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Discussion Paper

INTEGRATING CONSERVATION AND DEVELOPMENT

AUSTRALIA'S RESOURCE ASSESSMENT COMMISSION AND THE TESTING CASE OF CORONATION HILL

Brian Galligan & Georgina Lynch

No. 14 March 1992

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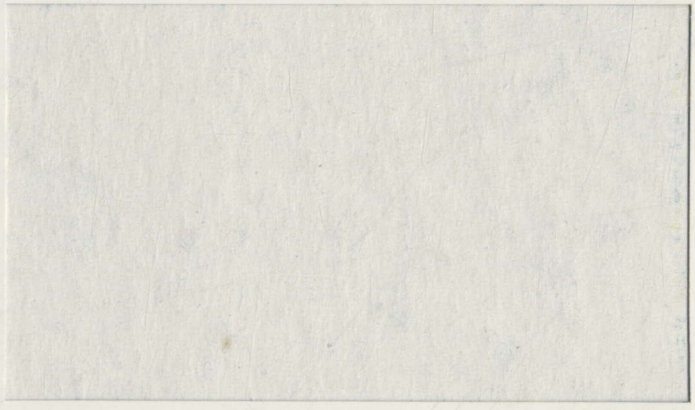

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ISSN 1036–8655
ISBN 0 7315 1360 6

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INTEGRATING CONSERVATION AND DEVELOPMENT

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INTRODUCTION

The politics of environmental dispute resolution are particularly volatile and contentious because they involve powerful groups and well entrenched interests that are passionately committed to opposing courses of action. Politics in pluralist societies typically work by means of incremental adjustments, tradeoffs and compromises. As much as possible, the claims of contending interest groups are partially accommodated through integration into, or marginal adjustment of, established policy and symbolic frameworks. This traditional politics of incremental adjustment tends to break down for environmental disputes, however, because of the character of those disputes and the nature of the groups involved. Environmental disputes tend to be zero-sum games requiring an either–or, develop or not-develop outcome. There are of course many instances when controlled development can be married with environmental preservation or even enhancement, but such tradeoffs may be more difficult because of the character of environmentalists and their politics. Environmentals or 'greens' epitomise the 'new politics': they form a single interest group; they tend to have a fundamentalist dedication to their purpose and do not easily accept compromise which is the stuff of traditional politics; and they are well organised with developed institutional structures, large membership and sophisticated media and lobbying capacities. Hence, in Australia as in many other

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* An earlier version of this paper was prepared for the North Australia Research Unit's Conference on Planning for Environmental Change: Conservation and Development in North Australia held in Darwin on 16–18 September 1991. The authors wish to achnowledge the assistance from participants in that forum, and from extensive discussions with Keith Jackson of the Northern Land Council, John Ah Kit of the Jawoyn Association and Richard Mills, Clive Hamilton and Leanne Wilks of the Resource Assessment Commission.

countries, the politics of environmental dispute resolution has put great stress on established political institutions and policy processes which have not responded well to the new challenges.[1]

Nor has the usual fall-back on the judiciary and court system been very effective in Australia or overseas. 'Given the incapacity of executive and legislative branches of government to resolve such fundamental disputes,' one American commentator reports, 'the courts have become a dominant force in American environmental policy.'[2] But these too are poorly equipped to fill the political breech because of their rigid procedures and inability to deal flexibly with broader issues of economic growth and social impact or to handle complex issues involving the physical and social sciences. Dissatisfaction with the courts has led to a mushrooming of 'environmental dispute resolution' (EDR) alternatives.[3] The emphasis in EDR is on avoiding litigation by bringing contending parties together in a less adversarial context to explore possible ways of accommodation and settlement. This alternative, however, also has limited scope because it is appropriate for disputes between contending parties and tends to exclude other parties and remove the issue from the public domain to an arena of private tradeoffs.[4]

There has been a comparable, although less pronounced, move away from courts to experimentation with alternative methods and forums of environmental dispute resolution at the state level in Australia where the courts have been traditionally relied upon for resolving environmental disputes.[5] The most notable Australian innovation in the politics of environmental dispute resolution, however, has been the creation of the Resource Assessment Commission (RAC) by the Hawke government in 1989. Established 'to bring a new level of rigour and sophistication to

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1 See Elim Papadakis, 'Environmental Policy', in Christine Jennett & Randal Stewart, eds, *Hawke and Australian Public Policy: Concensus and Restructuring*, Macmillan, South Melbourne, 1990, pp. 339–55; and Elim Papadakis, 'Struggles for Social Change: The Green Party in West Germany', in Christine Jennett & Randall Stewart, eds, *Politics of the Future: The Role of Social Movements*, Macmillan, South Melbourne, 1989, pp. 76–97.

2 Barry G. Rabe, 'The Politics of Environmental Dispute Resolution', *Policy Studies Journal* 16(3), Spring 1988, p. 583.

3 See Lawrence Bacon, & Michael Wheeler, *Environmental Dispute Resolution*, Plenum Press, New York 1987; and Gail Bingham *Resolving Environmental Disputes: A Decade of Experience*, The Conservation Foundation, Washington, DC, 1986.

4 Ibid., pp. 590–98, for a critical discussion of shortcomings in EDR.

5 Commission of Inquiry into the Conservation, Management and Use of Fraser Island and the Great Sandy Region (Fraser Island Environmental Inquiry), *Final Report*, Government Printer, Brisbane, 1991.

the Government's decision-making processes related to resource use issues', the RAC 'constitutes a major step forward in providing governments with the results of an analysis of the likely implications of proposals for the use of Australia's natural resources'. At least that was the claim of the Chairperson of the Commission, Justice D.G. Stewart, in presenting the RAC's first inquiry report on the Kakadu Conservation Zone, and more particularly on mining Coronation Hill, in May 1991. Steward boasted that 'the initiative puts Australia at the forefront of developing a more objective and enlightened process for dealing with these important issues'.[6]

This paper examines Australia's brave new experiment in institutional design that established a process for enhanced assessment of the conservation and development aspects of major projects, and the testing case of Coronation Hill which was a baptism of fire for the new organisation and its procedures. As we shall see in the last section, the politics of enhanced rationality which is embodied in the RAC process of systematically exploring options tended to be brutalised at the decision making stage by a prime minister and cabinet enmeshed in larger power struggles. Nevertheless, the outcome of banning mining and incorporating Coronation Hill within the Kakadu National Park was in accord with the RAC's thorough assessment and report. The RAC's future is not assured given the opposition parties' commitment to its abolition in the name of more streamlined developmental policies. And one must be cautious about judging the success of an institution from one completed reference case. Nevertheless, this Australian experiment in transparent policy analysis is a significant institutional innovation in environmental dispute resolution.

