

COMMONWEALTH OF AUSTRALIA

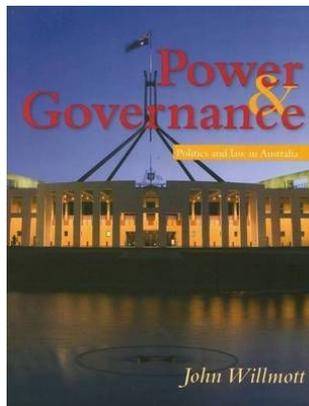
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Willmott, J. (2011). *Power & governance: politics and law in Australia*. (2nd ed). Perth, W.A: Politics Law Publishing.

of the text and structure of the Constitution. In appellate decisions it has been described as a black letter of the law court.

Despite its cautious approach many of its decisions have been contentious. The Court has strongly defended the right to fair legal process based on the mandamus provision (s75(v)) of the Constitution. For example in *Plaintiff M61* (2010) it ruled that refugees held on Christmas Island (outside Australia's 'migration zone') had the same appeal rights as any other Australian resident. It has also defended the courts, overturning laws that tried to give courts functions that were incompatible with judicial independence. The High Court argued that any federal or state court that had any responsibility for dealing with disputes under federal law was by definition a 'Chapter Three' court. This means that it was guaranteed independence under Chapter Three of the Constitution. In *Totani* (2010) it ruled that anti-biker laws in South Australia were unconstitutional because they limited judicial discretion and independence. Similar laws in NSW were struck down in *Wainohu* (2011).

Recent landmark cases on the federal balance

Over the past thirty years, the decisions of the High Court have reflected a broad interpretation of Commonwealth's authority under the Constitution's concurrent powers. Similarly, a broad reading has widened the application of Commonwealth exclusive powers.

Tasmanian Dams (Franklin Dam Case 1983)

Tasmania's attempt to build the Franklin Dam in the state's southwest created historical landmarks in more than one sense. It was a significant factor in the emergence of the national environmental protest lobby. The issue was prominent in the 1983 Federal election and this was the first time environmental issues were significant in an election outcome. It also resulted in a High Court decision that confirmed the broad interpretation of the Commonwealth's concurrent powers on corporations and external affairs.

The Tasmanian Hydro-Electric Commission's extensive program of dam construction since World War Two provided Tasmania with cheap electric power and also sought to attract industry and employment to the state. In the late 1970s, Tasmania decided to build a dam that would flood the Gordon and Franklin Rivers in the southwest of the state. The dam threatened to seriously degrade the area's pristine environment. It also would flood aboriginal heritage sites. The plan was opposed by environmentalists. It was also opposed by the Liberal Prime Minister, Malcolm Fraser. Direct action by the protesters (who included high profile figures such as the British botanist, David Bellamy) and offers of compensation to Tasmania by the Federal government did not succeed in stopping the dam's construction. The federal Labor Party's declared intention

the political and legal significance of Tasmanian Dams (1983)

to prevent construction of the dam was a factor in its 1983 election victory. In government, Prime Minister Hawke moved to stop the dam by passing the *World Heritage Properties Preservation Act* (1983). Tasmania promptly challenged the constitutional validity of the federal legislation.

The High Court rejected the challenge. The Commonwealth's passage of the *World Heritage Act* (1975) and the inclusion of Tasmania's southwest on the World Heritage List was found to be a valid use of its 'external affairs' power under Section 51(xxix) of the Constitution. Accordingly the Commonwealth had the legal power to pass the *World Heritage Properties Preservation Act* and stop the continued construction of the Franklin Dam.

This decision confirmed the broad interpretation of the external affairs power that had been the basis the High Court's decision in *Koowarta* (1982). It meant that the Commonwealth could pass valid laws on any matter of international concern arising from a bona fide treaty. This replaced the narrow view that suggested that the external affairs power restricted central policy to traditional 'external' matters such as trade and defence. The narrow view would prevent the use of the external affairs power to have an 'internal' effect on the residual powers of the states. In addition the Court reinforced the *Concrete Pipes* (1971) precedent that under Section 51(xx), the Commonwealth's power over 'corporations' covered all incorporated bodies. Under this judgment an incorporated body could be any private firm operating across state boundaries or within any state, state statutory authorities, and even community clubs. In this case the Commonwealth had the power to pass legislation that covered the actions of the Hydro-Electric Commission. Opponents of the decision claimed that it gave the Commonwealth almost unlimited legislative powers.

Tasmanian Crayfish (Cole v Whitfield 1988)

This case arose from the prosecution of a Tasmanian based crayfish export company by the Tasmanian State government. The company supplemented their supply of Tasmanian crayfish with Victorian crays. The stocks from Victoria were under-sized under Tasmanian law. The Court ruled that the freedom of interstate trade protected the company's use of Victorian crayfish. This represented a revision of the Court's existing interpretation of the constitutional guarantee that trade and commerce between the states would be '...absolutely free' (Section 92). That older interpretation had resulted in the Court overturning any state or commonwealth law that even indirectly affected interstate trade (e.g. the rejection of Commonwealth legislation in the Bank Nationalisation Case 1948). The Court's new test was that Australian laws must not create 'discriminatory burdens of a protectionist kind' on interstate trade. This precedent substantially increased Commonwealth power both to regulate business and to engage in commercial activity itself.

the 'external
affairs' head of
power

the 'corporations'
head of power

modification of
the Section
Ninety-two test