

# **ENVIRONMENTAL DECISION-MAKING IN A FEDERATION**

**Is the Allocation of Powers Envisaged by the 2006 Reform of German  
Federalism Sound in Terms of Environmental Decision-Making?**

**An Analysis with Regard to the Australian Experience**

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## A. Introduction

### I. Current Relevance

The pressing necessity to protect the integrity of the environment with all its natural resources has only been recognised as an autonomous area of decision-making since the 1970s. Therefore, neither the *Commonwealth of Australia Constitution Act 1901* nor the German *Basic Law 1949* considered it necessary to provide for an allocation of legislative competences over the environment.<sup>1</sup>

Not surprisingly, the continuously growing public awareness of environmental problems in the 1970s<sup>2</sup> coupled with the steady aggravation of environmental degradation on a global scale, encompassing issues such as climate change, ozone depletion and threats to biodiversity,<sup>3</sup> prompted a discrepancy between the silence of both constitutions in this area on the one hand and the growing need to tackle environmental issues through regulation on the other.

As a result of this institutional vacuum within both federal systems, every layer of government sought to use the protection of the environment as a vehicle to expand its powers to the detriment of the other levels as well as to attract the increasingly important ‘green vote’ in upcoming elections.<sup>4</sup>

The German response to this issue entailed several amendments of the *Basic Law* that were made in an ad hoc fashion and allocated singular competences in the

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<sup>1</sup> Geoffrey Lindell, ‘Scope of the Commonwealth’s Environmental Powers and Responsibilities’ (1999) *Environmental Outlook, Law and Policy No. 3* 107, 107.

<sup>2</sup> Bruce Davis, ‘Federalism and Environmental Politics: An Australian Overview’ in R. L. Mathews (ed) *Federalism and the Environment* (1985) 1, 2.

<sup>3</sup> Michael Kloepfer, *Umweltrecht* (3<sup>rd</sup> ed, 2004) 96, 98-9.

<sup>4</sup> Brian Galligan and Christine Fletcher, *New Federalism, Intergovernmental Relations and Environment Policy* (1993) 10; Drew Hutton and Libby Connors, *A History of the Australian Environment Movement* (1999) 165; Michael Kloepfer, ‘Bemerkungen zur Föderalismusreform’ (2004) 57 *Die öffentliche Verwaltung* 566, 570; Volker Haug, ‘Die Föderalismusreform – Zum Ringen von Bund und Ländern um die Macht im Staat’ (2004) 57 *Die öffentliche Verwaltung* 190, 190 and Bruce Davis, ‘Federal-State Tensions in Australian Environmental Management: The World Heritage Issue’ (1989) 6 *Environmental and Planning Law Journal* 66, 75-6.

field of environmental protection when this seemed necessary.<sup>5</sup> In the end, this prompted the emergence of a highly complex and detailed, though partly inconsistent and impractical system of competence allocation.<sup>6</sup> Contrariwise, the Australian development was characterised by fierce conflicts between the federal level and individual states and territories in the scope of which extensive litigation was used in order to define the ambit of the mutual competences of both levels under the Australian Constitution.<sup>7</sup>

But despite these slight differences in the response to a similar starting point,<sup>8</sup> the underlying common feature of both the Australian and the German constitutional situation concerning environmental protection is the omnipresent antagonism between federal and state rights and responsibilities, or to put it another way, the inherent tension between centralism and devolution.<sup>9</sup>

As a consequence, any upcoming debate on the allocation or re-allocation of environmental competences will be automatically accompanied by the general discussion about the merits and pitfalls of a centralised as opposed to a decentralised approach to environmental decision-making and management. And even more, this issue also tends to ebb and flow in response to changing political climates or to pressing environmental or economic problems.<sup>10</sup>

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<sup>5</sup> Heinrich Pehle, 'Germany: Domestic Obstacles to an International Forerunner' in Mikael Skou Anderson and Duncan Liefferink (eds) *European Environmental Policy, The Pioneers* (1997) 161, 161-8.

<sup>6</sup> Wolfgang Köck and Cornelia Ziehm, 'Föderalismusreform: Chance für das Umweltrecht vertan' (2006) 17 *Zeitschrift für Umweltrecht* 337, 337 and Anne-Kathrin Fenner and Guido Wustlich, 'Abfallwirtschaft im Bundesstaat – Perspektiven des föderalen Umweltschutzes am Beispiel der Abfallwirtschaft' (2002) 24 *Natur und Recht* 602, 602.

<sup>7</sup> Ben Boer, 'Environmental and Resource Law in Australia' (1993) 31 *Osgoode Hall Law Journal* 327, 331.

<sup>8</sup> For details see Martin Painter, *Collaborative Federalism, Economic Reform in Australia in the 1990s* (1998) 23, 25.

<sup>9</sup> Perry Shapiro, 'Which Level of Government Should Be Responsible for Environmental Regulation? The Federalists Versus the Calhoun' in John Braden, Henk Folmer and Thomas Ulen (eds) *Environmental Policy with Political and Economic Integration, The European Union and the United States* (1996) 132, 143 and Clark Kelso, 'To Devolve, Or Not to Devolve?: The (D)Evolution of Environmental Law' (1996) 27 *Pacific Law Journal* 1457, 1457.

<sup>10</sup> Jacqueline Peel and Lee Godden, 'Australian Environmental Management: A "Dams" Story' (2005) 28 *University of New South Wales Law Journal* 668, 690-1.

Within this general framework, it is only logical that the far-reaching reform of the German federal structure, that was passed in July 2006 and the main objective of which was *inter alia* the re-allocation of environmental competences, needs to be scrutinised with respect to the question of whether this re-allocation of regulatory authority will indeed improve the quality of environmental policy, decision-making and management.

Thus, the focus of this thesis will be the assessment of whether the new division of environmental powers under the amended German *Basic Law* is advisable not only with respect to the theoretical analysis of both the centralist and the decentralist approach, but also with regard to the Australian experience within this context.

Whilst it goes without saying that the theoretical discussion about centralism and devolution in environmental law is the essential background against which the assessment of the German reform needs to be conducted, it must also be emphasised that the Australian experience within this area is extremely valuable as well. The major reason for this is that, after a long period of fierce political battles, Australia adopted a cooperative approach to environmental decision-making that involved both the Commonwealth and the state and territory governments.<sup>11</sup> But nevertheless, recent test cases such as *Booth v Bosworth*<sup>12</sup> or the *Nathan Dam Case*<sup>13</sup> call this system of competence allocation under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, the centrepiece of Australian federal environmental law, into question, demanding a greater role for the Commonwealth in this sphere.

In consequence, the systems of environmental competence allocation in Australia and Germany are currently in a state of flux. Hence, the question that arises is whether the institutional setting in both systems, upon which the environmental

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<sup>11</sup> R. S. French, 'Cooperative Federalism: A Constitutional Reality or a Political Slogan?' (2005) 32 *Brief* 6, 11.

<sup>12</sup> See *Booth v Bosworth* (2001) FCA 1453.

<sup>13</sup> See *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190.



decision-making is based, is indeed best suited to make sound environmental decisions or whether there is still work to be done.

## II. Scope and Structure of the Thesis

In reflecting on this issue, the thesis will commence with a description of the legal starting point and development of the environmental competence allocation in Germany and Australia.

Outlining the German situation first, it will encompass an account of the constitutional state of affairs preceding the reform of federalism in July 2006, followed by a detailed explanation of the shortcomings with which the old system had to struggle. This will be contrasted with a specification of the new allocation of competences under the amended *Basic Law*.

Subsequently, the focus will shift to the constitutional situation in Australia. This analysis will entail a description of the general constitutional background against which the subsequent World Heritage Disputes will be discussed. Following this, the Australian new federalism approach will be outlined along with its realisation in the political practice through instruments such as the Intergovernmental Agreement on the Environment or the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment. The focus will then move to the implications of the *EPBC Act* that currently provides the head of power for environmental management in Australia.

The accounts of both countries will then be compared. From this comparison it will be argued that both systems, although operating with different institutional arrangements, are still struggling to find the right solution for the issue of which level of government is best equipped and willing to tackle environmental problems.

Having defined this issue in question, the thesis will now turn to a theoretical analysis and discussion of the solutions available: namely the centralist, the decentralist and the cooperative federalism approach. In the end, it will be

concluded that a centralist approach is best suited for sound environmental decision-making.

This suggestion will then build the basis for a final assessment of the current situations in Germany and Australia. Within this context, the new competence allocation under the amended German *Basic Law* will be analysed, before considering the current Australian approach under the *EPBC Act*.

This analysis, which will lead to the final comparison and the respective conclusion, will indicate that both the Australian statutory as well as the German constitutional system of competence allocation do not provide a sufficient or satisfactory implementation of a centralised institutional system of decision-making.

## **B. Implications of a Federal-State Structure for Environmental Decision-Making in Germany and Australia**

### **I. The Constitutional Situation in the Federal Republic of Germany**

#### **1. The Constitutional Situation Prior to the Reform of Federalism in 2006**

##### **a) The Allocation of Legislative Competences Concerning the Environment**

Prior to the reform of German federalism in July 2006, the division of legislative competences between the federal and state levels followed a highly complex and detailed system laid down in Art. 70 to 75 *Basic Law* (old).

Pursuant to the general rule of Art. 70 I *Basic Law* (old and new), the federal legislator was only competent to pass legislation concerning subject-matters that were expressly mentioned in the *Basic Law* as either an exclusive federal

competence,<sup>14</sup> a concurrent federal competence<sup>15</sup> or a framework/skeleton competence.<sup>16</sup> Contrariwise, all legislative powers that were not explicitly conferred to the federal level were without limitation retained by the *Länder* (the German states).<sup>17</sup>

But even in areas in which the federal legislator possessed the power to enact concurrent or framework legislation, this competence was not an unlimited one.<sup>18</sup>

Rather, the federation was only allowed to pass a law in the field of the concurrent legislation if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity rendered federal regulation necessary in the national interest, Art. 72 II *Basic Law* (old).<sup>19</sup> This condition applied, according to Art. 75 I 1 *Basic Law* (old), in the area of the framework legislation likewise.<sup>20</sup> Apart from this, the constitutional ability of the federal level to enact framework legislation was also limited by Art. 75 II *Basic Law* (old) that allowed federal framework legislation containing details or directly applicable provisions in exceptional circumstances only.<sup>21</sup> Merely, in the sphere of the exclusive federal competence the federation was entitled to regulate without any limitations due to Art. 71 *Basic Law* (old and new).

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<sup>14</sup> See Art. 73 *Basic Law* (old).

<sup>15</sup> See Art. 74, 74a *Basic Law* (old).

<sup>16</sup> See Art. 75 *Basic Law* (old).

<sup>17</sup> See Art. 70 I *Basic Law* (old and new).

<sup>18</sup> Quite to the contrary, the respective prerequisites both in Art. 72 II and Art. 75 II *Basic Law* (old) had been heightened through a constitutional amendment in 1994. Subsequently, they were also interpreted narrowly by the Federal Constitutional Court, since the objective of the amendment had been to increase the constitutional powers of the *Länder*. See, eg, Stefanie Schmahl, 'Bundesverfassungsgerichtliche Neujustierung des Bund-Länder-Verhältnisses im Bereich der Gesetzgebung' in *Jahrbuch des Föderalismus 2006, Band 7, Föderalismus, Subsidiarität und Regionen in Europa* (2006) 220, 220-32 and Reinhard Sparwasser, Rüdiger Engel and Andreas Voßkuhle, *Umweltrecht, Grundzüge des öffentlichen Umweltschutzrechts* (5<sup>th</sup> ed, 2003) 56-7.

<sup>19</sup> See especially Hans Jarass, 'Allgemeine Probleme der Gesetzgebungskompetenz des Bundes' (2000) 19 *Neue Zeitschrift für Verwaltungsrecht* 1089, 1092-3.

<sup>20</sup> For a detailed account of the prerequisites and the legal consequences of the framework/skeleton legislation see especially Thomas Streppel, *Die Rahmenkompetenz, Voraussetzungen und Rechtsfolgen der Rahmengesetzgebung des Bundes* (2005).

<sup>21</sup> See especially Jarass, above n 19, 1093-6.

Within this general framework of competence allocation, the power to enact environmental legislation was more or less explicitly divided between the federal and the state level, since the catalogues of specified federal competences did not even allude to the terms ‘environment’ or ‘environmental protection’.<sup>22</sup> Rather, a whole variety of issues falling within the traditional ambit of environmental law were spread out across the divergent competence titles of the *Basic Law*.<sup>23</sup>

For instance, the federal level had the concurrent competence to regulate matters such as the production and utilization of nuclear energy,<sup>24</sup> waste disposal, air pollution control and noise abatement<sup>25</sup> as well as the analysis and modification of genetic information.<sup>26</sup> Apart from this, Art. 75 I 1 no. 3, 4 *Basic Law* (old) allocated the power to enact framework legislation concerning hunting, nature conservation, and landscape management, as well as regional planning, and the management of water resources to the federal level.

These powers, enabling the federal legislator to adopt direct environmental protection measures in the above-mentioned areas under the conditions of Art. 72 II, 75 I 1, II *Basic Law* (old) were complemented by other federal concurrent competences such as the right to enact law regulating economic affairs,<sup>27</sup> the right to promote agricultural production and forestry<sup>28</sup> or the right to adopt protective measures in connection with the marketing of food, drink, and tobacco, essential commodities, foodstuffs, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals.<sup>29</sup> Even though these powers had originally not been created in order to permit federal environmental legislation, any regulation within these fields was

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<sup>22</sup> Sparwasser, Engel and Voßkuhle, above n 18, 56.

<sup>23</sup> See generally Werner Hoppe, Martin Beckmann and Petra Kauch, *Umweltrecht, Juristisches Kurzlehrbuch für Studium und Praxis* (2<sup>nd</sup> ed, 2000) 119-21; Steffen Himmelmann, Andreas Pohl and Christian Tünnesen-Harmes, *Handbuch des Umweltrechts* (4<sup>th</sup> service, August 2000) A.1 32-6 and Wilfried Erbguth and Sabine Schlacke, *Umweltrecht* (2005) 56-7.

<sup>24</sup> See Art. 74 I no. 11 a *Basic Law* (old).

<sup>25</sup> See Art. 74 I no. 24 *Basic Law* (old).

<sup>26</sup> See Art. 74 I no. 26 *Basic Law* (old).

<sup>27</sup> See Art. 74 I no. 11 *Basic Law* (old).

<sup>28</sup> See Art. 74 I no. 17 *Basic Law* (old).

<sup>29</sup> See Art. 74 I no. 20 *Basic Law* (old). For a comprehensive list of all federal competences that might enable the federal legislator to enact measures concerning the environment see Kloepfer, above n 3, 152.

likely to have an impact on the environment as well. As a consequence, the federal legislator was able to rely on them when regulating issues that could well be categorised as environmental law.

## b) The Legislative Procedure

Having outlined this general system of legislative competence allocation,<sup>30</sup> it must also be emphasized that the legislative procedure in Germany may have involved not only the *Bundestag* as the primary federal legislative body,<sup>31</sup> but also the *Bundesrat* as the body through which the *Länder* participate in the legislation and administration of the federation and in matters concerning the European Union.<sup>32</sup>

Within this context, there were two different procedures for the participation of the *Bundesrat*. Whereas there were bills that needed the actual consent of the *Bundesrat* ('*Zustimmungsgesetze*'), others could just be objected to by the *Bundesrat* ('*Einspruchsgesetze*').<sup>33</sup>

The former participation procedure, laid down in Art. 77 II, IIa, 78 *Basic Law* (old and new), required the positive approval of the *Bundesrat* for a bill to become law. Thus, in these cases, which originally had been supposed to be the exception in constitutional practice, the *Bundesrat* was able to veto a bill that had already been passed by the *Bundestag*. In contrast to this, the *Bundestag* was empowered to override mere objections raised by the *Bundesrat* in the latter case by a respective majority according to Art. 77 IV, 78 *Basic Law* (old and new).

Furthermore, it is important to note that the cases in which the actual consent of the *Bundesrat* was required, needed to be explicitly mentioned in the *Basic Law*, whilst in all other cases only an objection of the *Bundesrat* was possible which underlay the overriding power of the *Bundestag* as federal legislator.<sup>34</sup>

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<sup>30</sup> See Art. 70 to 75 *Basic Law* (old).

<sup>31</sup> See Art. 77 I 1 *Basic Law* (old and new).

<sup>32</sup> See Art. 50 *Basic Law* (old and new).

<sup>33</sup> See Heinrich Wilms, 'Klarere Verantwortungsteilung von Bund, Länder und Kommunen?' (2004) 37 *Zeitschrift für Rechtspolitik* 150, 150.

<sup>34</sup> *Ibid.*

### c) The Allocation of Administrative Competences Concerning the Environment

Apart from the legislative powers, the competence to implement and to apply environmental legislation is of crucial importance for achieving an effective protection of natural resources.<sup>35</sup>

Pursuant to Art. 83 *Basic Law* (old and new), the *Länder* are exclusively responsible for the execution of federal laws and they do so in their own right insofar as the *Basic Law* does not otherwise provide or permit.

