoption of legal instruments to protect, conserve and manage the environment will create obligations upon States that inevitably will impact upon their sovereignty. The adoption of resolutions, recommendations or declarations concerning the environment which do not have legal effect are more acceptable to many States because they do not have the impact of immediately imposing legal obligations. Rather they tend to set goals and aims for the international community to aspire to. However, soft law can over time become "hard law" and impose obligations upon States and Australia will need to be aware of this dynamic in international environmental law.

Another factor which needs to be considered is the increasing flexibility that is found in some international instruments to make adjustments to originally agreed upon standards in order to reflect changing circumstances.[199] The latest example of this is found in the report of the Meeting of the Parties to the Framework Convention on Climate Change, where it was decided to strengthen the commitments of the developed country parties for the setting of specific targets for greenhouse gas emission reductions by the adoption of a protocol.[200] This trend to greater flexibility in convention obligations could

196 Robinson, N A, "Universal and National Trends in International Environmental Law" (1993) 23 *Environmental Policy and Law* 148 at 152.

197 Id at 153.

198 Above n57. See generally, Kiss, A, "The implications of global change of the international legal system", in Brown Weiss (ed) above n44 at 315.

199 Palmer, above n33.

200 See *Conclusion of Outstanding issues and Adoption of Decisions,* Conference of the Parties, First Session, 28 March - 7 April 1995, Berlin; FCCC/CP1995/L.14, 7 April 1995; Australia was in an awkward position in these negotiations, given that it, along with a number of other countries, is having some difficulty in limiting greenhouse emissions to 1990 levels, as previously agreed; by the year 2000, it is expected that Australia's emissions of greenhouse gases will be 7 per cent higher than its 1990 emission levels; see Wensley, above n25; Australia was unsuccessful in its arguments opposing the setting of

require the Commonwealth also to reassess existing methods of implementing international environmental law in Australia. The High Court's decision in *Teoh*[201] may also have an impact on the obligations that rest with administrative decision-makers to take into account Australia's obligations under international environmental conventions. Given the extent of administrative discretion which is vested in a wide range of Commonwealth, state, territorial and also local government agencies over environmental and planning matters and the potential for decisions to be made which conflict with Australia's international obligations, the potential reach of this decision is considerable.[202] It also further raises for consideration the debate over the operation of the external affairs power and whether the Commonwealth alone should be in the position to decide what new international commitments Australia is prepared to adopt with respect to, for example, the emission of chlorofluorocarbons (CFCs) and other ozone-depleting and greenhouse gases into the atmosphere, the protection of biodiversity, or the listing of Australian indigenous species as endangered or threatened.

Because of the unique nature of Australia's biodiversity and environment, we have much to gain from initiatives to protect the global environment from harm. It is therefore in Australia's very best national interests to seek to continue to implement international environmental obligations into domestic law and to set high standards for meeting these international obligations. By adopting such an approach Australia can set a continuing example to the international community as a State which takes seriously its international obligations not only to ensure that transboundary pollution to other States does not occur, but also as one that is serious about the long term protection of the whole global environment. If Australia is to meet this challenge it will require a serious commitment on the part of all levels of government. It will also be the most important test of whether Australia has adequately internationalised its environmental law and policies.[203]

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tighter targets for reduction in greenhouse gas emissions; see McCathie, A, "Australia forced to U-turn at climate summit", *Sydney Morning Herald* 8 April 1995, at 1 and 15.

201 *Minister of State for Immigration and Ethnic Affairs v Teoh*, unreported, High Court of Australia, 7 April 1995. [For a more detailed discussion of this case, see Mathew, above at 201–3 and Allars above at 204ff.]

202 Id, where in the context of the United Nations Convention on the Rights of the Child, Toohey J remarked at 15 "ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation ... that administrative decision-makers will act in conformity with the Convention".

203 For an exploration of internationalisation of environmental law on a more general level, see Boer, B W, "The Globalisation of Environmental Law: The Role of the United Nations" (forthcoming, *MULR* 1995).