THE RAC

Genesis

The Resource Assessment Commission (RAC) was established by the federal government in 1989 to deal with highly contentious environmental and resource allocation issues. The passing of the Resource Assessment Commission Act by the commonwealth Parliament on 16 June 1989 followed the announcement by the Prime Minister, the Hon. Robert Hawke, of a series of new principles to guide decision-making in future conservation and development disputes. These were enunciated by Mr. Hawke in a joint news conference with Senator Graham Richardson, Minister for the Arts, Sport, the Environment,

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6 Preface to Resource assessment Commission, Kakadu Conservation Zone Inquiry, *Final Report*, Australian Government Publishing Service, Canberra, May 1991, p. v.

Tourism and Territories, and the Hon. John Kerin, Minister for Primary Industries and Energy, in November 1988. The government's purpose, claimed the Prime Minister, was to 'discharge to this and future generations of Australians the responsibilities that we have for both sustainable and appropriate economic development on the one hand and the obligation that we have to this and future generations to protect the Australian environment'.[7] This would entail establishing a formal policy framework which was much more ambitious than the *ad hoc* approach typical of decision-making to date.

Up to this point there had been a proliferation of conflicting rhetoric and claims advanced by both business and environmental groups, each side endeavouring to 'balance the green debate' in ways which were congenial to its particular interests. At one end of the spectrum, business and industry groups recognised the growing political clout of burgeoning green lobby groups and saw the need to establish a coherent policy direction. The Wesley Vale Pulp Mill experience, which saw the plans of a private corporation frustrated and delayed due to a conservation controversy, motivated a number of industry groups to lobby collectively for a defined policy from the government.[8] At the other and, environmental groups could not afford to ignore empirical studies which indicated that, as economic conditions deteriorated, concern for the environment could be out-weighed by the necessity for economic development.[9] With such convergence, the time was ripe for the establishment of a cohesive policy framework.

The political protagonists, Richardson and Kerin, welcomed a climate responsive to striking a balance between development and environment groups. The consummate political operator, Senator Richardson, had become the 'born again greenie' who was clearly capable of advancing the cause of environmental groups, while John Kerin, the solid economic rationalist, was considered as the saving hope for a frustrated business community. There was no doubt that the electoral consequences of alienating one, or conceivably both, of these groups would be damaging for the Hawke government. In the face of such a dilemma, the idea of an independent body with the capacity to weigh the

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7 Transcript of Joint News Conference with Senator Graham Richardson, Minister for Arts, Sport, The Environment, Tourism and Territories and the Hon John Kerin, Minister for Primary Industries and Energy and the Prime Minister, the Hon. Robert Hawke, 18 November 1988, p. 1.

8 R J K. Chapman, 'How We Cut Off Our Nose To Spite Our Face: The Case Of Wesley Vale', Occasional Paper, 1989.

9 *The Sydney Morning Herald*, in an article entitled 'Public Support for Green Issues Strong, but Fading', conducted a poll in December, 1989, which indicated that as economic conditions became harder, the scales of concern for the environment adjusted in favour of economic progress.

value of competing claims was advocated as the ideal instrument for achieving a solution. In a show of unprecedented (but in view of the climate, perhaps not unpredictable) cooperation, representatives from Industry Groups and the Australian Conservation Foundation supported the idea of an independent body with the capacity to consider all sides to the debate. The RAC was heralded as an appropriate vehicle for balancing economic needs with preservation of the environment for future generations.[10] It is noteworthy that the Wilderness Society, the largest self-funded Australian conservation group, boycotted participation in the RAC inquiry process.[11] The group claimed that they could not participate in the RAC inquiry process unless a moratorium was placed on tree felling in areas which were the subject of the Forest and Timber Inquiry.[12]

Rites of passage

The passage of the RAC legislation through Parliament was not an easy process. The opposition was under considerable pressure from business groups to support the legislation, but, in the Australian tradition of partisan politics, an agreement could not be reached between the two major political parties. Ian Sinclair, leading the debate for the opposition, proposed that the RAC bill was nothing more than an extra layer of bureaucracy, adopted by the government to 'avoid making hard decisions'. Sinclair condemned the government for favouring minority view points in resource management issues, and for 'using the RAC concept to atone for public reaction against the government's last minute intervention on the Wesley Vale Pulp Mill'.[13] Moreover, the opposition objected to the RAC bill on federal grounds that land use was the responsibility of the states and, accordingly, the states should have a clearly defined role in the RAC proposal. The opposition fuelled the states rights issue by moving that the government 'be condemned for failing to ensure consultation with the States before the appointment of special Commissioners to the RAC'.[14]

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10 'Conservation: A Time for Co-operation', *Canberra Times*, 31 January 1989.

11 'Green Group Split', *Courier Mail*, 21 July 1990.

12 Figures within the Resource Assessment Commission have found that the potentially debilitating effect that non-participation by the Wilderness Society may have on the Inquiry process has been, to a large extent, limited in practice by the Wilderness Society's continued contribution to the Environmental Impact Assessment Process.

13 House Of Representatives *Hansard*, 10 May 1989 at p. 2431.

14 *Ibid.*

While not succeeding with their proposed amendments, the opposition's negative stance ensured that the passing of the RAC legislation was contingent upon the support of the Democrats who held the balance of power in the Senate. Democratic spokesman, Senator Norm Sanders, conceded that the Bill was a step in the right direction, but initiated a package of amendments designed to 'put the environment first'. Essentially, the amendments were to ensure the following: that in matters relating to a National Estate, the Australian Heritage Commission would have the right to give evidence about the matter to the inquiry; that witnesses who testified before the Commission were reimbursed for expenses and, in certain cases, remunerated for the development of data; and that the concepts of 'ecosystem integrity and sustainability' and 'ecological sustainability' be included in the RAC Act.[15] To secure the support of the Democrats, the government agreed to review the RAC legislation, and included the amendments proposed by the Democrats in the final draft.[16] From this legislative compromise, the RAC was born.

An ambitious purpose

From a very early stage it was apparent that the genesis of the RAC belonged to Kerin and his Department of Primary Industries and Energy. Indeed, Kerin attributed the idea of the RAC to a former senior private secretary from his department. Kerin also explained in a paper, 'Making Decisions We Can Live With', that he had welcomed the proposal for the RAC as a means of 'trying to accommodate my frustration with endless public inquiries'.[17] Through the RAC, he hoped to achieve a balanced approach.