Therefore, the cases in which the federal legislator was allowed to execute federal laws through direct federal administration (*'bundeseigene Verwaltung'*) or to establish federal administrative agencies (*'selbständige Bundesoberbehörden'*) needed to be mentioned expressly in the *Basic Law* and this occurred only rarely.<sup>36</sup> As a consequence, in nearly all cases it belonged to the exclusive competence of the *Länder* to execute federal environmental legislation pursuant to Art. 83 *Basic Law* (old and new).<sup>37</sup>

This competence to execute federal legislation in their own right included the power of the *Länder* to establish the competent agencies, to put an administrative procedure in place and to enact general administrative guidelines (*'allgemeine Verwaltungsvorschriften'*).<sup>38</sup> Notwithstanding this general rule, Art. 84 I, II *Basic Law* (old) empowered the federal government (*'die Bundesregierung'*) and the federal legislator to regulate these aspects divergently and even to enact general administrative guidelines with the consent of the *Bundesrat*.

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<sup>35</sup> Klaus Hansmann, 'Der Beitrag der Länder zum Umweltrecht' in Klaus-Peter Dolde (ed) *Umweltrecht im Wandel, Bilanz und Perspektiven aus Anlass des 25-jährigen Bestehens der Gesellschaft für Umweltrecht (GfU)* (2001) 767, 775.

<sup>36</sup> See generally Erbguth and Schlacke, above n 23, 59-60; Hoppe, Beckmann and Kauch, above n 23, 121-2 and Himmelmann, Pohl and Tünnesen-Harmes, above n 23, A.1 36-8.

<sup>37</sup> Hans Schulte, *Umweltrecht* (1999) 106-7.

<sup>38</sup> See Art. 84 I, II *Basic Law* (old).

Apart from this power to influence the administrative procedure directly, the federal government was also allowed to monitor and to supervise whether the *Länder* executed the federal legislation in accordance with the law.<sup>39</sup>

In conclusion, the *Länder* were the primarily competent body for the execution of federal legislation pursuant to Art. 83 *Basic Law* (old and new), whereas the federal government was only allowed to regulate singular issues of the implementation process with the approval of the *Bundesrat*.<sup>40</sup>

#### **d) The Influence of the European Level on German Environmental Protection Policy**

Within the past decades, the influence of international and, most importantly, of European regulation on German environmental law has increased significantly.<sup>41</sup> Due to the trends of globalisation and Europeanization, the German environmental law cannot be seen as a separate field of national decision-making anymore.<sup>42</sup> Rather, it is of crucial importance for the national authorities to consider and to integrate European regulations and opinions into the national decision-making process.<sup>43</sup>

Whilst the European treaties prior to 1987 did not confer any expressive power over environmental regulation to the European Communities (EC), the Single

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<sup>39</sup> See Art. 84 III 1 *Basic Law* (old and new).

<sup>40</sup> Susan Rose-Ackerman, *Controlling Environmental Policy, The Limits of Public Law in Germany and the United States* (1995) 46 and Wilms, above n 33, 153.

<sup>41</sup> Kloepfer, above n 3, 105.

<sup>42</sup> Rudolf Hrbek, 'The Effects of EU Integration on German Federalism' in Charlie Jeffery (ed) *Recasting German Federalism, The Legacies of Unification* (1999) 217, 218-9; Ute Wachendorfer-Schmidt, *Politikverflechtung im vereinigten Deutschland* (2<sup>nd</sup> ed, 2005) 120-1 and Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit (ed) *Umweltgesetzbuch (UGB-KomE), Entwurf der Unabhängigen Sachverständigenkommission zum Umweltgesetzbuch beim Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit* (1998) 80-1.

<sup>43</sup> Hans-Werner Rengeling, *Gesetzgebungskompetenzen für den integrierten Umweltschutz, Die Umsetzung inter- und supranationalen Umweltschutz und die Gesetzgebungskompetenzen nach dem Grundgesetz* (1999) 1; Astrid Epiney, 'Grundlagen und Überblick' in Hans-Werner Rengeling (ed) *Handbuch zum europäischen und deutschen Umweltrecht, Eine systematische Darstellung des europäischen Umweltrechts mit seinen Auswirkungen auf das deutsche Recht und mit rechtspolitischen Perspektiven, Band I: Allgemeines Umweltrecht* (2<sup>nd</sup> ed, 2003) 1005, 1005-6 and Peter-Christoph Storm, *Umweltrecht, Einführung* (8<sup>th</sup> ed, 2006) 60.

European Act of 28 February 1986 established an explicit and comprehensive head of power for a common European environmental policy.<sup>44</sup> Moreover, it was laid down that the protection of the environment had to be taken into account in the scope of harmonising the law throughout the common market.<sup>45</sup>

Subsequently, the status of environmental protection within the context of European decision-making gained in significance. Not only the *Treaty of Maastricht*, but also the *Treaty of Amsterdam* proceeded with this development, implementing the formula of harmonious, balanced and sustainable development as well as calling for the promotion of a high level of protection and an improvement of environmental quality.<sup>46</sup> In order to pursue this goal, an environmental policy was envisaged<sup>47</sup> as well as the integration of environmental protection requirements into the definition and implementation of the other Community policies and activities with a view to promoting sustainable development.<sup>48</sup> Putting these overall objectives in a concrete form, Title XIX of the *EC Treaty* allocates specific powers to the EC to regulate environmental matters.<sup>49</sup>

Art. 175 I *EC Treaty*, for instance, confers the power on the Council to decide what action is to be taken by the Community in order to achieve the environmental objectives referred to in Art. 174 *EC Treaty*. Since this provision does not limit the options of the Council in any way, it is free to decide on the nature of the regulatory instrument it wants to put in place. According to Art. 249 *EC Treaty*, possible instruments for such actions are regulations, directives, decisions or recommendations and opinions.

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<sup>44</sup> See Art. 130r to t *EC Treaty* (old). See also Storm, above n 43, 60 and Michael Longo, 'Co-Operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 *Federal Law Review* 127, 131-5.

<sup>45</sup> See Art. 100a, 100b *EC Treaty* (old).

<sup>46</sup> See Art. 2 *EC Treaty*.

<sup>47</sup> See Art. 3 I lit. (l) *EC Treaty*.

<sup>48</sup> See Art. 6 *EC Treaty*.

<sup>49</sup> See especially Meinhard Schröder, 'Umweltschutz als Gemeinschaftsziel und Grundsätze des Umweltschutzes' in Hans-Werner Rengeling (ed) *Handbuch zum europäischen und deutschen Umweltrecht, Eine systematische Darstellung des europäischen Umweltrechts mit seinen Auswirkungen auf das deutsche Recht und mit rechtspolitischen Perspektiven, Band I: Allgemeines Umweltrecht* (2<sup>nd</sup> ed, 2003) 199, 199-214 and Erbguth and Schlacke, above n 23, 111.



Although all these instruments are theoretically available, the most important and the most frequently used one within the context of environmental protection regulation is the directive.<sup>50</sup> Due to Art. 249 *EC Treaty*, directives are binding upon Member States only as to the result to be achieved, leaving the choice of form and methods to the national authorities. Thus, in theory the Council is only empowered to set broad policy objectives or to establish a regulatory framework, which subsequently needs to be implemented by the Member States.<sup>51</sup> Thereby, this instrument has the advantage of providing the Member States with flexibility, enabling them, for example, to accommodate national peculiarities or to set even higher environmental standards.<sup>52</sup> In practice however, it is not uncommon anymore that European environmental directives regulate a specific subject-matter in a very detailed and precise way, leaving hardly any scope for important policy decisions by the Member States.<sup>53</sup>

In conclusion, along with the growing recognition of the transboundary nature of most environmental problems as well as with the increasing economic implications of environmental measures, both the importance as well as the ambit of European regulation in the area of the environment has been widened steadily.<sup>54</sup> As a consequence, an increasing amount of German environmental

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<sup>50</sup> Kurt Faßbender, *Die Umsetzung von Umweltstandards der Europäischen Gemeinschaft* (2001) 17; Kloepfer, above n 3, 680; Schulte, above n 37, 30 and Himmelmann, Pohl and Tünnesen-Harmes, above n 23, A.9 31.

<sup>51</sup> Eckard Reh binder and Richard Stewart, 'Volume 2, Environmental Protection Policy' in Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds) *Integration Through Law, Europe and the American Federal Experience* (1985) 34.

<sup>52</sup> Johannes Caspar, 'Europäisches und nationales Umweltverwaltungsrecht' in Hans-Joachim Koch (ed) *Umweltrecht* (2002) 41, 57; Astrid Epiney, Hanspeter Pfenninger and Reto Gruber, *Europäisches Umweltrecht und die Schweiz, Neuere Entwicklungen und ihre Implikationen* (1999) 51; Schulte, above n 37, 30 and James Pfander, 'Environmental Federalism in Europe and the United States: A Comparative Assessment of Regulation Through the Agency of Member States' in John Braden, Henk Folmer and Thomas Ulen (eds) *Environmental Policy with Political and Economic Integration, The European Union and the United States* (1996) 59, 96.

<sup>53</sup> Rüdiger Breuer, 'Umsetzung von EG-Richtlinien im neuen Energiewirtschaftsrecht' (2004) 23 *Neue Zeitschrift für Verwaltungsrecht* 520, 521; Cornelia Nicklas, *Implementationsprobleme des EG-Umweltrechts, Unter besonderer Berücksichtigung der Luftreinhalte Richtlinien* (1997) 50; Walter Frenz, *Europäisches Umweltrecht* (1997) 69-70; Kloepfer, above n 3, 680 and Epiney, Pfenninger and Gruber, above n 52, 51.

<sup>54</sup> Sachverständigenrat Umwelt, *Der Umweltschutz in der Föderalismusreform, Stellungnahme* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a16/aktuelles/Stellung\\_Foederalismusreform\\_Feb2006.pdf](http://www.bundestag.de/ausschuesse/a16/aktuelles/Stellung_Foederalismusreform_Feb2006.pdf)> at 22 September 2006, 4. Concerning the European environmental law see also Michael Kotulla, *Umweltrecht, Grundstrukturen und Fälle* (3<sup>rd</sup> ed, 2006) 15-23 and Heinz-Joachim Peters, *Umweltrecht* (3<sup>rd</sup> ed, 2005) 8-26.

protection legislation is based upon guidelines and frameworks made in Brussels.<sup>55</sup>

## 2. Critique Concerning the Constitutional Situation Prior to the Reform

In scrutinising this regulatory framework, upon which German national decision-making within the context of environmental protection prior to the 2006 reform was based, it becomes apparent that the institutional allocation of environmental competences showed significant shortcomings such as fragmentation, duplication, time delay and an inability to cope with the demands of the European level.

### a) Critique Concerning the Allocation of Legislative Competences

Describing these shortcomings in more detail, it must be emphasized that the lack of any comprehensive power to regulate matters concerning the environment produced a highly fragmented system of environmental legislation in Germany both in a horizontal as well as in a vertical direction.<sup>56</sup>

To start with a striking example underlying the problem of horizontal fragmentation, the federal legislator had the power to regulate the management of water resources as a framework competence,<sup>57</sup> whilst waste disposal and noise abatement were allocated to the federal level as a concurrent competence.<sup>58</sup> This assignment is quite astonishing, since sound management of water resources frequently requires the consideration of transboundary implications, whereas waste disposal and noise abatement are usually named as the classical examples

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<sup>55</sup> Currently, 80 % of the German environmental law is based upon European regulations, see Oliver Hendrichke, 'Föderalismusreform: Neuordnung der Umweltkompetenzen – Für einen integrierten Schutz von Natur, Boden, Wasser, Luft – Bericht zur Tagung des BMU am 29.3.2004 in Berlin' (2004) 23 *Neue Zeitschrift für Verwaltungsrecht* 1090, 1090.

<sup>56</sup> Joachim Sanden, *Umweltrecht* (1999) 51; Pehle, above n 5, 173; Michael Kloepfer, 'Die europäische Herausforderung – Spannungslagen zwischen deutschem und europäischem Umweltrecht' (2002) 21 *Neue Zeitschrift für Verwaltungsrecht* 645, 653 and Franz-Josef Feldmann, 'Aktuelle Entwicklungen zum Umweltgesetzbuch' in Eberhard Bohne (ed) *Perspektiven für ein Umweltgesetzbuch* (2002) 13, 13-4.

<sup>57</sup> See Art. 75 I 1 no. 4 *Basic Law* (old).

<sup>58</sup> See Art. 74 I no. 24 *Basic Law* (old).

for issues that can be adequately dealt with even on a local level.<sup>59</sup> Notwithstanding this, the regulation of waste disposal and noise abatement allowed detailed federal regulation under the concurrent competence, while only the enactment of a regulatory framework with broad policy objectives was possible within the context of water resource management.

Another reason for horizontal fragmentation was the fact that the federal legislator had the concurrent competence over air pollution control, while not having the same power concerning water or soil pollution control.

Hence, the German system of environmental competence allocation contained many peculiar discrepancies and inconsistencies or as Rose-Ackerman puts it

the constitutional distinction between concurrent and framework legislation in the context of the environment contains anomalies that are not justified on the basis of the nature of substantive environmental problems.<sup>60</sup>

As a consequence of this incoherent and inappropriate allocation of competences<sup>61</sup> coupled with the constitutional principle that all residual powers are conferred to the *Länder*,<sup>62</sup> the federal legislator was incapable of enacting a comprehensive piece of legislation in which the whole law concerning environmental protection (*Umweltgesetzbuch*) would have been codified.<sup>63</sup> Accordingly, this inability paved the way for a situation in which various pieces of

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<sup>59</sup> Lothar Neumann and Hans-Joachim von der Ruhr, 'Dezentrale europäische Umweltpolitik im Lichte der ökonomischen Theorie des Föderalismus' in Michael Kloepfer (ed) *Umweltstaat als Zukunft, Juristische, ökonomische und philosophische Aspekte, Ergebnisse des Ladenburger Kollegs "Umweltstaat"* (1994) 300, 303.

<sup>60</sup> Rose-Ackerman, above n 40, 45.

<sup>61</sup> Annegret Eppler, 'Föderalismus-Reform in Deutschland: die geplante Kompetenzverteilung in der Umweltpolitik' in *Jahrbuch des Föderalismus 2006, Band 7, Föderalismus, Subsidiarität und Regionen in Europa* (2006) 200, 203, 205.

<sup>62</sup> See Art. 70 I *Basic Law* (old and new).

<sup>63</sup> Sanden, above n 56, 52-3.

environmental protection legislation had been put in place, most of which were constrained to regulating a specific field of environmental degradation.<sup>64</sup>

The resulting horizontal fragmentation of the environmental law rendered impossible a sound consideration of interactions and inter-dependencies between different sources of environmental pollution and degradation or of different environmental media (*Umweltmedien*), thereby complicating or even hindering effective protection of the environment.

Apart from this horizontal fragmentation of the German environmental law, another facet of this problem was the considerable amount of vertical fragmentation occurring as well.

The main problem of vertical fragmentation was the framework competence that had been designed to provide the *Länder* with the opportunity to enact individual pieces of legislation to fit their local peculiarities in a flexible way.<sup>65</sup> Although this mechanism might have been beneficial for some *Länder*, it obviously and inevitably led to a situation in which sixteen different pieces of legislation concerning the same subject-matter and filling in the same federal framework were in force.<sup>66</sup> In most cases, the *Länder* also enacted distinct administrative guidelines, thereby establishing a different implementation and enforcement procedure, further complicating the legal state of affairs.<sup>67</sup>

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<sup>64</sup> Rolf Schwartmann, *Umweltrecht* (2006) 2. Examples for such pieces of legislation are the Federal Pollution Control Act (*Bundesimmissionschutzgesetz*), the Water Resources Act (*Wasserhaushaltsgesetz*) or the Circulation Economy and Waste Disposal Act (*Kreislaufwirtschafts- und Abfallgesetz*).

<sup>65</sup> Christean Wagner, 'Reform der bundesstaatlichen Ordnung im Bereich der Gesetzgebung' (2004) 37 *Zeitschrift für Rechtspolitik* 60, 60.

<sup>66</sup> Kerstin Engelhardt, *Die Umsetzung der IVU-Richtlinie in Deutschland, Unter Berücksichtigung des Gesetzes zur Umsetzung der UVP-Änderungsrichtlinie, der IVU-Richtlinie und weiterer EG-Richtlinien zum Umweltschutz vom 27. Juli 2001 (sog. Artikelgesetz)* (2002) 185-6.

<sup>67</sup> Josef Feldmann, 'Grußwort' in Michael Kloepfer (ed) *Umweltföderalismus, Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz?* (2002) 17, 19.

As a consequence of the large extent to which both horizontal and vertical fragmentation occurred, information and search costs for both industry and citizens increased significantly, since they had to find out about the scope and content of the applicable environmental legislation.<sup>68</sup> Furthermore, the resulting legal uncertainty<sup>69</sup> was likely to discourage further investment and to have detrimental effects for acceptance of and compliance with environmental standards.<sup>70</sup>

In conclusion, the excessively high level of horizontal and vertical fragmentation in German environmental law caused by the complex and inconsistent competence allocation under the old *Basic Law* neither promoted sound environmental outcomes nor facilitated environmental decision-making, compliance or implementation.

