



# ANU LAW STUDENTS' SOCIETY

## LAWS2215 Environmental Law 2<sup>nd</sup> Semester 2000

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## Question 1

75/100

### Introduction

The Commonwealth government ought to increase its role in environmental management, particularly in regard to the establishment of uniform environmental standards. However, due to the nature of both the environmental problems facing Australia and the Australian federal system, it is necessary to maintain a level of local and state government participation. [√] The best means of achieving increased Commonwealth participation is not necessarily through the amendment of s51 of the Constitution (Cth) to include "environment" as a specific head of power. This is because the Commonwealth presently has the potential to regulate the environment adequately through other specific heads of power contained in the Cth Constitution. [√]

### The need for local government

The nature of the environmental problems facing Australia means that it is necessary to confront the problem and implement solutions of a local and regional level. Problems of dry-land salinity, native vegetation clearance and water quality and quantity are often site-specific and must be addressed at the source of the problem. The Earth Summit in Rio (1992) produced a paper called local Agenda 21. This paper (specifically Chapter 28) recognised the need for local solutions to local problems. [√] Australia has adopted this paper, thus recognising the importance of local government participation in Environmental problems.

The Intergovernmental Agreement of the Environment (IGAE) attempted to incorporate local govt in environmental management by spelling out the environmental policy and management responsibilities of each level of govt, including local government.

Thus local government still has an important role to play in env management. [√] The use of zoning plans and development standards by local government has the potential to provide sound management of the environment.

### **Tragedy of the Commons**

It is however important to realise that while many environmental problems begin as 'site-specific', they have the tendency to accumulate and affect a large area, irrespective of local, and state, govt boundaries. For example, hydrological boundaries rarely coincide with administrative boundaries imposed by humans. The Murray Darling Basin provides the perfect example of this. Extending through Qld, NSW, Vic and eventually reaching SA, the Murray Darling Basin crosses many jurisdictional boundaries. While local govt plans and development standards can help to maintain certain levels of environmental standards (eg through landcare programs and agricultural sites) it is necessary to incorporate state and Cth control to address the problem.

As the State govt retains the right to regulate private property, it is necessary to involve state legislation in the management of an environmental problem such as the Murray Darling Basin. [√] With a resource such as water viewed as a 'common' right individual landholders across the states will exploit the quantity of water used and quality of such water unless rights are allocated to it. This is an example of where state legislation is necessary to allocate these private property rights.

### **The Role of the Cth**

While the States have the responsibility of allocating rights it is necessary for the Cth to intervene to set standards. A COAG agreement in 1994 produced a Water Reform Framework. The 'CAP' was introduced to create a uniform standard for water consumption across the Murray Darling Basin.

Under the IGAE, the Cth accredits state practices to prevent duplication of administrative work. Additionally, once the Cth passes legislation dealing with Env management, the states sometimes enact similar legislation. In this respect it is possible to achieve uniform standards, however as it is not mandatory to adopt the Cth legislation the standards often only meet the lowest common

denominator. Additionally, some states choose not to adopt legislation at all. For example, Qld's reluctance to enact the native revegetation Bill.

Thus, due to the nature of environmental problems, it is necessary to address solutions at a local, state and ultimately Commonwealth level. Local govt is necessary to achieve 'grass roots' implementation, State govt is necessary to legislate in regards to private property right for example, and the Cth govt is necessary to attempt to achieve uniform standards. It is in this area that the Cth govt ought to increase its role as the IGAE does not make it mandatory for States to enact similar legislation adopting the set standards.

### **How can the Cth increase it's role?**

It has been suggested that the best means of increasing Commonwealth participation in env management is through amending the Constitution to provide for a specific head of power. However, the amendment is not necessarily the best means of achieving increased Cth participation for a number of reasons.

#### 1. The potential of the Cth to adequately legislate

The Cth govt presently has enough potential to adequately legislate for env management. The High Court has recognised the validity [√] of Cth laws dealing with the environment as enacted under other specific heads of power in the Constitution. In the *Murphyores Case* the Cth could use the trade [√] and commerce power to legislate for the environment (namely the formation of an EIA and Ministers subsequent approval). In *Tasmanian Dams* it was held that the Cth could use the external affairs power [√] and corporations power to legislate for the environment. It has been commented upon that through the use of the corporations power the Cth could extend laws to virtually cover all env. aspects of a foreign or trading corp.

Additionally, the Cth may use the taxation power to tax env unfriendly developments and actions and give incentive for env friendly practices.

S 96 of the Const also allows for the allocation of grants with specific conditions attached. The Cth govt can use this power to manipulate states into complying with environmental standards. This has been used in the past in relation to the CAP mentioned earlier (Dr Terry Hillman, Murrumbidgee Darling Freshwater Research Centre (pers comm) 1999). [√]

The Cth also has the power to manufacture inconsistency with State and local planning laws. There is precedent that the Cth law will prevail where it intends to legislate exclusively on the matter in question (eg *Lane Cove*).

The Cth also has the power to appropriate land on just terms. *Newcrest* is an example of where it was considered that through the removal of mining rights, the Cth have acquired land. In such cases however the Cth is obliged to pay compensation. It should be noted that the decision in *Newcrest* has led to apprehension on the part of the Cth to interfere with private property rights. *Tas Dams* however provides an example of where it was not an acquisition. Thus it appears that if the Cth restricts land use but allows certain rights to survive (ie does not sterilise rights) then it is possible to do so without paying compensation.

## 2. Defining the environment

If a specific head of power for the env were to be incorporated into the Const, it would be difficult to define the term 'environment'. Potentially 'environment' can extend far and take away many state rights. It has been proposed by Phillip Toyne that a number of specific heads of power be included rather than just one referring to 'environment'. While this solves the potentially broad nature of defining 'environment' it may also create problems in the future if a new env problem emerges that is unforeseeable and not covered by the Const. Will the absence to act to exclude it from Commonwealth power.

Thus the Cth govt has sufficient power to manage the environment. It's inadequacy at the moment lies in the lack of political will [√] and the contraction of Cth powers through the IGAE.

Politics plays a central role in environmental management. Major influences are the political orientation of parties at the time, the power struggles within those parties, the timing of elections [√] (eg *Tas Dams*) and the influence of the media (P. Toyne, *Reluctant Nation*, 1994).

Additionally, the Constitutional Commission in 1988 found that it was not necessary to put to referendum the 'environment' as a specific head of power among other reasons this was due to those mentioned earlier. That is, the potential exists for the Cth to manage the env and the problems with defining the environment.

### **Conclusions**

Thus, while the Cth ought to increase its role in env management, it is still necessary to maintain local and state participation due to the fact the env problems do not respect administrative boundaries. The Cth must move to set uniform env standards across the State. The fact that it has not done so thus far is not due to the absence of ... power.

[Examiner's Comments:

Clearly set out. You've included issues from just about every part of the unit - some of which are more distracting from your main argument (rather than being of assistance to it). However, you have made each individual point clearly and your analysis demonstrates that you have given some thought to the issues considered in class and materials.]