The lack of common ground between the disparate development and environmental groups had become starkly apparent in the negotiated settlement in the Lemonthyne and Southern forests Inquiry in Tasmania. Kerin suggested that an important environmental area with an equally significant economic benefit did not have to be resolved in terms of 'either/or' outcomes.[18] The findings of the Helsham Inquiry, set up to look into the conflict between forestry groups and conservationists over Tasmanian forest management, were abandoned after the Commission of inquiry failed to provide a unanimous result. This in turn lead to a series

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15 Senate *Hansard*., 16 June 1989, p. 4222–4.

16 See the *RAC Act*, sections 31, 38 and schedule 1 respectively.

17 J. Kerin, 'Making Decisions We Can Live With', *Canberra Bulletin of Public Administration* 62, October 1990, p. 18.

18 'Green Luddites De-Rail Policy Creation', *Australian Financial Review*, 8 November 1989.

of intergovernmental negotiations between the commonwealth and Tasmanian government.[19] In the short term, the result was a complex arrangement of compromises and consultations which had little, if any, resemblance to the actual findings of the Helsham Inquiry. In the long term, there was no doubt that the commonwealth government could not afford another '*Helsham*', hence an independent body with the authority to consider complex issues of resource management seemed to be the solution. Kerin saw the alternative as an independent review body with a systematic methodology and transparent process of investigation. With the capacity to 'sort out some of the wood from the trees literally', the RAC might prove to be an invaluable addition to the decision-making process in Australia.[20]

From bitter experience, the federal government had come to recognise the glaring need to link the policy problems associated with the development/environment debate with an institutional framework. Clearly, the task of translating policy formation into policy implementation is not an easy one, as commentators such as Pressman and Wildavsky, Dunshire, Sabitier and Mazmanian have recognised.[21] This is especially the case where developmental and environmental issues are involved together. Indeed, the difficulties associated with policy implementation in environmental policy making characterised the final report of the World Commission on Environment and Development, chaired by Mrs Gro Harem Bruntland. In a report titled 'Our Common Future', the Bruntland Commission flagged the need for institutional innovation in developing an appropriate framework for dealing with matters that raised both economic and environmental issues:

> The integrated and interdependent nature of the new challenges and issues contrasts sharply with the nature of the institutions which exist today. These institutions tend to be independent, fragmented and working to relatively narrow mandates with closed decision processes. Those responsible for managing natural resources and protecting the environment are institutionally separated from those responsible for managing the economy. The real world of

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19 B.M. Tsamenyi, J. Bedding, & L. Wall, 'Determining the World Heritage Values of the Lemonthyne and Southern Forests: Lessons from the Helsham Inquiry', *Environment Planning and Law Journal* 6(2), 1989.

20 J. Kerin, 'Making Decisions We Can Live With', *op.cit.*, p. 20.

21 J. Pressman & A. Wildavsky, *Implementation*, 3rd edn, University of California Press, Berkeley, 1984. A. Dunshire, *Implementation in a Bureaucracy*, Martin Robertson, Oxford, 1978. P. Sabitier, & D. Mazmanian, (eds), *Effective Policy Implementation*, Health & Co., Lexington Mass, 1981.

> interlocked economic and ecological symbols will not change; the policies and institutions concerned must. [22]

Kerin's approach to establishing the terms of reference for the RAC were in keeping with the spirit of 'Our Common Future'.[23] The objective of the commission was to enquire into and report not only on environmental and economic considerations but on the cultural, social, industrial, and any other aspects of resources and their uses. The Policy Principles for resolving competing claims for the use of resources were set out in schedule 1 of the RAC Act and emphasised a qualitative approach.

> 1. There should be an integrated approach to conservation (including all environmental and ecological considerations) and development by taking both conservation and development aspects into account at an early stage.
>
> 2. Resource use decisions should seek to optimise the net benefits to the community from the nation's resources, having regard to efficiency of resource use, environmental considerations, ecological integrity and sustainability, ecosystem integrity and sustainability, the sustainability of any development, and an equitable distribution of the return of resources.
>
> 3. Commonwealth decisions, policies and management regimes may provide for additional uses that are compatible with the primary purpose values of the area, recognising that in some cases both conservation and development interests can be accommodated concurrently or sequentially, and, in other cases, choices must be made between alternative uses or combinations of uses. [24]

Clearly, the terms of reference for the Commission indicated that the expected impact of the RAC far exceeded merely determining the 'value' of a particular area. There were hopes that the RAC would be capable of developing a prudent, but forthright, *policy framework* for handling questions of environmental and developmental significance. This would entail working out a comprehensive strategy to assist the federal government in integrating environmental and economic factors into its decisions about the use of Australia's natural resources. If it succeeded in its lofty but difficult purpose, the RAC would be a major institutional and policy innovation of the Hawke government, and a political godsend to boot.

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22 World Commission on Environment and Development, *Our Common Future*, Oxford University Press Australia, 1987, p. 9.

23 House of Representatives, *Hansard*, 3 May 1989, p. 1822–3.

24 *RAC Act*, schedule 1

An approximate model: the IAC

While the attempt at integrating environmental and economic factors into a workable policy framework was unique for Australia, an integrative approach to policy decision making has important precedents in industry policy. Tariff protection for manufacturing which was the central pillar of Australian industry policy from federation until the 1980s always had an independent body charged with assessing applications for increased protection and to which the minister could refer matters for investigation. This was at first the Interstate Commission until it was rendered impotent by a jealous High court, replaced by the Tariff Board through its various protective and corrective phases from 1921 until the 1970s, then the Industries Assistance Commission and, finally, its mutant the Industry Commission in 1989.[25] Australia's propensity for using independent state institutions to develop and monitor government policy is as old as federation. In the early 1970s the Whitlam government had restructured the Tariff Board as the Industries Assistance Commission (IAC) to free it from the clutches of the protectionist Department of Trade and Industry. The IAC was charged with a broader mandate of assessing the economic impact of protectionism in general and tariff levels for particular industry sectors in particular.

When the idea of the RAC was first mooted in Cabinet in 1988, the Prime Minister proposed that the RAC amalgamate with the IAC. This suggestion was resoundingly defeated, however, as there was an 'existing apprehension that the IAC was overwhelmingly an economics industry oriented body'.[26] The Australian Conservation Foundation (ACF) supported this resolution, claiming that a body such as the IAC did not have the capacity to deal with issues of a complex environmental nature.