## **b) Critique Concerning the Allocation of Administrative Competences**

Apart from these problems within the legislative process, another issue that arose under the old German constitutional framework in the context of environmental protection was the responsibility of the *Länder* for the day-to-day implementation of federal legislation according to Art. 83 *Basic Law* (old and new).

In discharging this responsibility, the *Länder* possessed a significant discretion to shape the federal legislation by means of establishing the implementation process. Thus, the constitutional power to execute federal legislation, which involved the competence to establish authorities and procedure as well as to issue general administrative guidelines,<sup>71</sup> enabled the *Länder* to modify federal environmental measures in order to accommodate their own policy priorities.<sup>72</sup>

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<sup>68</sup> Harald Ginzky and Jörg Rechenberg, 'Der Gewässerschutz in der Föderalismusreform' (2006) 17 *Zeitschrift für Umweltrecht* 344, 345 and Rose-Ackerman, above n 40, 39.

<sup>69</sup> Fenner and Wustlich, above n 6, 602.

<sup>70</sup> Feldmann, above n 67, 17, 19.

<sup>71</sup> See Art. 84 I, II *Basic Law* (old).

<sup>72</sup> Rose-Ackerman, above n 40, 46-7.

This ability to shape the implementation of federal laws had even been enlarged by the federal legislator's habit either to use deliberately indefinite legal terms (*'unbestimmte Rechtsbegriffe'*) or to employ accidentally vague language in statutes, giving the states a significantly greater scope for individual decision-making at the stage of implementation.<sup>73</sup> Thereby, this discretion of the *Länder* is again a factor that is most likely to produce legal fragmentation between the sixteen *Länder* within the context of the implementation process.

Reflecting on the already fragmenting effect produced by the allocation of legislative powers outlined above, the additional differences in the implementation processes of the *Länder* were likely to further aggravate the situation triggering several detrimental effects.

Hence, any unequal implementation and application of a federal law would not only be highly problematic in terms of the principle of equal treatment before the law,<sup>74</sup> but also questionable because of its economic implications and its drawbacks for sound environmental protection.

Since any differences in environmental standard-setting, monitoring and enforcement would cause trade distortions, it is clear that different enforcement practices would have negative impacts on competition and economic development.<sup>75</sup>

Apart from this detrimental economic implication, fragmentation in implementation and enforcement of environmental regulation also involves risks for sound environmental protection. Since individual decision-making on the state level neglects the transboundary character of most environmental problems, it prevents a comprehensive approach to combating environmental degradation. The reason for this is that it is highly unlikely that states will manage cross-border

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<sup>73</sup> Wolfgang Bergfelder, 'Probleme des Umweltrechtvollzuges im Bundesstaat' in Michael Kloepfer (ed) *Umweltföderalismus, Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz* (2002) 127, 128-9.

<sup>74</sup> See Art. 3 *Basic Law*.

<sup>75</sup> Reh binder and Stewart, above n 51, 4.

effects of serious environmental problems in the best interest of the environment as a whole without furthering their own development interests.<sup>76</sup> Within this context, it is also not improbable that some *Länder* allow exceptions or make concessions for powerful industries in order to promote economic growth and development within their boundaries to the detriment of the environment.<sup>77</sup>

In conclusion, the constitutional allocation of the competences to implement and enforce federal regulation on the state level causes fragmentation on the administrative level as well. Therefore, this fragmentation leads to trade distortions that hinder economic growth and development without promoting environmental protection.

### c) Critique Concerning the Legislative Procedure

Apart from these effects, the ability of the *Länder* to execute federal legislation in their own right<sup>78</sup> caused another significant problem within the ambit of environmental decision-making in Germany.

Since the *Länder* were, pursuant to Art. 83 *Basic Law* (old and new), solely responsible and competent for the execution of federal laws, the drafters of the *Basic Law* considered it necessary to provide for a compensating mechanism in cases of federal interference with this state power. Thus, although it was acknowledged in the drafting process of the *Basic Law* that some cases might require a uniform execution of federal law in order to counteract fragmentation and unequal application, they ensured that such nation-wide federal regulation of the implementation process could not be adopted without the consent of the *Länder* in the *Bundesrat*.<sup>79</sup>

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<sup>76</sup> For details see chapter C. II. 2. to 3..

<sup>77</sup> Rose-Ackerman, above n 40, 116.

<sup>78</sup> See Art. 83, 84 *Basic Law* (old).

<sup>79</sup> Brigitte Zypries, 'Reform der bundesstaatlichen Ordnung im Bereich der Gesetzgebung' (2003) 36 *Zeitschrift für Rechtspolitik* 265, 266.

As a result, the federal government might have established administrative authorities and their procedure or enacted general administrative guidelines, but because this would have meant a grave interference with the constitutional rights of the *Länder* any decision in this field required the consent of the *Bundesrat*.<sup>80</sup>

This considerable competence in the field of implementation rendered the *Länder* very powerful vis-à-vis the federal legislator, as it granted the *Bundesrat* the power to veto federal legislation.<sup>81</sup> This power had even been enlarged by the jurisdiction of the Federal Constitutional Court (*Bundesverfassungsgericht*) holding that only one provision in a bill concerning the execution of the law and thereby falling within the ambit of Art. 84 I, II *Basic Law* (old) triggered the requirement of the *Bundesrat*'s consent concerning the whole bill (so-called '*Einheitstheorie*').<sup>82</sup>

It follows from this that in the legislative practice before the 2006 reform approximately 60 % of all bills required the consent of the *Bundesrat* and in 60 % of these cases the approval requirement originated from Art. 84 I *Basic Law* (old).<sup>83</sup> Quite in contrast to this reality, the drafters of the *Basic Law* had intended the bills requiring the *Bundesrat*'s approval to be the exception. Accordingly, the rate of bills requiring the consent of the *Bundesrat* tripled since the *Basic Law* had entered into force in 1949.<sup>84</sup>

Not surprisingly, this inadvertently high rate of bills that require *Bundesrat* approval prompted many difficulties within the decision-making process.

First and foremost, it caused a lengthy decision-making process. This was because the *Bundestag* as well as the federal government had to consider the interests and positions of sixteen very different *Länder*,<sup>85</sup> leading to a drafting process in which

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<sup>80</sup> See Art 84 I, II *Basic Law* (old).

<sup>81</sup> Edzard Schmidt-Jortzig, 'Reformbedürftigkeit des deutschen Föderalismus' (2005) *Aus Politik und Zeitgeschichte* 6, 9 and Kate O'Neill, *Waste Trading Among Rich Nations, Building a New Theory of Environmental Regulation* (2000) 121.

<sup>82</sup> *BVerfGE* 8, 274, 294.

<sup>83</sup> Zypries, above n 79, 266.

<sup>84</sup> Joachim Stünker, 'Ist der Bundesrat ein Störfaktor? Pro' (2005) 38 *Zeitschrift für Rechtspolitik* 279, 279.

<sup>85</sup> Kloepfer, above n 56, 647-8.



the state decision-makers had to be involved at an early stage in order not to risk a veto of the *Bundesrat* from the beginning.<sup>86</sup>

Furthermore, since the German electorate tended to elect opposing majorities in *Bundesrat* and *Bundestag*, the *Bundesrat* was often used not, as originally envisaged, for safeguarding the state interests, but simply for party politics.<sup>87</sup>

Consequently, the whole process often triggered the establishment of the committee for the joint consideration of bills (*Vermittlungsausschuss*), consisting of both members of the *Bundestag* and members of the *Bundesrat* to discuss the options and try to reach a compromise solution.<sup>88</sup> Within the past decade, this committee for the joint consideration of bills had even reached the status of a silent substitute legislator, although it does not sit publicly and is not obliged to give reasons for its decisions.<sup>89</sup> Furthermore, the compromise decisions, that are achievable in this committee, feature mostly highly complex and infeasible regulations simultaneously watering down the original policy objectives.<sup>90</sup> Apart from this negative result in terms of stringent decision-making, this approach makes any allocation of political responsibility extremely difficult if not impossible.<sup>91</sup> Hence, citizens are not able to hold the competent institution accountable for their decisions anymore.<sup>92</sup>

In conclusion, the legislative process involving the necessity of the *Bundesrat's* consent to bills as result of the rule laid down in Art. 84 I, II *Basic Law* (old), inefficiently prolonged and complicated the federal decision-making process.

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<sup>86</sup> Michael Kloepfer, 'Föderalismusreform und Umweltgesetzgebungskompetenzen' (2006) 17 *Zeitschrift für Umweltrecht* 338, 338.

<sup>87</sup> In 37 of the 55 years after the coming into being of the Federal Republic of Germany, there has been opposing majorities in *Bundestag* and *Bundesrat*; Hartmut Kühne, 'Föderalismusreform – Laufen oder Stolpern?' (2005) *Aus Politik und Zeitgeschichte* 3, 3. See also Michael Nierhaus and Sonja Rademacher, 'Die große Staatsreform als Ausweg aus der Föderalismusfalle?' (2006) 16 *Landes- und Kommunalverwaltung* 385, 386-7; Wilms, above n 33, 150-1 and Zypries, above n 79, 266.

<sup>88</sup> See Art. 77 II, IIa *Basic Law* (old and new).

<sup>89</sup> Stünker, above n 84, 279.

<sup>90</sup> Wilms, above n 33, 151.

<sup>91</sup> Wagner, above n 65, 60 and Stünker, above n 84, 279.

<sup>92</sup> Zypries, above n 79, 266.

Furthermore, it prevented an allocation of political responsibility and promoted infeasible and highly complex decision-making.<sup>93</sup>

#### **d) Clash with the European Level**

But although the above-mentioned drawbacks of the German allocation of both legislative and administrative powers were serious indeed, the main problem that arose under this system was its inability to discharge Germany's obligations as a Member State of the European Union.<sup>94</sup>

With 80 % of the German environmental law currently based upon European regulations,<sup>95</sup> this figure reveals impressively that any inability of the German institutional framework to implement European measures would have a significant impact for Germany as a Member State of the European Union.<sup>96</sup>

As already mentioned above, each Member State has the duty to implement European directives within the set time frame and in the legally correct manner pursuant to Art. 249, 10 *EC Treaty*. These requirements encompass, according to the European Court of Justice, a procedural as well as a substantive element.<sup>97</sup> Whilst the former demands that the Member States must guarantee legal certainty, which encompasses that any directive has to be implemented by means of a legal act and not by merely administrative guideline,<sup>98</sup> the latter requirement of a sufficient substantive implementation is interpreted even more narrowly by

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<sup>93</sup> For the opposing view see, eg, Roger Kusch, 'Ist der Bundesrat ein Störfaktor? Contra' (2005) 38 *Zeitschrift für Rechtspolitik* 279, 279.

<sup>94</sup> Breuer, above n 53, 522.

<sup>95</sup> Hendrichske, above n 55, 1090.

<sup>96</sup> Hans-Günter Henneke, 'Bestandsaufnahme der Kommissionsarbeit und Umsetzungsperspektiven für die Föderalismusreform in Deutschland, Bericht über das DLT-Professorengespräch 2005 in Frankfurt am Main' (2005) 26 *Verwaltungsblätter für Baden-Württemberg* 249, 254. See generally Horst Sandler, 'Deutsche Schwierigkeiten mit dem EG-Recht – Zur Misere der Umsetzung von EG-Umweltschutz-Richtlinien' (2000) 53 *Neue Juristische Wochenschrift* 2871, 2871-2.

<sup>97</sup> See Steffen Himmelmann, *EG-Umweltrecht und nationale Gestaltungsspielräume* (1997) 130-44 and Astrid Epiney, 'Europäisches Umweltrecht und deutscher Föderalismus aus Sicht der Wissenschaft' in Michael Kloepfer (ed) *Umweltföderalismus, Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz?* (2002) 167, 171.

<sup>98</sup> Caspar, above n 52, 41, 58; Himmelmann, Pohl and Tünnesen-Harmes, above n 23, A.9 32 and Faßbender, above n 50, 76-7.

the European Court of Justice. Although this does not envisage a literal adoption of the directive's wording, the Member States must ensure that the implementation guarantees an effective enforcement of the European law in form of the directive in question (*'effet utile'*).<sup>99</sup>

Bearing this legal obligation under Art. 249, 10 *EC Treaty* in mind,<sup>100</sup> it seems precarious that the German federal system had serious problems in discharging its duties as a Member State of the European Union especially in the context of environmental protection legislation under the old *Basic Law*.<sup>101</sup>

Commencing with the procedural difficulties of implementing European regulations into national German law, attention must be drawn to the fact that the main vehicle for the European regulation of environmental matters is the directive.<sup>102</sup>

Due to Art. 249 *EC Treaty*, European directives have the characteristic that they set out only broad regulatory frameworks or lay down policy goals without specifying any details. Since in Germany most environmental measures fell within the ambit of the framework legislation, the German federal legislator had to enact a regulatory framework implementing the framework already laid down by the

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<sup>99</sup> See Hans-Werner Rengeling, 'Die Ausführung von Gemeinschaftsrecht, insbesondere Umsetzung von Richtlinien' in Hans-Werner Rengeling (ed) *Handbuch zum europäischen und deutschen Umweltrecht, Eine systematische Darstellung des europäischen Umweltrechts mit seinen Auswirkungen auf das deutsche Recht und mit rechtspolitischen Perspektiven, Band I: Allgemeines Umweltrecht* (2<sup>nd</sup> ed, 2003) 956, 968.

<sup>100</sup> See especially Rengeling, *ibid* 956-84.

<sup>101</sup> Such serious deficits in the implementation of European directives on the national German level occurred in the implementation process of the Environmental Impact Assessment Directive (85/337/EEC), the Integrated Pollution Prevention and Control Directive (96/61/EEC), the Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (92/43/EEC) and the Water Framework Directive (2000/60/EEC). See Caspar, above n 52, 41, 58; Ginzky and Rechenberg, above n 68, 345; Jochen and Anke Schumacher, 'FFH-Richtlinie und Vogelschutzrichtlinie: Kritik der Europäischen Kommission an der Umsetzung in der Bundesrepublik Deutschland' (2003) 2 *Naturschutz in Recht und Praxis – online* 2 and Rüdiger Breuer, 'Zunehmende Vielgestaltigkeit der Instrumente im deutschen und europäischen Umweltrecht – Probleme der Stimmigkeit und des Zusammenwirkens' (1997) 16 *Neue Zeitschrift für Verwaltungsrecht* 833, 834.

<sup>102</sup> Faßbender, above n 50, 17; Kloepfer, above n 3, 680; Schulte, above n 37, 30 and Himmelmann, Pohl and Tünnesen-Harmes, above n 23, A.9 31.

EC. And not until this federal framework had been adopted, were the states able to enact the legislative details pursuant to their competence under Art. 75 II, III *Basic Law* (old).

Thereby, this whole process of two consecutive legislative acts within Germany was extremely time-consuming,<sup>103</sup> especially since the states were not able to develop their legislation without knowing how the federal framework would be constituted and they would be required to fill.<sup>104</sup>

Moreover, this mechanism was not cost-efficient, either, because seventeen different parliamentary councils had to be concerned with the drafting of different pieces of legislation for the same subject-matter.<sup>105</sup>

Apart from this, the overall rationale of European directives, which is the harmonisation of law throughout the whole European Union, was likely to be thwarted, if sixteen *Länder* were able to regulate the issue in question according to their own priorities.<sup>106</sup>

Pointing in the same direction, a major substantive problem occurred as well within the context of implementing European environmental protection directives under the old German constitutional system. This problem was prompted by the diametrical difference between the approaches to environmental protection taken by the EC on the one hand and Germany on the other.

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<sup>103</sup> Thomas Fischer, 'Reformziel Aufgabenentflechtung – Die Beratungen der Föderalismuskommission zur Neuordnung der Gesetzgebungskompetenzen' in *Jahrbuch des Föderalismus 2005, Band 6, Föderalismus, Subsidiarität und Regionen in Europa* (2005) 100, 109.

<sup>104</sup> Engelhardt, above n 66, 186 and Eckard Reh binder and Rainer Wahl, 'Kompetenzprobleme bei der Umsetzung von europäischen Richtlinien' (2002) 21 *Neue Zeitschrift für Verwaltungsrecht* 21, 22.

<sup>105</sup> An example for the serious difficulties in this respect is the implementation of the FFH-Directive (RL 92/43/EWG). See Michael Kloepfer, 'Umwelt-, Naturschutz- und Jagdrecht – Eine kompetenzrechtliche Betrachtung im Lichte der Föderalismusdebatte' (2006) 28 *Natur und Recht* 1, 2.

<sup>106</sup> Alexander Schink, 'Neuordnung der Gesetzgebungskompetenzen für das Abfallrecht? – fachliche und europarechtliche Anforderungen' (2004) 24 *Umwelt- und Planungsrecht* 206, 209.

To describe this in more detail, the recent legislative activities of the EC such as the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the so-called Environmental Impact Assessment Directive) follow the so-called integral approach.<sup>107</sup> Aiming at the protection of the environment as a whole, this integral approach is meant to prevent the protection of one environmental medium such as water, air or soil to the detriment of other environmental media.<sup>108</sup> Implementing this approach, the above-mentioned directive aimed at the establishment of a single application process for projects, in the scope of which all factors that might have an impact on the environment must be considered at the earliest stage possible.<sup>109</sup>

This approach envisaged by the Environmental Impact Assessment Directive and subsequently also by the Integrated Pollution Prevention and Control Directive 96/61/EEC<sup>110</sup> challenged the German system of competence allocation, which in contrast to the European level followed a medial approach.<sup>111</sup>

This medial approach was reflected in the whole German system of environmental protection, in which a specific piece of legislation was confined to the protection of one specific environmental medium such as air, water, soil or habitat irrespective of the influence its protection might have on the other

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<sup>107</sup> Rebecca Prella, *Die Umsetzung der UVP-Richtlinie in nationales Recht und ihre Koordination mit dem allgemeinen Verwaltungsrecht* (2002) 68-9. Concerning a definition of the integral approach within the context of environmental regulation see Marc Röckinghausen, *Integrierter Umweltschutz im EG-Recht, Der Begriff des integrierten Umweltschutzes in der Rechtsordnung der Europäischen Gemeinschaft I* (1998) 37-48.

<sup>108</sup> Astrid Epiney, 'Föderalismusreform und Europäisches Umweltrecht, Bemerkungen zur Kompetenzverteilung Bund – Länder vor dem Hintergrund der Herausforderungen des europäischen Gemeinschaftsrechts' (2006) 28 *Natur und Recht* 403, 406; Andreas Wasielewski, 'Die versuchte Umsetzung der IVU-Richtlinie in das deutsche Recht – Eine Bilanz' in Klaus-Peter Dolde (ed) *Umweltrecht im Wandel, Bilanz und Perspektiven aus Anlass des 25-jährigen Bestehens der Gesellschaft für Umweltrecht (GfU)* (2001) 213, 216; Winfried Haneklaus, 'Vorbemerkungen' in Werner Hoppe (ed) *Gesetz über die Umweltverträglichkeitsprüfung (UVPG), Kommentar* (2<sup>nd</sup> ed, 2002) 45 and Kloepfer, above n 56, 650.

<sup>109</sup> Franz-Josef Feldmann, 'Umweltverträglichkeitsprüfung: EG-Richtlinie und ihre Umsetzung in Deutschland' in Hans-Werner Rengeling (ed) *Handbuch zum europäischen und deutschen Umweltrecht, Eine systematische Darstellung des europäischen Umweltrechts mit seinen Auswirkungen auf das deutsche Recht und mit rechtspolitischen Perspektiven, Band I: Allgemeines Umweltrecht* (2<sup>nd</sup> ed, 2003) 1115, 1115-6 and Reiner Schmidt and Helmut Müller, *Einführung in das Umweltrecht* (6<sup>th</sup> ed, 2001) 15-6.

<sup>110</sup> Wasielewski, above n 108, 216-9 and Haneklaus, above n 108, 45.

<sup>111</sup> Haneklaus, above n 108, 51 and Engelhardt, above n 66, 185.

environmental media.<sup>112</sup> Not surprisingly, this medial approach of the ordinary statutes originates from the constitutional allocation of powers under the *Basic Law* (old), according to which the environmental competences were divided between the federal and the state level along the lines of environmental media without allocating an integral environmental competence to just one level.<sup>113</sup>

Therefore, neither the federal nor the state legislator had the necessary power to pursue an integral approach as required by the EC.

This problem was even aggravated as a result of the constitutional amendment in 1994. Prior to this reform of the constitutional system, the federal legislator was allowed and able to rely on a mix of different federal competences ('*Kompetenzmix*') for the implementation of European regulations with cross-sectional character ('*Querschnittscharakter*').<sup>114</sup> But in order to hand back legislative competences to the *Länder*, which had been the purpose of the constitutional reform in 1994, much stricter conditions for federal legislation were employed in Art. 75 III *Basic Law* (old) and in Art. 72 II *Basic Law* (old).<sup>115</sup> Accordingly, the Federal Constitutional Court started to interpret these conditions very narrowly, strengthening the rights of the *Länder* to the detriment of the federal legislator.<sup>116</sup>

In conclusion, even though it is still generally possible for the federal legislator to rely on a mix of competences,<sup>117</sup> this technique had become very fragile on grounds of the strong position the *Länder* had gained within the scope of the concurrent and the framework legislation due to the 1994 reform of Art. 72 II, 75 I, III *Basic Law* (old).<sup>118</sup>

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<sup>112</sup> Pehle, above n 5, 173; Eppler, above n 61, 203 and Haneklaus, above n 108, 51.

<sup>113</sup> Engelhardt, above n 66, 184-6 and Storm, above n 43, 58-9.

<sup>114</sup> Rehbinder and Wahl, above n 104, 21-2.

<sup>115</sup> Sparwasser, Engel and Voßkuhle, above n 18, 56-7.

<sup>116</sup> For details see Henneke, above n 96, 251-3.

<sup>117</sup> See especially Franz-Joseph Peine, 'Probleme der Umweltgesetzgebung im Bundesstaat' in Michael Kloepfer (ed) *Umweltföderalismus, Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz?* (2002) 109.

<sup>118</sup> Sachverständigenrat Umwelt, above n 54, 9.

It follows from these deliberations that all subject-matters that had been embraced and subsequently regulated in Brussels as a whole, had to be separated again on the German level along the lines of the constitutional allocation of competences before they could be implemented into national German law by the competent level.<sup>119</sup> This process of splitting the subject-matters into bits and pieces was time-consuming, costly and not always free from dispute between state and federal legislators about the scope of their respective competences and responsibilities.<sup>120</sup> In the end, all these problematic issues culminated in the fact that any German regulation enacted under this framework, was not able to implement a European integral approach appropriately, since no legislator had the power to regulate environmental issues as a whole.

In conclusion, the German institutional framework produced serious problems within the context of both procedural as well as substantive implementation of European directives in the field of environmental protection. The fact that Germany was convicted many times by the European Court of Justice within the scope of the legal proceedings concerning the failure to fulfil its obligations under the *EC Treaty* according to Art. 226 *EC Treaty* (so-called ‘infringement procedure’<sup>121</sup> or ‘*Vertragsverletzungsverfahren*’)<sup>122</sup> was just another sign indicating that the German regulatory process had proven incapable of appropriately enacting legislation originating from the European level in the field of environmental protection.<sup>123</sup>

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<sup>119</sup> Hendrichske, above n 55, 1090.

<sup>120</sup> Michael Kloepfer, ‘Föderalismusreform und Umweltrecht’ (2004) 26 *Natur und Recht* 759, 760.

<sup>121</sup> See Daniel Kelemen, ‘Environmental Federalism in the United States and the European Union’ in Norman Vig and Michael Faure (eds) *Green Giants? Environmental Policies of the United States and the European Union* (2004) 113, 122-4.

<sup>122</sup> Apart from this, the European Court of Justice acknowledged that directives that are not properly implemented by the Member States might nevertheless possess a direct effect. See Erbguth and Schlacke, above n 23, 114-5.

<sup>123</sup> Juliane Kokott and Bernhard Raberger, ‘Föderalismus im europäischen und ausländischen Recht aus Sicht der Wissenschaft’ in Michael Kloepfer (ed) *Umweltföderalismus, Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz?* (2002) 75, 102.

### e) Conclusion

Summing up, it can be deduced that the German division of both legislative and administrative powers between the state and the federal level within the context of environmental protection regulation resulted in a highly complicated regulatory system involving complex allocations of competences as well as time-consuming and inefficient decision-making processes. Furthermore, this system had proven incapable of appropriately implementing European regulation, which currently underlies 80 % of all national German environmental law.

It goes without saying that the German institutional system under the *Basic Law* was in desperate need for reform in order to remedy these grave and manifold problems.

## 3. The Constitutional Situation After the Reform of Federalism in 2006

### a) History of the Reform

In view of the above-mentioned problems, *Bundestag* and *Bundesrat* decided on 17 October 2003 to establish the Commission of *Bundestag* and *Bundesrat* for the Modernisation of the Federal Order (*Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*).<sup>124</sup>

Working under the chairmanship of Franz Müntefering and Edmund Stoiber, this Commission was supposed to draft proposals for a reform of the German federal system with a particular focus on the allocation of legislative competences.<sup>125</sup> Thus, the task was to re-allocate the competences in a clear-cut, consistent and appropriate way, thereby streamlining the decision-making processes and

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<sup>124</sup> Concerning preceding reform efforts see Hans-Günter Henneke, 'Föderalismusreform kommt in Fahrt' (2003) *Deutsches Verwaltungsblatt* 845.

<sup>125</sup> Udo Margedant, 'Ein bürgerfremdes Machtspiel ohne Gewinner' (2005) *Aus Politik und Zeitgeschichte* 20, 23-5.



rendering the institutional framework more efficient, transparent and compatible with Germany's obligations as a Member State of the European Union.<sup>126</sup>

But despite the considerable efforts made, in the end the Commission was unable to reach a consensus on the draft that had been formulated so far.<sup>127</sup> The reason for this was a significant disagreement between the state and the federal level concerning the allocation of competences in the area of educational policy.<sup>128</sup> As a consequence, the reform of federalism under the auspices of the Commission of *Bundestag* and *Bundesrat* ultimately failed on 17 December 2004.<sup>129</sup>

Notwithstanding that, the draft of the Commission of *Bundestag* and *Bundesrat* for the Modernisation of the Federal Order underlay the further reform efforts, which were resumed by the newly established Grand Coalition government shortly after the federal election in September 2005.<sup>130</sup>

Subsequent to several expert hearings, discussions and only minor changes to the original draft, the *Bundestag* passed the *Basic Law Amendment Act* ('*Gesetz zur Änderung des Grundgesetzes*') as well as the *Reform of Federalism Accompanying Act*

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<sup>126</sup> See Rudolf Hrbek, 'Auf dem Weg zur Föderalismus-Reform: die Kommission zur Modernisierung der bundesstaatlichen Ordnung' in *Jahrbuch des Föderalismus 2004, Band 5, Föderalismus, Subsidiarität und Regionen in Europa* (2004) 147, 147-62. For a detailed account of the general aims of the German reform of federalism see Hans-Wolfgang Arndt, Ernst Benda, Klaus von Dohnanyi, Hans-Peter Schneider, Rita Süßmuth and Werner Weidenfeld, 'Zehn Vorschläge zur Reform des deutschen Föderalismus' (2000) 33 *Zeitschrift für Rechtspolitik* 201, 202.

<sup>127</sup> For this draft see Kommission zur Modernisierung der bundesstaatlichen Ordnung, *Vorentwurf, Vorschlag der Vorsitzenden* (2004) <[http://bundesrat.de/cln\\_051/nn\\_8344/DE/foederalismus/kommission/unterlagen/AU-1](http://bundesrat.de/cln_051/nn_8344/DE/foederalismus/kommission/unterlagen/AU-1)> at 22 September 2006.

<sup>128</sup> René Grandjot, 'Die Auswirkungen der Rahmengesetzgebungskompetenz im Umweltrecht auf die Wirtschaft' (2005) 27 *Natur und Recht* 679, 679; Stefan Brink, 'Unreformierter Föderalismus' (2005) 38 *Zeitschrift für Rechtspolitik* 60, 61; Rainer-Olaf Schultze, 'Die Föderalismusreform zwischen Anspruch und Wirklichkeit' (2005) *Aus Politik und Zeitgeschichte* 13, 17-8 and Volker Kröning, 'Bundesstaatsreform: In einem Akt oder Schritt für Schritt?' (2005) 41 *Recht und Politik* 9, 9-11.

<sup>129</sup> For a detailed historical account see Rudolf Hrbek, 'Ein neuer Anlauf zur Föderalismus-Reform: Das Kompromisspaket der Großen Koalition' in *Jahrbuch des Föderalismus 2006, Band 7, Föderalismus, Subsidiarität und Regionen in Europa* (2006) 139, 139-57 and Roland Sturm and Petra Zimmermann-Steinhart, *Föderalismus, Eine Einführung* (2005) 138-49.

<sup>130</sup> Helge Wendenburg, 'Die Abfallwirtschaft in der Föderalismusreform' (2006) 17 *Zeitschrift für Umweltrecht* 351, 351.

(‘*Föderalismusreform-Begleitgesetz*’) on 30 June 2006 by a majority of 428 to 162 votes. The *Bundesrat* consented on 7 July 2006 by a majority of 62 of 69 votes.

On 5 September 2006, the Federal President (‘*Bundespräsident*’) certified both laws (‘*Ausfertigung*’), which were subsequently promulgated in the Federal Law Gazette (‘*Verkündung im Bundesgesetzblatt*’) on 31 August 2006 and 11 September 2006 so that they could enter into force on 1 September 2006 due to Art. 82 I, II *Basic Law* (old and new).<sup>131</sup>

## **b) The Allocation of Legislative Competences Concerning the Environment**

The most significant characteristic features of the new allocation of legislative competences under the amended *Basic Law* in the area of environmental protection are the abolition of the framework competence, the establishment of the rights of the *Länder* to deviate from federal legislation and the reduction in the scope of Art. 72 II *Basic Law* (new).

### **aa) The Abolition of the Framework Legislation**

As a remedy for the above-mentioned problems, the construction of the framework/skeleton legislation has been abolished. As a consequence, the environmental competences that had so far been allocated to the federal level under its ambit, have been transferred to the concurrent federal legislation.<sup>132</sup>

Thus, the subject-matters of hunting, nature conservation, and landscape management which had been part of the federal framework competence due to Art. 75 I 1 no. 3 *Basic Law* (old) have now been transferred to the concurrent federal competence under Art. 74 I no. 28, 29 *Basic Law* (new). The same is true for the issues of land distribution, regional planning, and the management of

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<sup>131</sup> See BGBl. I no. 41 (31 August 2006) 2034-8 and BGBl. I no. 42 (11 September 2006) 2098-2107.

<sup>132</sup> See BGBl. I no. 41 (31 August 2006) 2034, 2035.

water resources (Art. 75 I 1 no. 4 *Basic Law* (old)) that can now be found in Art. 74 I no. 30, 31, 32 *Basic Law* (new).

### **bb) Further Changes to the Competence Titles**

Apart from this mere transferral of the subject-matters from the framework to the concurrent federal competence, several other legislative powers have been re-divided and re-allocated between the state and the federal level.

Thus, the power over the production and utilization of nuclear energy has been transferred from the concurrent<sup>133</sup> to the exclusive federal competence under Art. 73 I no. 14 *Basic Law* (new).

In contrast to this, the general allocation of the concurrent federal power over waste disposal, air pollution control and noise abatement in Art. 74 I no. 24 *Basic Law* (old) remains unchanged, whilst its wording has been modified slightly. Thus, Art. 74 I no. 24 *Basic Law* (new) includes waste management as opposed to waste disposal; air pollution control and noise abatement with the latter being recently confined to noise that is not related to conduct (*‘verhaltensbezogener Lärm’*).

Explaining this in more detail, it can be stated that the change in the federal competence’s wording from waste disposal to waste management does not involve any modification of its scope. The reason for this is the jurisdiction of the Federal Constitutional Court,<sup>134</sup> according to which even the old version of ‘waste disposal’ in Art. 74 I no. 24 *Basic Law* (old) comprised not only all stages of waste disposal, but also all measures that have a connection with it such as waste collection, storage, transport and prevention.<sup>135</sup> Therefore, this already existing jurisdiction was merely captured in the new wording.<sup>136</sup>

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<sup>133</sup> See Art. 74 I no. 11a *Basic Law* (old).

<sup>134</sup> *BVerfGE* 98, 106, 120.

<sup>135</sup> Deutscher Bundestag, Drucksache 16/813, 13.

<sup>136</sup> Wendenburg, above n 130, 352.

With the competence over air pollution control remaining unchanged, the most significant change within the new competence allocation of Art. 74 I no. 24 *Basic Law* (new) occurred within the context of noise abatement. While the federal government possessed the overall concurrent power over noise abatement due to Art. 74 I no. 24 (old) *Basic Law*, this competence has now been confined to the abatement of noise that is not related to conduct.<sup>137</sup> Since the prevention of conduct-related noise is seen as a merely local problem, which for this reason can also be resolved on the local level, the respective legislative competence was transferred from the concurrent federal to the exclusive state power.<sup>138</sup>

### **cc) The Necessity for a Uniform Regulation Requirement**

As already mentioned above, the federal legislator was only allowed to utilize its power to regulate matters that fall within the ambit of the concurrent federal legislation if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity rendered federal regulation necessary in the national interest, Art. 72 II *Basic Law* (old).

Although its content as well as its basic requirements remain unchanged, the scope of this ‘necessity requirement’ (the so-called ‘*Erforderlichkeitsklausel*’) has been limited under the new Art. 72 II *Basic Law*. According to the constitutional amendment, this requirement is now only applicable to the cases that are explicitly enumerated in Art. 72 II *Basic Law* (new). Thus, all issues not mentioned in this provision, can be regulated by the federal level without any limitation. The rationale underlying this constitutional change is the agreement between state and federal level that the necessity for a uniform federal regulation can and must be assumed in the cases that are now excepted from its application.<sup>139</sup>

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<sup>137</sup> See Art. 74 I no. 24 *Basic Law* (new).

<sup>138</sup> Deutscher Bundestag, above n 135, 13.

<sup>139</sup> Ibid 11.

Considering the environmental competence titles, it becomes clear that all of them are now free from the condition under Art. 72 II *Basic Law* (new).