Although the Prime Minister was unable to amalgamate the two Commissions, the guide-lines for the RAC process were modelled on those of the IAC.[27] The RAC, like the IAC, is a permanent body. However, except for the Chairperson of the Commission, Justice Stewart, 'special' commissioners are only appointed for the duration of the inquiry, rather than on a permanent basis. This differs from the IAC's strong emphasis on permanent staffing which has been justified in these terms: 'The IAC'S reputation for professionalism in the Australian community and internationally could not have been achieved without

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25 A. Capling & B. Galligan, *Beyond the Protective State*, Cambridge University Press, Sydney, 1992, ch. 3.

26 Transcript of Joint News Conference, 18 November, 1988.

27 S. Cuthberson, 'Commissions for Industry Assistance and Resource Assessment: Some Comparisons', *Canberra Bulletin of Public Administration* 62, October, 1990, p. 62.

some sort of consistent staff presence around an integrity of structure and identity.'[28]

The guide-lines articulated in the RAC Act emphasise the need for an integrated, independent approach to the inquiry process, which is similar to that of the IAC. Further to this, the proceedings of the RAC, like those of the IAC, are not adversarial or legalistic in nature in order to facilitate public participation at all levels of the inquiry process. Because of this emphasis on a transparent process of public inquiry, some commentators have drawn close parallels between the IAC's review of tariffs in the 1980s and the RAC's processes for assessing economic and environmental issues in the 1990s.

Federal dimensions

In the last two decades, a number of controversies have involved disputes about the respective powers of the commonwealth and the states. Disputes over the constitutionality of certain commonwealth decisions in relation to environmental policy and land-use management have lead to court battles and bitter political stand-offs between the commonwealth and state governments. Examples include the extraction of mineral sands from Fraser Island,[29] the Dams dispute in South West Tasmania,[30] the Pulp Mill proposal in Wesley Vale Tasmania, the Lemonthyne and Southern Forests inquiry in Tasmania,[31] the destruction of rainforests in Queensland and N.S.W., bauxite mining in the Jarrah Forests of Western Australia and uranium mining in the Northern Territory. In the past the legislative framework for environmental policy and management has been of little assistance in trying to resolve these tensions. Both the commonwealth and the states have enacted legislation in the arena of environmental protection and resource management in an attempt to define more clearly lines which are hazy.

The states have strong jurisdictional claims in this area, as Bruce Davis points out:

> natural resources, utilisation, land-use planning and nature conservation programs are all the prerogatives of the States, with the Federal role limited to suasion for common standards, research assistance of the provision of funds for some resource conservation activities. In addition, the commonwealth jurisdiction includes

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28 *Ibid.*

29 *Murphyores Inc. Pty. Ltd* v. *The Commonwealth & Others* (1976) 136 CLR 1.

30 The *Franklin Dam* case (1983) 46 ALR 625.

31 *Richardson* v. *The Forestry Commission* (*Tasmanian Forests* case) (1988) 62 ALJR 158.

federal sites and buildings within states and all Federal territories, including some off-shore islands and Antarctica.[32]

But as concern for the environment has increased in the past twenty years, so too has the commonwealth's desire for direct involvement in environmental protection and resource management initiatives. Thus, it has come as no surprise that some commonwealth proposals in the field of land management have impinged upon what the states considered to be their jurisdiction. The result has been an underlying tension and, in some cases, an innate suspicion that the commonwealth is trying to erode state rights in resource management issues. It has been argued by numerous commentators that the fact that the constitution does not make any express provision to empower the federal parliament to make laws with respect to the environment encourages federal/state antagonism in the area. However, the Constitutional Commission found that an express environmental head of power for the federal government was not necessary.[33] Indeed, the commonwealth, has considerable power to influence environmental policies of the states that derives from a number of constitutional provisions.

Section 51(1) of the constitution, the trade and commerce power, has been used by the commonwealth to prohibit the export of minerals unless the express approval of the appropriate federal minister is obtained. The High Court in *Murphyores* v. *The Commonwealth* (1976) approved of the intervention of the commonwealth in preventing the mineral sand-mining of Fraser Island, indicating the extensive practical scope of section 51(1).[34] In addition, the commerce power confers a plenary authority on the commonwealth to prohibit imports absolutely and conditionally.[35]

The constitution also provides that power with respect to foreign corporations, and trading or financial corporations, section 51(xx), falls within the ambit of the commonwealth. This power has proven to be of considerable significance since the *Concrete Pipes* case in 1971.[36] The *Tasmanian Dam* case has widened the possible ambit for the

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32 B. Davis, 'Federalism and Environmental Politics: An Australian Overview', in R.L. Mathews (ed.) *Federalism and the Environment*, Centre for Research on Federal Financial Relations, ANU, Canberra, 1985.

33 *Final Report of the Constitutional Commission*, AGPS, Canberra, Vol. 2 1988, p. 757.

34 *Murphyores Inc. Pty Ltd* v. *The Commonwealth* (1976).

35 L. Zines, 'The Environment and the Constitution', in R.L. Mathews (ed.) *Federalism and the Environment*, Centre for Research on Federal Financial Relations, ANU, Canberra, 1985, p. 15.

36 *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

operation of the power significantly. The corporations power is now considered to be the main vehicle for federal commercial regulations in Australia. Essentially the commonwealth may control, having regard to environmental considerations, all manufacturing, production or extractive processes conducted by corporations for the purpose of trade.[37]

Another potent source of commonwealth power for intervening in state resource development issues is the section 51(xxix) 'external affairs' power. As the number of International Agreements dealing with the preservation of world cultural and natural heritage sites increases, the utilisation of section 51(xxix) widens the commonwealth's base of authority in addressing issues regarding the environment and its resources. Following the decision of the High Court in the *Tasmanian Dam* case, the existence of a treaty obligation is sufficient to bring the matter within the external affairs power. As a result, the commonwealth has a significant role to play in a World Heritage Listing issue which has the potential to affect the environmental policy of any state.[38] As Mason CJ commented in *Queensland* v. *The Commonwealth*: 'Entry of a property in the World Heritage List supported by the protection given by the Act, constitutes perhaps the strongest means of environment protection recognised by Australian Law.'[39]

While not as pervasive as the *commerce* and *corporations* powers, the *races power* is relevant to the protection of Aboriginal relics and sacred sites which are an integral part of Australia's cultural environment.[40] In the *Tasmanian Dam* case, the High Court also approved of the commonwealth's providing legislation for the protection or conservation of a site which is of particular significance to people of Aboriginal race.[41]

In addition, there are a number of financial powers which the commonwealth can use for environmental objectives. Section 96 enables the commonwealth to give financial assistance to the states on the terms and conditions it prescribes. Such incentives can be used to ensure that states adopt certain practices, for example, Soil Conservation programs.[42] So too, sections 51(ii), 51(iii), 90 and 99 concerning taxation, bounties and excise, are useful tools for the commonwealth to grant depreciation allowances for appropriate environment protection

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37 *Tasmanian Dam* case (1983)

38 *Final Report of the Constitutional Commission*, 1988, Vol. 2, p. 758.