Thus, neither hunting, nor nature conservation or landscape management are subject to the necessity requirement.<sup>140</sup> The same is true for land distribution, regional planning and the management of water resources.<sup>141</sup>

Although, according to the legislative initiative, the necessity requirement was intended to apply at least partly to the subject-matters under Art. 74 I no. 24 *Basic Law* (new), namely to waste management,<sup>142</sup> this limitation was also abandoned within the scope of the legislative process.

In conclusion, the concurrent power of the federal legislator to enact environmental laws is not limited by the necessity requirement under Art. 72 II *Basic Law* (new) anymore.

#### **dd) The Right of the *Länder* to Deviate from Federal Law**

Having outlined this, it is unmistakable that the newly restricted scope of the necessity requirement in Art. 72 II *Basic Law* (new) has been balanced by the creation of a right of the *Länder* to deviate from federal laws.

Hence, according to Art. 72 III 1 *Basic Law* (new) the *Länder* are entitled to pass legislation that deviates from the federal legislation in the areas of hunting (except for the law concerning hunting licenses), nature conservation and landscape management (except for the general principles of nature conservation, the law concerning the protection of species or the sea nature conservation), land distribution, regional planning and the management of water resources (except for measures concerning the material or the facility part of water resource

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<sup>140</sup> See Art. 72 II, 74 I no. 28, 29 *Basic Law* (new).

<sup>141</sup> See Art. 72 II, 74 I no. 30, 31, 32 *Basic Law* (new).

<sup>142</sup> Deutscher Bundestag, above n 135, 2, 11.

management), if the federal legislator has utilized its concurrent competence in these spheres.<sup>143</sup>

This means that only the fields of hunting licensing, the general principles of nature conservation, the protection of species, the sea nature conservation and measures concerning the material or the facility part of water resource management cannot be regulated divergently by the *Länder* (so-called ‘*abweichungsfeste Kerne*’).<sup>144</sup>

In view of this significant right of the *Länder* to deviate from federal law within the ambit of the concurrent federal competence it becomes apparent that the entering into force of federal laws shortly followed by the entering into force of different, maybe even contradictory state laws will be confusing and unacceptable for the affected citizens. Therefore, Art. 72 III 2 *Basic Law* (new) puts a process in place according to which federal laws will enter into force only six months after they have been promulgated. This period is intended to provide the *Länder* with a sufficient time frame enabling them to decide whether they want to enact a divergent law as well as to adopt the respective law, if this question has been answered in the affirmative.<sup>145</sup> Notwithstanding this general principle, Art. 72 III 2 *Basic Law* (new) permits federal laws to enter into force earlier, if the *Bundesrat* consents.

Furthermore, Art. 72 III 3 *Basic Law* (new) lays down that the rule *lex posterior derogat legi priori* applies in cases in which federal and state law collide in the exercise of the constitutional legislative rights.

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<sup>143</sup> See Art. 72 III 1 no. 1, 2, 3, 4, 5 *Basic Law* (new).

<sup>144</sup> Deutscher Bundestag, above n 135, 11.

<sup>145</sup> *Ibid.*

### c) The Allocation of Administrative Competences Concerning the Environment & the Legislative Process

Concerning the allocation of administrative competences, it must be stated that now as before the *Länder* possess the right to execute federal legislation in their own right,<sup>146</sup> so that they are still responsible for the establishment of the authorities and their administrative procedure.<sup>147</sup>

But in contrast to the old provision, the federal legislator is now empowered to regulate the establishment of the authorities and their administrative procedure even without the consent of the *Bundesrat* according to Art. 84 I 2 *Basic Law* (new). The abolition of this consent requirement is meant to reduce the number of bills that trigger the necessity for approval by the *Bundesrat* by 20 to 25 %.<sup>148</sup>

In compensating the *Länder* for their de facto loss of the right to veto federal legislation in the *Bundesrat*, they have been granted the right to deviate from federal regulation concerning the establishment of authorities and their administrative procedure pursuant to Art. 84 I 2 *Basic Law* (new).

Whilst originally an analogous application of Art. 72 III 2, 3 *Basic Law* (new) had been envisaged,<sup>149</sup> so that the deviation right of the *Länder* in the administrative area would have resembled their respective right in the legislative sphere, the actual regulation in Art. 84 I 3 *Basic Law* (new) entails a different solution. Accordingly, any federal regulation concerning the establishment of authorities or administrative procedure that is already regulated divergently by a state law pursuant to Art. 84 I 2 *Basic Law* (new) will enter into force only six months after it has been promulgated. Furthermore, this period can only be shortened with approval of the *Bundesrat*.<sup>150</sup>

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<sup>146</sup> See Art. 83 *Basic Law* (old and new).

<sup>147</sup> See Art. 84 I 1 *Basic Law* (new).

<sup>148</sup> Deutscher Bundestag, above n 135, 14.

<sup>149</sup> See the proposed Art. 84 I 3 *Basic Law*, Deutscher Bundestag, above n 135, 3.

<sup>150</sup> See Art. 84 I 3 *Basic Law* (new).

Moreover, the rule *lex posterior derogat legi priori* regulates which law will prevail in cases of a collision between state and federal law.<sup>151</sup>

This right of the *Länder* to deviate from the federal regulation of the administrative procedure, which is very similar to the right of the *Länder* to deviate from federal legislation in the context of the concurrent competence, can only be excluded by the federal legislator in exceptional cases and on grounds of a specific necessity for a uniform, nation-wide regulation (*‘besonderes Bedürfnis nach bundeseinheitlicher Regelung’*).<sup>152</sup> Moreover, such an exclusion requires the consent of the *Bundesrat* according to Art. 84 I 6 *Basic Law* (new). Furthermore, it is striking that Art. 84 I 5 *Basic Law* (new) no longer grants the federal legislator the power to establish authorities without giving the *Länder* the right to do otherwise.

Apart from this area, the reform implemented another case in which the consent of the *Bundesrat* will be needed. Pursuant to Art. 104a IV *Basic Law* (new), the approval of the *Bundesrat* will be required if the *Länder* execute federal laws in their own right or on federal commission and if these laws oblige the *Länder* to supply a third party with cash benefits or with other services of a monetary value or any other character.

#### **d) Conclusion**

According to the new constitutional allocation of powers after the reform of the German federalism in 2006, there are four different kinds of environmental competences: First, the exclusive state competence over conduct-related noise abatement,<sup>153</sup> secondly the exclusive federal power over nuclear energy,<sup>154</sup> thirdly, the concurrent federal competence not bound by the necessity requirement and without the right of the *Länder* to enact divergent legislation over the law concerning hunting licenses,<sup>155</sup> the general principles of nature conservation, the

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<sup>151</sup> See Art. 84 I 4 in connection with Art. 72 III 3 *Basic Law* (new).

<sup>152</sup> See Art. 84 I 5 *Basic Law* (new).

<sup>153</sup> See Art. 74 I no. 24 *Basic Law* (new).

<sup>154</sup> See Art. 73 I no. 14 *Basic Law* (new).

<sup>155</sup> See Art. 72 III 1 no. 1 in connection with Art. 74 I no. 28 *Basic Law* (new).



law concerning the protection of species and the sea nature conservation,<sup>156</sup> and the regulations concerning the material and the facility part of water resource management.<sup>157</sup> The issues of waste management, air pollution control and noise abatement except for the abatement of conduct-related noise belong to this category as well.<sup>158</sup> Finally, there is the concurrent federal competence not limited by the necessity requirement, but granting the *Länder* a right to deviate concerning the issues of hunting, nature conservation, landscape management, land distribution, regional planning and water resource management, although it must be emphasized that the right to deviate does not extend to the matters enumerated in the third place.<sup>159</sup>

Apart from this right of the *Länder* to deviate from federal laws as such, they have also been granted extensive rights to deviate from any federal establishment of administrative agencies and their procedure.<sup>160</sup>

## II. The Constitutional Situation in the Commonwealth of Australia

### 1. The General Constitutional Background to Environmental Decision-Making in Australia

The Commonwealth of Australia is, like the Federal Republic of Germany, a federation in which the legislative competences are divided between the different layers of government.<sup>161</sup> As a consequence, public policy in the context of environmental protection is strongly influenced by the division and allocation of

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<sup>156</sup> See Art. 72 III 1 no. 2 in connection with Art. 74 I no. 29 *Basic Law* (new).

<sup>157</sup> See Art. 72 III 1 no. 5 in connection with Art. 74 I no. 32 *Basic Law* (new).

<sup>158</sup> See Art. 72 II, III in connection with Art. 74 I no. 24 *Basic Law* (new).

<sup>159</sup> See Art. 72 III 1 no. 1, 2, 3, 4, 5 in connection with Art. 74 I no. 28, 29, 30, 31, 32 *Basic Law* (new).

<sup>160</sup> See Art. 84 I 2, 4, 5 *Basic Law* (new).

<sup>161</sup> Louisa Mamouney, 'Should Local Government be Responsible for Biodiversity Management? A Critical Review of Local Government's Ability to Manage Biodiversity Loss in NSW through the Development Process' (2000) 17 *Environmental and Planning Law Journal* 138, 138. Concerning the general set-up of the Australian federation see Cheryl Saunders, 'Der australische Bundesstaat' in *Jahrbuch des Föderalismus 2002, Band 3, Föderalismus, Subsidiarität und Regionen in Europa* (2002) 439, 439-49 and Bradley Selway, 'The Federation – What Makes It Work and What Should We Be Thinking About for the Future' (2001) 60 *Australian Journal of Public Administration* 116, 116-22.

powers laid down in the *Commonwealth of Australia Constitution Act 1901* (Cth), the Australian Constitution.<sup>162</sup>

Generally speaking, pursuant to s 51 *Commonwealth of Australia Constitution Act 1901* (Cth), the Commonwealth possesses only the power to enact legislation concerning subject-matters that are expressly mentioned in this section as Commonwealth competences, whereas all residual powers are conferred to the states.<sup>163</sup> In scrutinising the Commonwealth competences under s 51 *Commonwealth of Australia Constitution Act 1901* (Cth), it becomes apparent that there is no reference to issues falling under the traditional ambit of environmental protection legislation, let alone to the term ‘environment’ as such.<sup>164</sup> The reason for this is that the Australian Constitution was drafted in the 1890s, when environmental degradation and protection were not considered everyday issues requiring a detailed allocation of legislative competences.<sup>165</sup> Rather, the emphasis lay on matters such as the promotion of industrial development and economic growth.

This resulting lack of clarity in the Australian Constitution concerning the allocation of competences over environmental issues led to the traditional view that the states and territories retain the main responsibility for environmental law-making,<sup>166</sup> since they possess the power over land, water and air management.<sup>167</sup>

Within this general framework, the emerging public awareness of and concern with environmental degradation in the 1970s challenged the long-established understanding that the states were solely responsible for environmental decision-

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<sup>162</sup> Mamouney, above n 161, 138.

<sup>163</sup> Brian Galligan, ‘Federalism and the Constitution’ in Ian McAllister, Steve Dowrick and Riaz Hassan (eds) *The Cambridge Handbook of Social Sciences in Australia* (2003) 234, 235.

<sup>164</sup> Davis, above n 2, 2.

<sup>165</sup> Longo, above n 44, 130; Donald Rothwell and Stuart Kaye, ‘A Legal Framework for Integrated Oceans and Coastal Management in Australia’ (2001) 18 *Environmental and Planning Law Journal* 278, 278 and Boer, above n 7, 330.

<sup>166</sup> Galligan and Fletcher, above n 4, 9 and Peel and Godden, above n 10, 670.

<sup>167</sup> Aynsley Kellow, ‘Thinking Globally and Acting Federally: Intergovernmental Relations and Environmental Protection in Australia’ in Kenneth Holland, F. L. Morton and Brian Galligan (eds) *Federalism and the Environment, Environmental Policymaking in Australia, Canada, and the United States* (1996) 135, 142.

making.<sup>168</sup> Fuelled by a growing recognition that all ecosystems are inherently interconnected, thereby, calling for a national or even international approach,<sup>169</sup> tensions between the state and the federal level with respect to the scope of their legislative competences over resource allocation and environmental protection measures arose, worsened steadily and culminated ultimately in the World Heritage Disputes of the 1980s.<sup>170</sup>

## 2. The World Heritage Disputes

### a) The Lake Pedder Dispute

Although not considered one of the traditional World Heritage Disputes,<sup>171</sup> the increasing Commonwealth interference with state politics in the context of the environment started with the argument over the anticipated flooding of Lake Pedder in Tasmania under the Middle Gordon Hydro-Electric Scheme, which ultimately triggered the emergence of serious federal-state-tensions as well as the expectation of greater Commonwealth involvement in environmental decision-making.<sup>172</sup>

Since the Prime Minister at that time, Gough Whitlam, pursued a policy of extending the Commonwealth's power to the detriment of the states in many directions, he supported the opponents of the Lake Pedder scheme that had called on the federal government for help after having lost on the state level.<sup>173</sup> And even though the Whitlam government relied on financial inducements to preserve Lake Pedder from being flooded instead of using direct coercion against the state of Tasmania, it adopted a number of complementary statutes such as the *Environment Protection (Impact of Proposals) Act 1974*, the *Australian National Parks and*

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<sup>168</sup> Ibid 135.

<sup>169</sup> Peel and Godden, above n 10, 670-1.

<sup>170</sup> Brian Galligan and Georgina Lynch, *Federalism Research Centre, Discussion Paper No. 14, Integrating Conservation and Development, Australia's Resource Assessment Commission and the Testing Case of Coronation Hill* (1992) 10-1 and Boer, above n 7, 331.

<sup>171</sup> See generally Ben Boer, 'World Heritage Disputes in Australia' (1992) 7 *Environmental Law and Litigation* 247, 247- 79 and Davis, above n 4, 66-78. For a brief overview of the disputes see John Summers, 'Federalism and Commonwealth-State Relations' in John Summers, Dennis Woodward and Andrew Parkin (eds) *Government, Politics, Power and Policy in Australia* (7<sup>th</sup> ed, 2002) 89, 107.

<sup>172</sup> O'Neill, above n 81, 162 and Kellow, above n 167, 143.

<sup>173</sup> Kellow, above n 167, 143.

*Wildlife Conservation Act 1975*, the *Great Barrier Reef Marine Park Act 1975*, and the *Australian Heritage Commission Act 1975* that are still underlying Commonwealth environmental policy.<sup>174</sup>

## **b) The Fraser Island Dispute**

In contrast to this rather small-scale dispute, that did not involve direct federal coercion against a state for the sake of environmental protection, state-federal-tensions heightened significantly during the Fraser Island Dispute.

In 1971, the Queensland government supported the plan of an American and an Australian company to undertake quartz sand mining on Fraser Island by granting mining leases over 12 000 hectares. Subsequently, these companies started exploiting the natural resources on Fraser Island. But since this Island exhibits the greatest number of distinct dune systems in the world, apart from being the home of 700 species of flowering plants and ferns as well as of a rich array of mammals and insects, the resistance against these mining proposals was fierce. As a consequence of the demonstrated support on the side of the Queensland state government for mining activities, the conservationists opposing the proposal asked the federal government to intervene in Queensland in order to protect the unique environment of Fraser Island in the national interest.<sup>175</sup>

Relying on the *Environment Protection (Impact of Proposals) Act 1974* that had been enacted under the Whitlam government as an attempt to expand the Commonwealth's powers, the competent federal minister initiated an inquiry into the environmental impacts of the sandmining proposal. This inquiry concluded that Fraser Island was of national and international significance, while the proposed mining would encompass major irreversible environmental harm to its landscape and vegetation. As a consequence of this report, the Commonwealth minister denied to grant an export license to the companies for the mineral sand

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<sup>174</sup> Ibid 144. See also Davis, above n 2, 2.

<sup>175</sup> For a detailed description of this dispute see Phillip Toyne, *The Reluctant Nation, Environment, Law and Politics in Australia* (1994) 16-31.

pursuant to the *Customs Act 1901*.<sup>176</sup> And since the economic viability of the project depended on exporting the mineral sand,<sup>177</sup> *Murphyores*, the Australian company engaged in the mining activity, challenged the validity of the regulation enabling the federal minister to deny the license before the High Court of Australia.

*Murphyores* argued that the refusal to grant the export license had been solely based upon the potentially adverse effects of sand mining on Fraser Island's environment without making any reference to trading policy. But because only considerations of trading policy empowered the minister to refuse export approvals, the refusal made on environmental reasons was invalid and the Commonwealth had acted *ultra vires*.<sup>178</sup>

Responding to this argumentation, the High Court rejected it unanimously emphasizing that a law that is directed at exports is also a law 'with respect to exports' irrespective of the aim it pursues. This meant that the only question to be asked was whether the law lay within the scope of the Commonwealth's constitutional powers, whereas any other objective of the law was completely irrelevant for its constitutional validity. And since the *Customs Act 1901* did not exceed the Commonwealth's legislative powers, but was based upon the trade and commerce power under s 51 (i) *Commonwealth of Australia Constitution Act*, the denial of the export license could not be struck down, even if it had been motivated solely by the result of environmental impact assessment.<sup>179</sup>

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<sup>176</sup> Ibid 22-4.

<sup>177</sup> Leslie Zines, 'The Environment and the Constitution' in Mathews, R. L. (ed) *Federalism and the Environment* (1985) 13, 14.