39 *Queensland* v. *The Commonwealth* (1988) 77 ALR 291, 296.

40 *Constitution of Australia Act*, section 51(xxvi)

41 L. Zines, *op.cit.*, p. 23.

42 *Soil Conservation (Financial Assistance) Act*, 1986.

developments and bounties for products produced by pollution free means.[43]

Finally, it should be noted that section 109 of the Constitution provides that when a commonwealth and state law are inconsistent, the commonwealth Act will prevail, and the state law, to the extent of the inconsistency, will be invalid. [44] Thus, while states do control the use of land and own the mineral resources of the land, in practice this power effectively means that the commonwealth may exert paramountcy over legislative arrangements for the environment in Australia.

Against this background, it can be seen that underlying the consultation process between the commonwealth and the states for determining terms of reference for RAC inquiries is a complex constitutional framework which gives the states extensive jurisdictional powers but the commonwealth most of the trumps. However, the states can seriously jeopardise the whole process because litigation before the High Court is a most unsatisfactory way of proceeding. By withdrawing from involvement in the RAC process which is, after-all, a commonwealth government initiative, a state might in practice be able to scuttle the whole exercise.

Where constitutional jurisdiction is so divided between semi-sovereign governments, the appropriate way forward is not litigation but working out cooperative arrangements and devising institutions and procedures which are effective yet appropriate for a concurrent system of federal jurisdiction. The RAC is a case in point since it is a commonwealth body whose work will normally require substantial involvement by state governments in the inquiry process. This is provided for in the RAC Act where section 16(2) requires, firstly, that state governments be *consulted*, and secondly, that reasonable steps be taken to consult with persons who are interested in the resource matter.[45] In practice, section 16(2) means that before a recommendation can be passed to the RAC, the governments of the states concerned must be consulted on the terms of reference for a particular inquiry. The precise nature of the 'consultation' process with affected states and the process for determinating the desired terms of reference for a particular inquiry were not specified, so there is obvious room for flexible development, but also for challenge and dispute.

So far the RAC has received the terms of reference for three recommendations: the first concerned the Forest and Timber Inquiry where terms of reference were decided after a successful consultative process with the relevant state governments; the second, which was completed first, was the Kakadu Inquiry, under the auspicious of the

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43 *Final Report of the Constitutional Commission*, p. 758.

44 *Constitution of Australia Act*, section 109.

45 *RAC Act*, section 16(2).

Northern Territory government, which fell within the authority of commonwealth jurisdiction;[46] and the third, the Coastal Zone Inquiry, for which consultation with the relevant states and interested parties was particularly delicate and lengthy. That was hardly surprising given the comprehensive scope of the inquiry which, among other things, requires the RAC to 'examine and report on the future use of Australia's coastal zone resources with particular reference to the integrated management of building, tourism, maxiculture and associated development, particularly outside metropolitan areas'.[47] For the Coronation Hill inquiry, however, the federal dimension was absent.

CORONATION HILL

The inquiry process: some lessons

Some important lessons can be drawn from the Final Report on the Kakadu Conservation Zone Inquiry, tabled in Parliament on Tuesday 7 May, 1991. In assessing the effects of mining in the Kakadu conservation zone, the commission found that the environmental effects of mining the Coronation Hill site would not threaten the fine environmental balance of the fragile wetlands of Kakadu. More specifically, thorough examination of relevant material the inquiry found that the impact of mining at Coronation Hill would not cause significant harm to the water flow levels in the South Alligator River. However, the final report did signal that the extractive industry at Coronation Hill would threaten the integrity of the park's world heritage listing, and irretrievably damage aboriginals' spiritual values, as the area sought for mining is claimed by the Jawoyn tribe to be a sacred site.

After the final report was handed down, the RAC came under considerable fire from the media for failing to provide a 'conclusive' decision, and thereby throwing the decision back in the federal government's lap.[48] These criticisms reflect a misunderstanding of the commission's inquiry process. The RAC is not a decision-making forum but has a purely advisory role. The purpose of the commission is to analyse and order various options to provide informed recommendations. Accordingly, the methodology of the commission is geared towards providing a thorough systemic analysis, not providing a winner-takes-all

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46 *Constitution of Australia Act*, section 122 Gives the Commonwealth Plenary Powers with Respect to Territories.

47 Coastal Zone Inquiry Terms of Reference, signed by the Prime Minister on 10 October 1991, published in RAC *Bulletin*, No. 5, November 1991.

48 P. McGuinness, 'Giving Voice to Utter Confusion', *The Australian*, 10 May 1991.

answer.[49] Ultimately, the success of impartially weighing the claims of interested parties depends upon the effectiveness of the commission in facilitating a comprehensive and consistent inquiry process.

The RAC Act outlines the forms and limits of adjudication which direct the course of the inquiry process. The object of the commission is to balance competing interests between conservation and development groups, and this needs to be tackled by integrating environmental and economic factors in assessing resource management issues of national significance. This process involves addressing the environmental, economic, industry, cultural and social implications of major natural resource proposals. Justice Stewart, as Chairperson of the RAC, has emphasised this factor as a major concern of the Commission, commenting that in an integrated assessment process the commission must 'identify all the factors and synthesise them in a comprehensive, consistent and balanced way'.[50]

Section 16(1) of the RAC Act provides that the Prime Minister can initiate an inquiry in relation to a resource matter, and refer the matter to the RAC to conduct an inquiry into the issue.[51] The commission does not have the authority to initiate its own inquiries. Moreover, the terms of reference for a particular inquiry are determined by the government. The Commission has no input into the specification of the matter, the scope or time frame of the inquiry, nor the priorities to be observed by the Commission in investigating a particular recommendation.[52] Hence, like the IAC, the RAC depends upon the political priorities of the federal government, to determine the scope of its work (and indeed its life-span).

The process of recommending a resource matter to the RAC has already raised concern in various sections of the community. The environment/development debate is swathed in emotion because it affects the livelihood of many people with a vested interest in a particular outcome. Any political party runs the risk of alienating a crucial proportion of the electorate by advancing the cause of one particular group at the expense of another. To achieve the objectives outlined in Schedule 1 of the RAC Act, the Commission must ensure that the inquiry process is not subject to political interference. If the government recommends a political 'hot-cake', the chance of the RAC evaluating the benefits of a particular area with the active participation of all interested parties is jeopardised.