<sup>178</sup> High Court of Australia, *Murphyores Inc Pty Ltd v Commonwealth of Australia* (1976) HCA 20; 136 CLR 1 (14 April 1976) Austlii <<http://www.austlii.edu.au/au/cases/cth/HCA/1976/20.html>> at 20 September 2006, paragraph 1 per Gibbs J.

<sup>179</sup> High Court of Australia, *Murphyores Inc Pty Ltd v Commonwealth of Australia* (1976) HCA 20; 136 CLR 1 (14 April 1976) Austlii <<http://www.austlii.edu.au/au/cases/cth/HCA/1976/20.html>> at 20 September 2006, paragraph 8-9 per McTiernan J.

Accordingly, in *Murphyores*<sup>180</sup> the High Court granted the Commonwealth the ability to rely upon non-purposive constitutional powers such as the trade and commerce power to regulate activities in order to protect and conserve the environment, even though the law in question ‘touches or affects a topic on which the Commonwealth has no power to legislate.’<sup>181</sup>

Thus in this case, a Commonwealth government for the first time used direct coercion in order to prevent a state government from promoting environmental degradation in favour of development proposals. Many Australian environmental groups interpreted this direct federal interference with state development policies as a sign that they could now rely on the Commonwealth’s support in promoting environmental protection against the states and territories.<sup>182</sup>

### c) The Franklin Dam Dispute

Not surprisingly, this general trend of an increased Commonwealth involvement in environmental protection policy triggered a clash between the federal government and its state and territory counterparts with their traditional focus on development and economic growth. Although the respective tensions had been growing steadily, ultimately they culminated in the highly publicised *Franklin Dam Case*.<sup>183</sup>

Following the already unpopular flooding of Lake Pedder under the Middle Gordon Hydro-Electric Scheme in 1972, the 1979 proposal to dam the Gordon River below the Franklin River in Tasmania caused a public outcry. The reason for this was that the dam would have resulted in a flooding of both rivers situated in the Western Wilderness of South West Tasmania being home not only to a unique wilderness with a huge variety of natural features such as a wild and rocky

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<sup>180</sup> See High Court of Australia, *Murphyores Inc Pty Ltd v Commonwealth of Australia* (1976) HCA 20; 136 CLR 1 (14 April 1976) Austlii <<http://www.austlii.edu.au/au/cases/cth/HCA/1976/20.html>> at 20 September 2006.

<sup>181</sup> High Court of Australia, *Murphyores Inc Pty Ltd v Commonwealth of Australia* (1976) HCA 20; 136 CLR 1 (14 April 1976) Austlii <<http://www.austlii.edu.au/au/cases/cth/HCA/1976/20.html>> at 20 September 2006, paragraph 21 per Mason J.

<sup>182</sup> Kellow, above n 167, 144.

<sup>183</sup> See *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1.

coastline, but also to a valuable cultural area embracing several Aboriginal shelters dating back 30 000 years.<sup>184</sup>

In this situation, Bob Hawke realised the great potential of the ‘green vote’ in the upcoming federal election and pledged to stop the damming of the Franklin River. He was elected Prime Minister on 5 March 1983.<sup>185</sup>

Relying on a combination of various non-purposive Commonwealth competences, the Hawke government adopted a much more activist approach to environmental decision-making and to intervening in state development policies. Since the Commonwealth was responsible for the implementation of the *World Heritage Convention* to which Australia had become a party in 1974,<sup>186</sup> the federal government initiated the enactment of the *World Heritage Properties Conservation Act 1983*. Being primarily based upon the external affairs<sup>187</sup> and the corporations power,<sup>188</sup> this Act prohibited foreign corporations and trading corporations to carry out specified works such as excavations, exploratory drillings, the erection of a building or the damaging of any tree on identified property with the latter being defined as property forming part of Australia’s natural and cultural heritage which had been submitted for inclusion on the World Heritage List.<sup>189</sup>

Since the Western Wilderness of Tasmania including the relevant area around the Franklin River had been nominated for inclusion on the World Heritage List, it was not possible anymore to engage in building a dam, since the necessary work such as drilling was forbidden under *World Heritage Properties Conservation Act 1983*.<sup>190</sup>

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<sup>184</sup> For a detailed description of this dispute see Toyne, above n 175, 32-47.

<sup>185</sup> Hutton and Connors, above n 4, 165 and Davis, above n 4, 69-70.

<sup>186</sup> Aliza Taubman, ‘Protecting Aboriginal Sacred Sites: the Aftermath of the Hindmarsh Island Dispute’ (2002) 19 *Environmental and Planning Law Journal* 140, 143 and Boer, above n 171, 255.

<sup>187</sup> See s 51 (xxix) *Commonwealth of Australia Constitution Act*.

<sup>188</sup> See s 51 (xx) *Commonwealth of Australia Constitution Act*.

<sup>189</sup> Zines, above n 177, 17-8.

<sup>190</sup> Peel and Godden, above n 10, 672.

The Tasmanian government challenged this regulation before the High Court on several grounds, the most convincing of which was that the Commonwealth could not rely on its corporations power to legislate the issue in question, since its use must be linked to trading activities of some kind. The prohibition of drilling or excavation works on the contrary, did not itself constitute an act of trading, but was a merely preparatory work for erecting a facility that could be used to produce electricity, which then could be sold as an act of trading.<sup>191</sup>

Rejecting this argumentation, the High Court held that the Commonwealth's corporations power covers the whole field of regulating and controlling all acts of trading and financial corporations that are conducted for the purpose of their trade including practically all manufacture, mining or agriculture.<sup>192</sup> As a result of this, even the building of the dam was covered, since it was a necessary precondition for the sale of electricity with the latter being the main trading activity of the corporation in question.

This extraordinarily broad interpretation of the Commonwealth's corporations power is mirrored by the respective High Court interpretation of the external affairs power.

Whilst the Commonwealth had argued it could enact any piece of legislation necessary to implement an international treaty in order to discharge Australia's obligations as a member of the international community, the Tasmanian government disapproved of this reasoning on the grounds that this would lead to a significant erosion of state rights. Further elaborating on this, it was stated that because most environmental problems cross state boundaries demanding international solutions, it was highly probable that the number of international agreements on the environment would increase significantly.<sup>193</sup> To allocate the competence over the implementation of all these treaties to the federal level

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<sup>191</sup> Zines, above n 177, 18.

<sup>192</sup> Ibid.

<sup>193</sup> See especially Rob Fowler, 'Global Change, The Present Regime' in Sandford Clark, Michael Crommelin and Cheryl Saunders (eds) *The Constitution and the Environment* (1991) 155, 155.



irrespective of the areas they touch on, would inevitably lead to an imbalance of power between the state and the federal level, thereby adversely affecting the fragile system of vertical separation of powers under the Australian Constitution.<sup>194</sup>

Again contradicting Tasmania's argumentation, the High Court ruled that any treaty empowered the Commonwealth to enact implementing legislation, as long as the treaty had been entered into *bona fide* and without any intention to deprive the states of their rights. Furthermore, the implementing act must faithfully pursue the provisions of the international agreement.<sup>195</sup>

Apart from the corporations and the external affairs power, the High Court allowed the Commonwealth to rely also on two other non-purposive powers to regulate environmental matters simultaneously interfering with state policies, namely on the people of any race power<sup>196</sup> and the financial power.<sup>197</sup>

Concerning the former, the High Court stated that the enactment of legislation pursuing the aim of conserving and protecting a site, the conservation or protection of which is by reason or presence of artefacts or relics or otherwise of particular significance to the people of the Aboriginal race, is subject to the Commonwealth's power.<sup>198</sup> Furthermore, the High Court made it clear that there are virtually no legal limits that would restrain the Commonwealth from making the granting of financial assistance under s 96 *Commonwealth of Australia Constitution Act* subject to environmental conditions.<sup>199</sup>

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<sup>194</sup> Peel and Godden, above n 10, 672-3.

<sup>195</sup> Cheryl Saunders, 'The Constitutional Division of Powers with Respect to the Environment in Australia' in Kenneth Holland, F. L. Morton and Brian Galligan (eds) *Federalism and the Environment, Environmental Policymaking in Australia, Canada, and the United States* (1996) 55, 62; Zines, above n 177, 21 and Gerry Bates, *Environmental Law in Australia* (5<sup>th</sup> ed, 2002) 61.

<sup>196</sup> See s 51 (xxvi) *Commonwealth of Australia Constitution Act*.

<sup>197</sup> See s 96 *Commonwealth of Australia Constitution Act*.

<sup>198</sup> Zines, above n 177, 23.

<sup>199</sup> Anthony Moeller and Jennifer McKay, 'Is there Power in the Australian Constitution to Make Federal Laws for Water Quality?' (2000) 17 *Environmental and Planning Law Journal* 294, 305-6 and Cheryl Saunders, 'Political and Constitutional Aspects: Commentary' in R. L. Mathews (ed) *Federalism and the Environment* (1985) 30, 32.

As a consequence of the High Court's expansive interpretation of the corporations and the external affairs power, coupled with the acknowledged ability of the Commonwealth to rely on other non-purposive powers such as the trade and commerce, the people of any race and the financial power, it became clear that the federal government had the ability to restrict state activities within or in relation to World Heritage Areas that formally underlay the jurisdiction of the states and territories.<sup>200</sup>

Subsequent to this particularly prominent World Heritage Dispute, the High Court's expansive interpretation of the Commonwealth's powers under the Constitution was confirmed in a number of environmental decisions such as the *Richardson Forestry Case*<sup>201</sup> and the *Daintree Rainforest Case*.<sup>202</sup>

#### **d) Conclusion**

Accordingly, by the end of the 1980s the High Court had succeeded in establishing a broad Commonwealth competence to regulate environmental matters, enabling the federal level to undertake extensive environmental management initiatives without involving or even acting against the will of the states and territories.<sup>203</sup>

### **3. The New Era of Cooperative Federalism**

But despite the expansive ambit of its power and the highflying expectations of the environmental movement of a greater role for the Commonwealth in preventing environmental degradation and implementing strong national

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<sup>200</sup> Lara Horstead, 'Redefining Political Responsibility for Environmental Laws: The Proposed New Federalism/State Co-operative Agreements' (1999) *Australian Environmental Law News* 50, 52 and Boer, above n 7, 332.

<sup>201</sup> *Richardson v Forestry Commission* (1988) 164 CLR 261 in which the High Court held that the external affairs power supports a law aiming at the discharge of not only Australia's known obligations, but also its reasonably apprehended obligations.

<sup>202</sup> *Queensland v Commonwealth of Australia* (1989) 167 CLR 232 in which the High Court held that the inclusion of a property on the World Heritage List is sufficient to define its status, giving rise to Australia's international obligation to protect and to preserve it. This obligation can then be discharged by the Commonwealth.

<sup>203</sup> For a comprehensive overview of the Commonwealth's environmental powers see Bates, above n 195, 55-73 and Lindell, above n 1, 109-33.

protective measures, the actual environmental regulation put in place by the Commonwealth fell short of the theoretical scope of its constitutional powers and was not characterised by increased centralist tendencies.<sup>204</sup>

Quite to the contrary, the expansion of the federal power resulting from the adjudication in the World Heritage Disputes triggered a basic rethinking of the federal-state-relationship within the context of environmental resource management in the Australian federation.<sup>205</sup>

This subsequent process of moving from a competitive towards a cooperative approach was catalysed by a variety of factors.

First and foremost, the growing recognition that Australia was confronted with pressing environmental problems most of which affected more than one state or territory made a national or cooperative approach appear much more effective and attractive.<sup>206</sup>

Secondly, the states and territories tried to avoid an openly confrontational approach vis-à-vis the Commonwealth, since this would have involved the risk of being overridden by the Commonwealth, thereby completely losing the traditional power over land use and environmental management.<sup>207</sup>

Thirdly, despite the extensive ambit of the Commonwealth's powers over the environment as interpreted by the High Court, their practical use could only be ad hoc and patchy. The reason for this is the distinct scope of the non-purposive powers on which the Commonwealth has to rely within the context of environmental protection. Whilst the corporations power applies only to foreign corporations, and trading or financial corporations formed within the limits of the

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<sup>204</sup> 'The 1986 Annual Conference at Canberra of the National Environmental Law Association' (1986) 60 *The Australian Law Journal* 595, 595 and Peel and Godden, above n 10, 675.

<sup>205</sup> Boer, above n 7, 333. Concerning the current operation of the *World Heritage Convention* in Australia see David Haigh, 'Australian World Heritage, the Constitution and International Law' (2005) 22 *Environmental and Planning Law Journal* 385.

<sup>206</sup> Boer, above n 7, 333.

<sup>207</sup> Bates, above n 195, 73 and Peel and Godden, above n 10, 675-6.

Commonwealth,<sup>208</sup> the use of the external affairs power requires an international treaty to which Australia is a party. The same is true for the overseas trade and commerce power allowing Commonwealth intervention only if the products are made for export.<sup>209</sup>

And finally, the Commonwealth itself became aware of both its substantial lack of information about a number of relevant factors for successful environmental protection and potential implementation deficits, that were likely to occur through Commonwealth law-making without involving states and territories thereby thwarting sound environmental protection.<sup>210</sup>

#### **a) Prime Minister Hawke's New Federalism Initiative**

Since ultimately the experiences of the hostile 1980s had demonstrated that intergovernmental conflict was counterproductive for efficient and successful environmental decision-making, the conviction won recognition that no level of government could address these issues on its own and that a new, more enduring institutional approach was crucial for a successful environmental protection policy.<sup>211</sup>

This suggests that a constitutional amendment was necessary, allocating the power to regulate environmental issues to the level of government best suited for this task, thereby clarifying and defining the respective competences and responsibilities of the Commonwealth and the states.<sup>212</sup> However, the difficulty with constitutional amendments in Australia is that the Australian Constitution is entrenched and it can only be changed by referendum.<sup>213</sup> And since the Australian citizens have proved to be reluctant to accept constitutional amendments, there

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<sup>208</sup> See s 51 (xx) *Commonwealth of Australia Constitution Act*.

<sup>209</sup> Saunders, above n 195, 64, 73.

<sup>210</sup> Bates, above n 195, 73-4 and Kellow, above n 167, 148-9.

<sup>211</sup> Kellow, above n 167, 146, 149.

<sup>212</sup> See French, above n 11, 11.

<sup>213</sup> See s 128 *Commonwealth of Australia Constitution Act*. See also Galligan, above n 163, 236.

has been very little textual change to the Australian Constitution over the past 100 years of federation.<sup>214</sup>

Because of the improbability of achieving a new constitutional allocation of powers with regard to the environment, Prime Minister Bob Hawke started his so-called 'new federalism' initiative in July 1990,<sup>215</sup> demanding that 'the environment must increasingly become an area in which common ground and common purpose come to replace controversy and confrontation'.<sup>216</sup> This envisaged new era of cooperation was meant to include the development of national standards for water and air quality, a landcare program dealing with soil degradation, and the management of areas that were subject to the jurisdiction of both the Commonwealth and a state government such as the Great Barrier Reef Marine Park or the Tasmanian World Heritage Area.<sup>217</sup>

As a consequence of Bob Hawke's proposal, the states, the territories and the Commonwealth intended to work towards the same end rather than to continue on the extremely time-consuming and resource-intensive path of confrontation and litigation.<sup>218</sup> Apart from this new spirit of cooperation,<sup>219</sup> other objectives such as the avoidance of institutional duplication and overlap in the field of environmental protection by clarifying mutual competences and responsibilities or the improvement of substantive environmental decision-making were also pursued.<sup>220</sup>

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<sup>214</sup> Saunders, above n 195, 56 and Michael Kloepfer and Ekkehard Mast, *Das Umweltrecht des Auslandes* (1995) 290.

<sup>215</sup> See generally Christine Fletcher and Cliff Walsh, *Federalism Research Centre, Discussion Paper No. 4, Intergovernmental Relations in Australia, Managerialist Reform and the Power of Federalism* (1991) 1-48.

<sup>216</sup> Bob Hawke as cited in Galligan and Fletcher, above n 4, 14.

<sup>217</sup> Kellow, above n 167, 149.

<sup>218</sup> Bates, above n 195, 73.

<sup>219</sup> Galligan and Fletcher, above n 4, 21.

<sup>220</sup> Concerning the general problem of duplication and overlap in Australia see Kenneth Wiltshire, 'Barriers to Rationalising Commonwealth/State Overlap' in *Towards a More Cooperative Federalism? Two Papers Prepared for the Economic Planning Advisory Council* (1990) 1-18.

## b) The Intergovernmental Agreement on the Environment (IGAE)

Opting for this cooperative approach, the Heads of Government<sup>221</sup> of the Commonwealth, States and Territories, and representatives of the Local Governments concluded the Intergovernmental Agreement on the Environment (IGAE) on 1 May 1992.<sup>222</sup>

Aiming at clarifying and defining the responsibilities of the different levels of government, eliminating duplication, establishing effective mechanisms for cooperation and developing strategies for managing particular areas of environmental degradation as well as enhancing transparency,<sup>223</sup> the IGAE is still regarded as the primary policy document adopting the new cooperative approach.<sup>224</sup>

Pursuant to its Preamble, the IGAE is supposed to provide a mechanism by which to facilitate a cooperative national approach to the environment, a better definition of the roles of the respective governments, a reduction in the number of disputes between the Commonwealth and the states and territories on environmental issues, greater certainty in government and business decision-making, and better environmental protection.<sup>225</sup> These concepts have been confirmed by subsequent policy agreements such as the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment in 1997.<sup>226</sup>

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<sup>221</sup> For details of this institution see Martin Painter, *Federalism Research Centre, Discussion Paper No. 28, The Council of Australian Governments and Intergovernmental Cooperation – Competitive or Collaborative Federalism?* (1995).