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49 D.G. Stewart, 'Future Directions', *Canberra Bulletin of Public Administration*, p. 104.

50 *Ibid.*, p. 102.

51 *RAC Act*, Section 16(1).

52 *RAC Act*, Section 17 (a), (b) & (c).

The RAC, to date, has been given three recommendations and already the problems of remaining impartial and independent have arisen. The referral of the Coronation Hill mining issue to the RAC took place amidst wide criticisms from the business community that the federal government has used the RAC as a 'cooling pond for hot environmental issues'.[53] In a joint statement nine industry groups, led by the Business Council of Australia, claimed that the decision to refer the issue of mining at Coronation Hill to a 12 month inquiry was a blatant attempt to delay making a politically sensitive decision. They concluded:

> While business supports the establishment of the RAC and hopes that it will remove the emotion which now characterises resource development decisions, the Government has yet to provide any undertaking that the process will replace short-term political expediency. [54]

Given such sentiments, it comes as no surprise that the final report on the fate of the Kakadu Conservation Zone did not take the 'heat' out of the Coronation Hill issue. In fact, the recommendations of the RAC had entirely the reverse effect. Commentators proclaimed that the report was a 'litmus test' for business confidence in the Hawke government policies, the plight of Aboriginal people, and the validity of the RAC itself. [55] These claims were made amidst loud protestations from the Prime Minister that the Kakadu Report represented no such test, as Coronation Hill was a 'special case' and should be interpreted in its natural isolation.[56] The federal cabinet was split as to whether the RAC recommendations on Coronation Hill should be implemented.[57]

It should be noted, however, that in the Kakadu inquiry the Commission achieved what the RAC process was designed to achieve. All available information and resources were employed to ensure that the Commission gave impartial, comprehensive and informative advice about different ways to use resources. The Coronation Hill study illustrates the immense difficulty in weighing the competing values of

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53 C. Wallace, 'Scepticisms on Role of New Commission', *Business Review Weekly* 31 November, 1989, p. 32.

54 *Ibid.*

55 P. Kelly, 'Hawke in a no-win situation', *The Australian*, 8 May, 1991.

56 L. Taylor, 'Mining a Threat to Jawoyn', *The Australian*, 3 May, 1991.

57 The pro-mining camp is understood to include Senator Button, Mr Willis, Mr Dawkins, Mr Beasley, Mr Kerin, Senator Cook, and Mr Griffiths, the last two do not have a vote in Cabinet. The anti-mining group is said to include Mr Hawke, Mrs Kelly, Senator Richardson, Mr Hand, Senator Bolkus and Mr Tickner (who does not have a vote on the issue.)

all factors. Furthermore, it highlights the increased difficulty faced by an independent body, such as the RAC when it is passed any issue which is already the subject of intense political wrangling.

The Options Clarified

In presenting the RAC report to the Prime Minister, Justice Stewart reiterated that its aim was to 'better inform government decision making, but that decision making remains the province of government which will still have to make difficult decisions'.[58] The options, however, had been comprehensively and publicly canvassed through the RAC process of inquiry, research, public hearings and draft report exposure.

On the economic development side, the RAC report made clear that from a strict financial cost-benefit analysis the project would represent an efficient use of resources. But clearly it would be no economic bonanza, yielding only about $82m in direct net economic benefits to the Australian economy (estimated in 1991 present value terms).[59] The project would contribute substantially to the depressed Northern Territory economy, especially in the construction stage, and to Australia's trade balance. It would also benefit financially the Jawoyn, a number of whom were in favour of mining which would boost their employment prospects and break the vicious circle of welfare dependency. Perhaps most significantly of all, a decision to forego mining would be interpreted by business as a failure on the part of government to deal with mining proposals in sensitive areas. The mining lobby was touting the line that 'sovereign risk' for investors was now primarily a matter of government fickleness, and this project was a 'litmus' test of the government's broader intentions.

On the environmental front, the RAC found that the conservation Zone which included Coronation Hill was closely linked, ecologically as well as geographically, with Kakadu National Park, especially through the South Alligator River which served as a refuge and a corridor for terrestrial and aquatic fauna. Mining development might, in the view of some, detract from the 'ecological integrity' of the combined Zone and National park area, but the RAC concluded that 'a single mine, properly managed and monitored, would have a small and geographically limited direct impact on the known biological resources of the Conservation Zone'.[60]

Hence, if economic development and protection of the environment were the only issues, there was not a great lot at stake in the decision, at

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58 RAC, *Final Report*, p. vii.

59 *Ibid.*, p. xx.

60 *Ibid.*, p. xxi.

least in substantive terms. The economic benefits were not so large, nor, with proper management, was the environmental impact very great. Of course, those facts did not decrease the symbolic significance of the decision for the opposing development or environmentalist lobbies, but they did enable the public and the government to discount the wilder rhetoric on both sides and put the issue into proper perspective. As one newspaper editorialised after the RAC report was made public, it was 'difficult to feel sympathy for the loud warnings of doom and gloom issued by either conservationists or miners in the controversy over mining Coronation Hill'.[61]

The primary issue, therefore, for both the RAC and the government was the preference of the Aboriginal people and the status to be accorded their religious belief. The RAC report warned:

> If mining proceeds in the Zone it will be against the wishes of the senior Jawoyn men, who are supported in their view by many Jawoyn people and other senior Aboriginal people in the Region; further, mining will adversely affect the ability of Jawoyn people, particularly the senior men, to sustain cultural and religious values, beliefs and practices that are important to them.[62]

The Conservation Zone was within Jawoyn territory; Coronation Hill (Guratba) was regarded by Jawoyn elders 'as being associated with Bula and as containing the essence of Bula' and mining would disturb that; and the three senior Jawoyn men who were acknowledged to speak with authority on the matter were opposed to mining.[63] Nothing was clear cut, however, since the Jawoyn religion was fluid and imprecise, and there was disagreement about the significance of Guratba and the permissibility of mining even among its senior custodians. In fact, two out of the three of these had indicated that the site was not significant, a fact that the RAC noted as an 'inconsistency' that 'cannot be easily explained'.[64] What was clear, however, was that the Jawoyn had been pressured and pestered by those supporting mining for a long period, and there was a real danger of their being simply worn down. Hence the option of leaving the decision over development to the Jawoyn, which some favoured, was not a fair one and was ruled out by the RAC report. Nor were the reported divisions among the Jawoyn people over mining Coronation Hill without a shady underside: the company kept a number of Jawoyn men on full pay during the

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61 *Financial Review*, 10 May 1991

62 RAC, *Final Report*, p. xxii.

63 *Ibid.*, pp. xxii–xxiii.