<sup>222</sup> See the Preamble of the IGAE.

<sup>223</sup> Horstead, above n 200, 53; Longo, above n 44, 156; Parliament of Victoria Environment and Natural Resources Committee, *Report on the Environmental Impact of Commonwealth Activities and Places in Victoria* (1994) 163 and Boer, above n 7, 339.

<sup>224</sup> Georgina Lynch and Brian Galligan, 'Environmental Policymaking in Australia: The Role of the Courts' in Kenneth Holland, F. L. Morton and Brian Galligan (eds) *Federalism and the Environment, Environmental Policymaking in Australia, Canada, and the United States* (1996) 205, 209 and Peel and Godden, above n 10, 676.

<sup>225</sup> See the Preamble of the IGAE.

<sup>226</sup> Peel and Godden, above n 10, 677-8 and Horstead, above n 200, 53.

In an effort to clarify roles and competences within the federation and to avoid duplication, the IGAE defines the responsibilities and interests of the states and territories on the one hand and those of the Commonwealth on the other.<sup>227</sup>

Within this context, the Commonwealth agreed to confine its involvement, despite its theoretical capacity to control a large range of environmental issues, to four main areas: foreign policy and international agreements relating to the environment;<sup>228</sup> to ensuring that the practices and policies of one state do not have significant inter-jurisdictional environmental effects;<sup>229</sup> to facilitating cooperative developments of national environmental standards and guidelines;<sup>230</sup> as well as to managing living and non-living resources on Commonwealth land.<sup>231</sup> Consequently, the Commonwealth's role under the IGAE is confined to the safeguarding and accommodating national environmental matters.<sup>232</sup>

In contrast to this limited scope of the Commonwealth's competences, it was acknowledged that the states and territories have a continuing responsibility for the environment in relation to environmental matters which have no significant effects on matters which are the responsibility of the Commonwealth or any other state<sup>233</sup> and for the policy, legislative and administrative framework within which the living and non-living resources are managed in the state.<sup>234</sup> Furthermore, it was laid down that the states have an interest in the development of Australia's position in relation to a proposed international treaty of environmental significance that may impact on the discharge of their responsibilities<sup>235</sup> as well as in participating in the development of national environmental policies and standards.<sup>236</sup>

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<sup>227</sup> See the Preamble and s 2 of the IGAE.

<sup>228</sup> See s 2.2.1 (i) of the IGAE.

<sup>229</sup> See s 2.2.1 (ii) of the IGAE.

<sup>230</sup> See s 2.2.1 (iii) of the IGAE.

<sup>231</sup> See s 2.2.3 of the IGAE.

<sup>232</sup> See s 2.2.1 of the IGAE.

<sup>233</sup> See s 2.3.1 of the IGAE.

<sup>234</sup> See s 2.3.2 of the IGAE.

<sup>235</sup> See s 2.3.3 of the IGAE.

<sup>236</sup> See s 2.3.4 of the IGAE.

In the nine schedules listed below the agreement, all issues are specified that are subject to the principles and cooperative mechanisms established above.<sup>237</sup> Moreover, the schedules include detailed agreements on the issues of data collection and handling, resource assessment, land use decisions and approval processes, environmental impact assessment, national environment protection measures, climate change strategies, biological diversity, national and world heritage as well as nature conservation.<sup>238</sup>

Most importantly within this context, the National Environmental Protection Agency (NEPA) was established. Being an independent body made up of representatives from Commonwealth, state and territory governments, the NEPA is responsible for the establishment of national environmental protection guidelines, goals and associated protocols with the object of ensuring that people enjoy the benefit of equivalent protection from air, water, soil pollution and from noise, wherever they live. Apart from this, NEPA had the task to ensure that decisions by businesses are not distorted and that markets are not fragmented by variations between jurisdictions in relation to the adoption or implementation of major environment protection measures.<sup>239</sup> Accordingly, NEPA is supposed to have responsibility for developing a national environmental approach through collaboration with the states and territories.<sup>240</sup>

Having described the major schemes adopted in the IGAE, it must also be emphasized that in the case of a Commonwealth involvement in state issues or vice versa, the IGAE provides for a mechanism demanding that the parties concerned should agree upon cooperative procedures, ideally by means of a collaborative development of environmental measures or by the accreditation of existing state environmental practices by the Commonwealth or vice versa.<sup>241</sup>

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<sup>237</sup> Boer, above n 7, 340 and Kellow, above n 167, 150.

<sup>238</sup> See Schedules 1 to 9 of the IGAE.

<sup>239</sup> See Schedule 4, s 1 of the IGAE.

<sup>240</sup> Boer, above n 7, 340.

<sup>241</sup> Ibid 339-40.



Within this context, it could be regarded as problematic that the IGAE does not implement a procedure for the resolution of potentially emerging disputes between the different levels of government. Rather, s 2.5.1.1 (iii) of the IGAE states that the Commonwealth and the states will endeavour to agree to a modification of those practices, procedures and processes to meet the needs of both the Commonwealth and the states concerned. Thus, the resolution of arising disputes or tensions and with it the quality of environmental decision-making depends upon the willingness of the governments involved to find and to agree on an environmentally sound compromise. This result is even underscored by the merely political status of the IGAE, rendering it a non-enforceable policy document.<sup>242</sup>

In conclusion, in the IGAE both federal and state/territory governments acknowledged that environmental protection was a responsibility that needed to be taken over by both levels.<sup>243</sup> Accordingly, the IGAE allocated the essential responsibility for environmental concerns that are confined to state or territory boundaries to the respective state or territory government, whilst assigning issues in which the Commonwealth has a demonstrated interest to the federal level.<sup>244</sup>

### **c) The Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment (HoA)**

Pursuing the aim of further developing this cooperative approach to environmental decision-making, the newly elected Howard government prompted a review of the environmental regulation in place. Resulting in the Council of Australian Governments' intention to conclude a Heads of Agreement (HoA)

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<sup>242</sup> Ross Cranston, 'From Co-Operative to Coercive Federalism and Back?' (1979) 10 *Federal Law Review* 121, 125; Ian Tunstall, 'Can Cross-Vesting Be Restored?' (1999) *Law Society Journal* 63, 64; Robert Wilcher, 'Water Resource Management in New South Wales and the Murray-Darling: Integrating Law and Policy' (1995) 12 *Environmental and Planning Law Journal* 200, 201 and Chris McGrath, 'Bilateral Agreements – Are They Enforceable?' (2000) 17 *Environmental and Planning Law Journal* 485, 485-6.

<sup>243</sup> Boer, above n 7, 340.

<sup>244</sup> Bernard Walrut, 'The Legislative Powers of the Commonwealth and the States Affecting Aquaculture' (2002) 19 *Environmental and Planning Law Journal* 415, 428; Simon Marsden, Kathy Gibson and Carl Hollingsworth, 'Tasmania's Environmental Improvement Programs and the "Brown Issues" – Environmental Accountability or Regulatory Capture?' (2000) 17 *Environmental and Planning Law Journal* 24, 27 and Boer, above n 7, 339.

that would fundamentally reform the Commonwealth-state roles and responsibilities for the environment, the ultimate aim of this process was the development of more effective measures promoting environmental protection while simultaneously avoiding duplication.<sup>245</sup>

On 7 November 1997, the Council of Australian Governments (CoAG) approved the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment (HoA).

Reinforcing the cooperative approach that already underlay the IGAE, the CoAG emphasized that the HoA provided for the benefits of focusing the Commonwealth's responsibilities and interests on matters of genuine national environmental significance; of significant streamlining, greater transparency and certainty in relation to environmental assessment and approval processes; of rationalisation of existing Commonwealth-state arrangements for the protection of places of heritage significance through the development of a cooperative national heritage place strategy; of improved compliance by the Commonwealth and the states with state environment and planning legislation; and of the establishment of more effective and efficient delivery mechanisms and accountability regimes for national environmental programs of shared interest.<sup>246</sup>

Hence, the pivotal point of this agreement was that the Commonwealth approved of restraining the scope of its environmental commitment to matters of genuine national environmental significance, thereby withdrawing from the area of protecting matters of mere local or state environmental significance.<sup>247</sup>

And exactly this outcome of the CoAG process attracted significant critique not only from environmental activist groups, but also from environmental lawyers. Thus, although the HoA could be welcomed as an instrument in which the states

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<sup>245</sup> Michael Longo, 'Subsidiarity and Local Environmental Governance: A Comparative and Reform Perspective' (1999) 18 *University of Tasmania Law Review* 225, 239 and Peel and Godden, above n 10, 677-8.

<sup>246</sup> Peel and Godden, above n 10, 678 and Longo, above n 245, 239.

<sup>247</sup> Longo, above n 245, 239.

formally acknowledged that the Commonwealth has a role to play in environmental decision-making,<sup>248</sup> a more careful scrutiny reveals, rather, that the Commonwealth abdicated its responsibility for the environment by obscuring its constitutional ability to take a strong, centralist lead.<sup>249</sup> As Horstead puts it ‘In emphasising the significance of a specific role for the Commonwealth, the Government is using federalism to hide the reduction of the Commonwealth’s part which the COAG definition actually accomplishes.’<sup>250</sup>

And it was exactly this diminished role of the Commonwealth in environmental protection, which the Howard government pursued subsequent to the adoption of the HoA.<sup>251</sup>

#### **d) The *Environment Protection and Biodiversity Conservation Act 1999* (Cth)**

Still acting in this spirit, the federal legislator enacted the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

This act replaced the *Environment Protection (Impact of Proposals) Act 1974*<sup>252</sup> that had been used by the Commonwealth government under Malcolm Fraser to prevent sand mining on Fraser Island, thereby initiating the period of grave federal-state tensions within the context of environmental decision-making.<sup>253</sup> In order to definitely overcome these detrimental struggles over competences, the EPBC Act emphasised the importance of sharing the responsibilities for environmental protection between the federal and the state level under the auspices of the

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<sup>248</sup> S. Münchenberg, ‘Commonwealth Environmental Legislation Review – a Small Revolution’ (1998) 15 *Environmental and Planning Law Journal* 77.

<sup>249</sup> Horstead, above n 200, 54 and Peel and Godden, above n 10, 678.

<sup>250</sup> Horstead, above n 200, 54.

<sup>251</sup> Longo, above n 245, 239-40.

<sup>252</sup> John Scanlon and Megan Dyson, ‘Will Practice Hinder Principle? – Implementing the EPBC Act’ (2001) 18 *Environmental and Planning Law Journal* 14, 15. See also Dean Love, ‘Cooperative Federalism: An Analysis of the Environmental Protection & Biodiversity Conservation Act 2000 (Cth)’ (2000) 27 *Brief* 13, 13.

<sup>253</sup> See chapter B. II. 2. b).

cooperative federalism approach that had already been entrenched both in the 1992 IGAE and in the 1997 HoA.<sup>254</sup>

Accordingly, the *EPBC Act* implements two basic principles that had already been suggested in the HoA. First and foremost, the Commonwealth should only be involved to the extent that matters of national environmental significance are concerned, whereas matters of purely local or state environmental significance are to be left to the respective state or local level. Secondly, the *EPBC Act* provides the accreditation of state environmental impact assessment processes, subsequent to which the Commonwealth is allowed to delegate to the states its responsibility to carry out environmental impact assessments for matters of national environmental significance.<sup>255</sup>

To describe the former aspect in more detail, the *EPBC Act* implements only seven matters of national environmental significance triggering an involvement of the Commonwealth. These seven triggers are namely: world heritage properties and national heritage places, wetlands of international significance listed under the *Ramsar Wetlands Convention*, nationally listed species and ecological communities, nationally listed migratory species, nuclear actions and commonwealth marine environments.<sup>256</sup>

Concerning the latter aspect of accrediting state processes, it must be stressed that this was supposed to be an essential characteristic of the *EPBC Act*. Thus, Chapter 3 of the *EPBC Act* provides for the possibility of the Federal Minister on the one hand and the states/territories on the other entering into bilateral agreements pronouncing that actions in a specified class do not require Commonwealth approval under the *EPBC Act* if these actions have already been

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<sup>254</sup> Love, above n 252, 16; Laura Hughes, 'Environmental Impact Assessment in the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (1999) 16 *Environmental and Planning Law Journal* 441, 443 and Laura Hughes, 'Environmental Impact Assessment in the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (1999) 16 *Environmental and Planning Law Journal* 304, 306.

<sup>255</sup> Laura Hughes, 'Environmental Impact Assessment in the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (1999) 16 *Environmental and Planning Law Journal* 304, 306-7.

<sup>256</sup> See chapter 2, part 3, division 1 of the *EPBC Act*.

approved by the state/territory on the basis of a bilaterally accredited management plan.<sup>257</sup>

Hence, a synopsis of the two aspects outlined above reveals that the *EPBC Act* acknowledges the Commonwealth's role in determining international and national environmental matters, whilst allowing the states to take over the responsibility for processes and management approaches that accommodate Commonwealth interests to an appropriate extent.<sup>258</sup>

In scrutinising this overall approach of the *EPBC Act*, it becomes apparent that the scope of a possible Commonwealth involvement is very narrow indeed. Not only is the small number of triggers striking, but also it is questionable that particularly pressing and broad-scale issues such as the regulation of greenhouse gas emissions to combat climate change, water pollution, land degradation or salinity control are not mentioned at all.<sup>259</sup> Furthermore, the ability of the Commonwealth to accredit state approval processes, thereby abdicating even its narrow responsibility for matters of national environmental significance, discloses the further diminished role of the Commonwealth in environmental decision-making within the post-IGAE process.

Even though there are voices hailing that the accreditation scheme for state environmental management would guarantee not only predictable, transparent and timely assessment processes, but also cooperation between the

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<sup>257</sup> Concerning these approval processes see Sophie Chapple, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): One Year Later' (2001) 18 *Environmental and Planning Law Journal* 523, 531-4 and Murray Raff, 'Environment Protection and Biodiversity Conservation Act and the Draft Bilateral Agreement with the State of Victoria' (2000) 17 *Environmental and Planning Law Journal* 369.

<sup>258</sup> Love, above n 252, 16-7.

<sup>259</sup> Lisa Ogle, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How Workable Is It?' (2000) 17 *Environmental and Planning Law Journal* 468 and Steve Campbell, 'Governance, Responsibility and the Market: Neo-Liberalism and Aspects of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (1999) 16 *Environmental and Planning Law Journal* 290, 294-5.

Commonwealth and the states leading to a truly national scheme of environmental protection,<sup>260</sup> such predictions must be doubted.

Although it is true that the *EPBC Act* was the first piece of legislation, implementing the cooperative approach to environmental decision-making as laid down in the IGAE,<sup>261</sup> the excessively narrow scope of the Commonwealth involvement possible under the *EPBC Act* falls short of the IGAE-commitments, namely the principle of treating environmental concerns as inter-jurisdictional, international and global issues.<sup>262</sup>

As a consequence, the *EPBC Act* can be seen as just another expression of the general trend of an increasingly reduced Commonwealth involvement in environmental politics, manifesting itself since the adoption of the IGAE in 1992 and especially under the period of the Howard government.<sup>263</sup> Accordingly, the current federal government has proven to be very reluctant to extend either the ambit of or the number of triggers requiring Commonwealth involvement in environmental decision-making.<sup>264</sup>

In conclusion, the *EPBC Act* must be regarded as a piece of legislation that re-defined and clarified the responsibilities and roles of the states and territories on the one and the Commonwealth on the other hand. Notwithstanding this positive feature, the main characteristic of this act is the diminished involvement of the Commonwealth level in environmental management, since the latter is confined to very narrowly shaped matters of national environmental significance.<sup>265</sup>

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<sup>260</sup> Love, above n 252, 18.

<sup>261</sup> Hughes, above n 255, 307.

<sup>262</sup> See the Preamble of the IGAE. See also Hughes, above n 255, 307.

<sup>263</sup> Peel and Godden, above n 10, 683.

<sup>264</sup> Scanlon and Dyson, above n 252, 14; Horstead, above n 200, 55; Hughes, above n 255, 307 and Peel and Godden, above n 10, 678-9.

<sup>265</sup> Longo, above n 245, 240.

#### 4. Conclusion

The history of Commonwealth/state-relationships within the context of environmental decision-making in Australia has been eventful and manifold.

The first period was characterised by fierce federal-state tensions, during which the Commonwealth interfered directly with state development policies, backed up by the High Court's broad interpretation of the Commonwealth's constitutional powers. The second period has been a period of cooperation, marked by an increasing Commonwealth withdrawal from environmental protection to the benefit of the states under the auspices of intergovernmental agreements.<sup>266</sup> By the end of the 1990s, this development culminated in the enactment of the *EPBC Act* by the Commonwealth parliament, which manifested not only a cooperative approach, but also a diminished role for the Commonwealth in environmental politics.