64 *Ibid.*, p. xxiii.

interregnum and their families naturally enough supported the mining option.[65]

The strong impression one gets from reading its report is that the RAC was highly sympathetic towards Aboriginal religious sensitivities and reservations about mining. For instance, 'the Inquiry took the view that underlying cultural and religious themes and trajectories of interpretation should be accorded primary importance in assessing the nature of Aboriginal cultural and religious interests.'[66] Whatever 'trajectories of interpretation' might mean, it is clearly not very precise.

Nor did the RAC beat about the bush in pointing up the Aboriginal issue for government decision making. 'The dilemma facing the Australian Government is clear', it said: 'should it set aside the environmental risk that cannot be eliminated and the strong views held by the Aboriginal people responsible for the Conservation Zone in favour of securing increases in national income of the order that seems likely from the Coronation Hill project and possibly from other mineral resources in the Zone?' As if to counterbalance the symbolic significance of the decision painted by the mining constituency, the RAC added the warning that 'a decision to permit mining may be seen as a further instance of reluctance on the part of the Australian government to take decisions in favour of retaining Aboriginal culture and religious values in the face of potential economic gains from mining'.[67] Coronation Hill was indeed a special case, the RAC concluded. And quite clearly, it had loaded the dice against mining by its findings and emphasis on the Aboriginal issue. Quite simply, as the press reported it, the RAC report 'backed Aborigines'.[68]

What Price Preservation?

The objectives of the RAC inquiry required that the preservation value of the Kakadu conservation zone be identified and assessed. Not surprisingly, assessing the market value of environmental factors such as clean air, water quality and wildlife is not an easy task. The RAC endeavoured to overcome the difficulties associated with placing a market value on 'non-market' factors by employing an economic technique known as the contingent valuation (CV) method. According to one of its

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65 These issues were rectified by officials of the Northern Land Council advisors and the Jawoyn Association.

66 *Ibid.*, pp. 155–56.

67 *Ibid.*, pp. xxiii–xxiv.

68 For example, *Australian*, 6 May 1991, 'Mining Report Backs Aborigines'.

proponents, 'the CV method attempts to assess the strength of an individuals preference to a specified level of environmental quality using money as the measuring rod'.[69] In its simplest form, CV entails surveying people as to how much they are willing to pay to preserve the environment. In the Kakadu case, 2,304 people were surveyed nationally, and a parallel survey of 502 people was conducted in the Northern Territory.

The debate surrounding the preservation value of the Kakadu conservation zone was an extensive one. In an attempt to encompass the differing schools of thought, the CV survey was divided into two scenario: one representing the case of major environmental damage if the mine went ahead, and the other couched in terms of minor environmental impact. The results of the survey showed that a high percentage of respondents were willing to pay to stop the mine in the Kakadu conservation zone. In more detailed terms, the national survey showed that the median average that the people surveyed were willing to pay to prevent the mine was $123.80 per year for 10 years, and $52.50 from respondents to the minor impact scenario. For the Northern Territory sample, the 'willingness to pay' figures were decidedly less, with $7.40 for 'major impact' and $14.50 for minor.[70]

The results of the CV survey, as well as the method itself, came in for intense criticism. Indeed, numerous commentators slammed the CV as nothing more than a ludicrous experiment in 'environmental altruism'.[71] While the RAC's research division defended the method and called in American experts to support the case, the public controversy was defused by the RAC's dropping any reference to CV in its report.

For our purposes, the CV study was significant as an indicator of public support for environmental protection. Indeed, in terms of the political wranglings which characterised discussions over the future of the Kakadu conservation zone, the results of the CV survey may have added fuel to the fire. In the final analysis, a survey which illustrated the Australian public's desire to preserve the environment, be it a result fraught with inconsistencies or not, would hardly have been lost on a prime minister committed to preserving the sanctity of Coronation Hill, and in a more general sense, securing the green vote.

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69 Leanne Wilks, *'A Survey of the CV Method'*, *RAC Research Paper No. 2*., Nov 1990, p. 1.

70 For full statistical details refer; D. Imber, G. Stevenson, L. Wilks, 'A Survey of the Kakadu Conservation Zone', Research Paper No. 3, February, 1991.

71 J. Stone, 'Put environmental altruism to the real test', *Australian Financial Review*, 7 Thursday, February, 1991.

The politics of government decision making

The Hawke government had been able to defer making a hard decision on mining at Coronation Hill for more than a year by referring the matter to its newly established Resource Assessment Commission. With the completion of the RAC's final report in May 1991, however, the government had to bite the bullet. Even the RAC, in the first of its recommendations, advised the government to make a decision 'as soon as possible'.[72]

That was always going to be difficult but was exacerbated by leadership instability in the government. Treasurer Keating, for long the prime minister in waiting, made his first challenge the very day that cabinet was scheduled to make its decision on Coronation Hill so the matter had to be deferred. Prime Minister Hawke survived this challenge with the support of most of his senior ministers and strong backing from Labor's Left faction. Significantly, the Left faction included current Aboriginal Affairs Minister, Robert Tickner, and his predecessor, Gerry Hand, who played a key role in delivering the Left's numbers for Hawke. Hawke survived easily enough, but it was widely perceived that the Left had strengthened its influence in the government with Brian Howe, the Left's senior minister, became deputy prime minister.

The day before the rescheduled cabinet decision on Coronation Hill, the prime minister came out strongly in favour of respecting Jawoyn religious beliefs about Bula and that disturbing Bula would unleash destruction. Hawke said: 'I think it's an enormous presumption for us to say about 300 people, you are irrational, fancy believing that Bula is there. I mean where is our God?'[73] Although Hawke's outburst was before an audience of Catholic girls at a Sydney school, it was immediate headline news. He had told the students that they would not be hard put to work out his position on the issue. Hawke's statement was interpreted as pre-empting cabinet because, in this first major issue after a wounding leadership challenge, a defeat would signal chronic lack of authority.

In such dramatic circumstances, the decision on Coronation Hill was hardly in doubt as cabinet met. Previously, it had been reported that the Centre Left faction that could be expected to have the swing vote favoured mining, and that the Labor caucus favoured leaving it to the Jawoyn people to decide whether they wanted mining or not.[74] It was also widely reported both before and after the cabinet meeting that a majority of cabinet, including the senior economic ministers, favoured

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72 RAC, *Final Report*, p. xxv.

73 Reported *Age*, 18 June 1991.

74 *Age*, 28 May 1991, 30 May 1991.

mining.[75] The issue was put to cabinet in terms of two broad options: for a complete ban on mining, or mining subject to approval by the Jawoyn Aborigines.[76] Bob Collins, Minister Assisting the Prime Minister on Northern Australia, put the case strongly for the second option, arguing that he was more familiar with Jawoyn views than the RAC through his political and personal ties in the Northern Territory. But Collins was opposed by the Left ministers, especially Bolkus and Hand. The decision was taken without a vote which is usual practice for cabinet, but only after Kim Beazley, a Hawke supporter in the recent leadership battle but a supporter of the mining option, is reported to have said: 'It's your government. You make a decision. We'll support you.'[77] In typical hard-headed fashion, Graham Richardson, a Keating supporter but an opponent of mining, summed up the outcome: against the background of the leadership challenge and Hawke's anti-mining remarks the previous day, cabinet had no choice but to give the prime minister 'a win' on the issue.[78]

So, as it turned out, the government's decision on Coronation Hill was in accord with the RAC's specification and weighting of options. But that was chiefly as a consequence of the charged leadership issue and factional politics within the government rather than as a result of the triumph of enhanced rationalism in government decision making. Hawke won by making it a make-or-break leadership issue that swamped the alternative preferences of his cabinet and Labor caucus. Additional factors that likely tipped the balance were Hawke's own personal commitment to the rightness of the Aboriginal position and his determination to win on their behalf, and popular support for a decision against mining. This last matter, however, was controversial and had been clouded by a public storm over the RAC's contingent valuation finding.

Because of the manner in which the decision was made, little public attention was focused on, nor credit given to, the RAC for its background work. More damaging was the pledge of the Liberal Coalition opposition to revoke the decision when in government, and abolish the RAC as 'yet another layer to the already over-layered decision-making process' and 'an excuse to delay action' without adding significantly to available information.[79] Nor has the mining company

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75 For a close analysis of the cabinet split on the day, see Glenn Milne, 'Hawke's bloodless victory reopens dangerous wounds', *The Australian*, 20 June 1991.

76 *Financial Review*, 19 June 1991.

77 *The Australian*, 20 June 1991.

78 *Ibid.*

79 Fred Chaney, Shadow Minister for the Environment, Media Release, 9 August 1991.

relinquished its determination to mine Coronation Hill: having tried unsuccessfully to pressure the new prime minister, Paul Keating, into reversing the government's decision, it has recently mounted a challenge in the High Court on the grounds that in effect the government deprived it of its property right without just compensation. Hence the RAC's legitimacy and future are not assured, nor was its Coronation Hill report the harbinger of an enhanced politics of environmental decision making.[80] Nevertheless, RAC's role was significant in publicly defining the options.

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80 See Frank Brennan, 'Tempting Earthly Powers', *Eureka Street*, September 1991, pp. 14–16.

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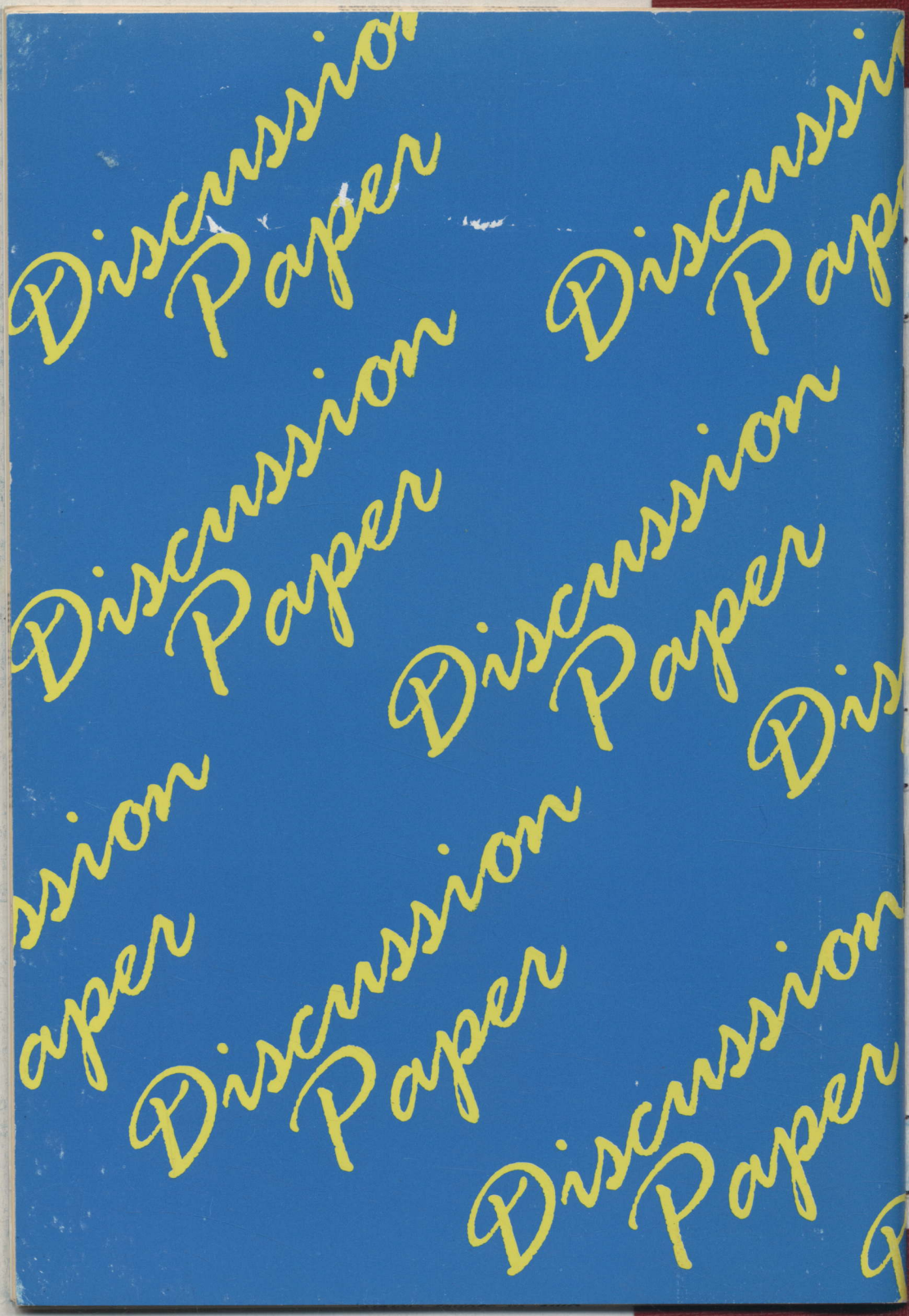
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