### III. Comparison

A major difference between the constitutional situation in Germany on the one hand and in Australia on the other, is the fact that in Germany a formal amendment of the *Basic Law* is possible, whilst the *Commonwealth of Australia Constitution Act 1901* is entrenched practically preventing an amendment.

It follows from this, that the Australian cooperative federalism approach, which relies on the conclusion of intergovernmental agreements, is an essentially political process, based upon voluntary and non-enforceable cooperation between the federal, the state and the territory governments. On the contrary, the German reform of federalism possesses the status of a legally binding constitutional amendment that can be enforced through federal or state actors by means of litigation before the Federal Constitutional Court.

Irrespective of these formal differences, the political debates about the re-allocation of environmental competences that preceded the constitutional

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<sup>266</sup> Michael Crommelin, *Commonwealth Involvement in Environment Policy: Past, Present and Future* (1987) 9-10.

amendments in Germany and the cooperative agreements in Australia share several similar features. Thus, even though some problems have arisen because of national peculiarities such as the clash of the German system with an increasing European environmental regulation or the traditional focus of the Australian states on development and economic growth, the underlying common denominator is the controversy between state and federal levels about mutual roles and responsibilities in the field of environmental protection legislation.

But whilst in Australia, the process led to a situation in which the Commonwealth mainly withdrew from environmental protection legislation within the scope of the cooperative federalism approach, the federal level in Germany at least intended to expand its role in this area by means of the constitutional amendment in 2006.

### **C. Different Approaches to Environmental Decision-Making and Standard-Setting in a Federation**

Regardless of the current state of affairs in Australia and Germany, the pivotal issue underlying all intergovernmental discussions and debates in these countries is identifying the level of government that is best suited for the enactment of sound environmental protection measures.

It goes without saying that any discussion of this topic centres around the inherent tension between possible and necessary devolution of powers on the one hand and essential centralism on the other.<sup>267</sup> Whilst the centralist approach advocates uniform, nation-wide standard-setting within the whole field of environmental regulation, the decentralist option suggests an allocation of environmental law competences to the state or local level. But even though these two approaches traditionally oppose each other, it is crucial not to lose sight of a potential middle course, the cooperative federalism approach.

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<sup>267</sup> Neumann and von der Ruhr, above n 59, 300.



The following discussion will therefore outline the basic incentives and obstacles to a complete harmonisation of environmental protection policy within federal states such as Germany and Australia. Subsequently, the cooperative federalism approach will be analysed, before entering into discussion about finding the best approach to sound environmental decision-making.

## I. The Decentralist Approach

Within the scope of this debate, the decentralist approach strongly argues in favour of a devolution of powers, transferring the legislative competences to regulate environmental matters to the state and local levels.

The main arguments put forth by the supporters of this approach are the genuine possibility to consider and to accommodate local peculiarities and conditions as well as local preferences in environmental decision-making. Other reasons for a devolution of powers are the higher degree of accountability and public participation on a lower level of government; the possibility of states acting as 'laboratories' of the federation; and the higher quality of an implementation by local authorities.<sup>268</sup>

### 1. Differing Local Conditions

Having enumerated the various arguments in favour of the decentralist approach, it becomes apparent that its main positive feature is the ability to accommodate specific local conditions when regulating environmental issues.

Typically, distinct areas within a federation possess a whole variety of differing geographical, ecological and industrial conditions.<sup>269</sup> Whereas one region might be highly industrialised developing ecological problems such as air and water

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<sup>268</sup> Richard Stewart, 'Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy' (1976-1977) 86 *The Yale Law Journal* 1196, 1210.

<sup>269</sup> Andreas Middeke, *Nationaler Umweltschutz im Binnenmarkt, Rechtliche Möglichkeiten und Grenzen umweltrelevanter Alleingänge im Verhältnis zum freien Warenverkehr* (1994) 66-7.

pollution, another region might be rural with a strong tourism industry that is dependent on an intact environment.

Bearing these highly distinct circumstances in mind, it becomes obvious that a national approach adopted by the federal legislator for the whole federation may be inappropriate for some states, while appropriate for others.<sup>270</sup> The weakness of such a uniform federal legislation is its inability to accommodate local peculiarities, rendering it incapable of enacting sound environmental and political solutions for every single state.<sup>271</sup>

While a rural, non-industrialised area might be able to absorb a high amount of pollution without detriment to the environment, a highly industrialised, already polluted area might not be able to cope with even half of this amount. Similarly, for a non-industrial area it might be easy and inexpensive to comply with high environmental standards, while a nation-wide standard might be extremely and inefficiently costly for an industrialised area.<sup>272</sup>

Thus, no matter whether a high or a low environmental standard is adopted, it will always turn out to burden different regions with unequal obligations as a result of the primary local conditions. Hence, it is arguable that uniform nation-wide standard-setting within the context of the environment will always lead to over-control in some areas and under-control in others.<sup>273</sup>

## 2. Differing Community Preferences

Furthermore, the reasoning outlined above reinforces the environmental implications of the natural fact that the population throughout a federation is

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<sup>270</sup> Charles Howe, 'Making Environmental Policy in a Federation of States' in John Braden, Henk Folmer and Thomas Ulen (eds) *Environmental Policy with Political and Economic Integration, The European Union and the United States* (1996) 21, 22; Wolfgang Renner, *Föderalismus im Umweltrecht der Vereinigten Staaten und der Europäischen Gemeinschaft* (2003) 51 and Reh binder and Stewart, above n 51, 5.

<sup>271</sup> Renner, above n 270, 51.

<sup>272</sup> Ibid. Astrid Epiney, *Umweltrecht in der Europäischen Union* (2<sup>nd</sup> ed, 2005) 119-20.

<sup>273</sup> Reh binder and Stewart, above n 51, 5 and Bergfelder, above n 73, 127.

usually not a homogeneous group.<sup>274</sup> Quite to the contrary, citizens in various communities have different sets of preferences, which are often linked to the above-mentioned local conditions.<sup>275</sup>

Whilst the population in an economically weak state might favour development projects even to the detriment of the surrounding environment, in order to increase the employment rate,<sup>276</sup> inhabitants of a highly developed and economically powerful region might be keen to enhance the environmental quality even if this involved economic burdens for industry. This example clearly shows that environmental protection legislation has an income redistribution effect, since it has a significant impact on the respective industry.<sup>277</sup>

A nation-wide regulatory approach neglects these differences in community preference to the same degree that it neglects the different impact its decision-making will have on local conditions.<sup>278</sup> As a result, uniform environmental standard-setting is arguably likely to lead to insufficient environmental quality in states with a high preference for environmental protection, whilst it results in excessive implementation costs in states with high preference for development and low preference for environmental protection.<sup>279</sup>

### 3. Higher Accountability of Local Decision-Makers

The devolution of environmental competences from the federal to the state or even local level suggested by the argumentation outlined above, would also involve the important advantage of increasing the accountability of the respective decision-making body.

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<sup>274</sup> Henry Butler and Jonathan Macey, *Using Federalism to Improve Environmental Policy* (1996) 4 and Giorgio Brosio, *Federalism Research Centre, Discussion Paper No. 24, The Balance Sheet of the Australian Federation, Some Tentative Estimates* (1994) 1.

<sup>275</sup> Shapiro, above n 9, 132; Stuart Harris and Frances Perkins, *Federalism and the Environment: Economic Issues, CRES Working Paper 1984/22* (1984) 6 and Rehbinder and Stewart, above n 51, 5.

<sup>276</sup> Grandjot, above n 128, 679 and Henry Butler and Jonathan Macey, 'Water Rights Regulation, Political Incentives, and Federalism' in Terry Anderson and Peter Hill (eds) *Water Marketing – The Next Generation, The Political Economy Forum* 63, 75.

<sup>277</sup> Harris and Perkins, above n 275, 6.

<sup>278</sup> Butler and Macey, above n 274, 31, 39 and Thomas Petersen and Malte Faber, *Bedingungen erfolgreicher Umweltpolitik im deutschen Föderalismus. Der Ministerialbeamte als Homo Politicus* (1999) 23.

<sup>279</sup> Rehbinder and Stewart, above n 51, 5.

Whereas environmental decision-making on a federal level gives local authorities the opportunity to make a scapegoat of the federal government for environmental measures that harm economic growth,<sup>280</sup> the allocation of legislative competences concerning the environment to a lower level of government has the effect of making these decision-makers more accountable. This is because the electorate of a smaller community will surely be more homogeneous than the entire federal level. As a consequence, the set of their preferences can be identified much more easily by the decision-makers, which again enables them to realise the electorate's will. In cases in which the decision-makers fail to implement the community preferences, they might not be re-elected in response.

Apart from that, the devolution of powers makes the competence allocation much more clear-cut for the population so that citizens are capable of allocating political responsibility for environmental and economic decisions.

This increase in the political accountability of decision-makers is often accompanied by an improved quality of the decisions made, since the federal level might be keen to make inefficiently costly environmental decisions to the detriment of the state or local communities, as it is not responsible for the costs.<sup>281</sup> And because sound environmental decisions must always involve a thorough cost-benefit-analysis, it could be argued that the state and local governments that are also responsible for the costs of the measures in question, are best equipped to make the respective decision.

#### **4. Enhanced Public Participation**

It is often argued that a devolution of legislative powers would enhance public participation, which is beneficial for a vital democracy.

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<sup>280</sup> Rose-Ackerman, above n 40, 42.

<sup>281</sup> Ibid.

Because the argument for enhanced public participation is often seen as a positive feature of federalism in general,<sup>282</sup> it is especially valid within the context of environmental protection, since citizens are affected directly both by the impact of environmental degradation and potential economic decline as a result of higher environmental standards.<sup>283</sup>

Thus, in theory it could be argued that any decentralisation through power-sharing between different levels of government increases the efficiency of the whole process, since the decisions are made as close as possible to the citizens who are affected by them.<sup>284</sup>

This benefit of increased public participation also has significant implications for the accountability of decision-makers. Since public participation usually involves right-to-know-legislation, the whole participation process enables a closer scrutiny of the decision-making process and a higher degree of transparency.<sup>285</sup> Thereby, citizens get the relevant information to evaluate and assess the quality of the environmental decisions made on the local or state level.<sup>286</sup> Within this context, public participation is also capable of narrowing the gap between state on the one hand and citizens on the other.<sup>287</sup>

Understanding public participation mainly as a consultative and informative process, it could also be stated that it helps to improve the quality of decision-making because citizens who know their region and its respective problems are able to make suggestions and to integrate their expertise into the process.<sup>288</sup>

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<sup>282</sup> Longo, above n 245, 228 and Steffen Flath, 'Zustand und Perspektive des deutschen Föderalismus aus Sicht der Praxis' in Michael Kloepfer (ed) *Umweltföderalismus, Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz?* (2002) 23, 23.

<sup>283</sup> Renner, above n 270, 53.

<sup>284</sup> Simon Bulmer, 'Efficiency, Democracy and Post-unification Federalism in Germany: A Critical Analysis' in Charlie Jeffery (ed) *Recasting German Federalism, The Legacies of Unification* (1999) 312, 315 and Longo, above n 245, 228.

<sup>285</sup> Kloepfer, above n 56, 651.

<sup>286</sup> David Robinson, 'Public Participation in Environmental Decision-Making' (1993) 10 *Environmental and Planning Law Journal* 320, 331.

<sup>287</sup> Kloepfer, above n 4, 568 and Robinson, above n 286, 332.

<sup>288</sup> Heinz Peter Volkert, 'Landesparlamentarismus im Prozeß der europäischen Einigung' in Detlef Merten (ed) *Föderalismus und Europäische Gemeinschaften unter besonderer Berücksichtigung von Umwelt und Gesundheit, Kultur und Bildung* (1990) 251, 256 and Howe, above n 270, 24.

Hence, citizens can provide a huge pool of differing opinion and ideas from which decision-makers can benefit.<sup>289</sup>

Additionally, the more intensive the public participation, the higher will be the legitimacy of the ultimate decision.<sup>290</sup> This is a very important point in environmental standard-setting, since people feel that their autonomy has been infringed upon, if federal decisions interfere with local development projects or economic policies.

Thus, local decisions are much more likely to be accepted, because credibility and legitimacy of local decision-makers are much higher.

## **5. Resentment at Centralised Decision-Making**

Not only does citizens' increased acceptance of final environmental decisions speak in favour of decentralised decision-making, but also the fact that centralised legislation might lead to resentments on part of the state or local authorities themselves.<sup>291</sup>

State and local authorities might feel patronised particularly in cases in which uniform environmental measures interfering with state or local development strategies and economic policies are enacted and enforced by federal bodies. The resulting resentments against the federal level might then trigger confrontations and tensions between the federal and the state or local level.

This again might prompt a situation in which the state or local level tries to thwart the federal environmental legislation if there is no rigid federal monitoring or enforcement mechanism in place.<sup>292</sup> In the end, such behaviour is neither

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<sup>289</sup> Hughes, above n 255, 318.

<sup>290</sup> Kloepfer, above n 56, 651 and Robinson, above n 286, 333.

<sup>291</sup> Howe, above n 270, 22 and Rehbinder and Stewart, above n 51, 5.

<sup>292</sup> Thomas McGarity, 'Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level' (1996) 27 *Pacific Law Journal* 1523, 1620; Jackson Battle, 'Environmental Law and Co-operative Federalism in the United States' (1985) 2 *Environmental and Planning Law Journal* 302, 316; Rose-Ackerman, above n 40, 47 and Rehbinder and Stewart, above n 51, 5.

efficient in the sense of good governance nor will it lead to sound environmental protection.

## 6. 'Laboratories' of the Federation

Another aspect of this debate is the ability of state and local governments to act as so-called 'laboratories' of the federation.

Thus, state and local governments could take the lead within the federation, developing innovative models for the improvement of environmental quality.<sup>293</sup> Adopting new, creative and perhaps even risky approaches to combat environmental degradation, state and local authorities are then able to test the feasibility and effectiveness of such models on a smaller scale.<sup>294</sup>

This is particularly beneficial, since a negative outcome of such an experiment does not affect as many people or businesses as would be affected on a nationwide level. Besides, the 'test' regulation can be corrected more easily and quickly on a state or local level.<sup>295</sup>

Contrariwise, in the case of a successful experiment, the model could be copied by other states or even at the federal level.<sup>296</sup> This would allow the other states to take advantage of the innovation developed by a state for the benefit of the environment.

Moreover, this approach is also advantageous in diminishing scepticism and reservations against new ideas<sup>297</sup> and in encouraging competition amongst the states for the best and most efficient environmental solutions.<sup>298</sup>

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<sup>293</sup> Butler and Macey, above n 274, 39.

<sup>294</sup> Rose-Ackerman, above n 40, 40.

<sup>295</sup> Renner, above n 270, 52.

<sup>296</sup> Rose-Ackerman, above n 40, 40.

<sup>297</sup> Renner, above n 270, 52.

<sup>298</sup> Michael Kloepfer, 'Begrüßung' in Michael Kloepfer (ed) *Umweltföderalismus, Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz?* (2002) 11, 12; Kloepfer, above n 56, 654-5; Werner Follmann, *Umweltschutzkoordination im Bundesstaat, Zur Bewältigung länderübergreifender Umweltprobleme im Bundesstaat* (1988) 29 and Butler and Macey, above n 274, 39.

## 7. Implementation

Having outlined these arguments speaking in favour of a decentralised approach to environmental decision-making, it is important not to lose sight of the implementation level as well. Especially in the field of environmental protection, the implementation is of crucial importance, because only monitoring and enforcement of environmental standards will lead to a considerable improvement in environmental quality.<sup>299</sup>

Particularly with respect to the German institutional framework in which the day-to-day implementation of federal laws resides with the states,<sup>300</sup> it could be argued that it is most likely that such decentralised implementation and application of the law will lead to different outcomes in terms of environmental protection anyhow.<sup>301</sup>

Concluding that an effective harmonisation of environmental law is consequently hindered in practice,<sup>302</sup> it could be argued that it would be much more efficient to allocate the legislative powers to the states as well, since this would allow for a complete accommodation of local peculiarities and preferences both on the statutory and on the implementation level.

But even leaving this argument aside and assuming instead that the federal government had a complete supervisory power to monitor state implementation, bringing the distinct state implementation processes into line would mean that the federal level would have to establish a comprehensive information gathering, processing and monitoring mechanism.<sup>303</sup>

And exactly such an institutionalisation would trigger considerable information processing costs, and would tend to introduce multiple and redundant levels of

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<sup>299</sup> Hansmann, above n 35, 775.

<sup>300</sup> See Art. 83 *Basic Law* (old).

<sup>301</sup> Reh binder and Stewart, above n 51, 5.

<sup>302</sup> Ibid.

<sup>303</sup> Christoph Demmke, 'Implementation of Environmental Policy and Law in the United States and the European Union' in Norman Vig and Michael Faure (eds) *Green Giants? Environmental Policies of the United States and the European Union* (2004) 135, 141.



decision-making and review.<sup>304</sup> This is a further argument suggesting that the decentralist approach is preferable.

## **II. The Centralist Approach**

Responding to the above-mentioned arguments in favour of a decentralised regulation of environmental problems, both the economic implications of environmental standard-setting as well as the transboundary nature of most environmental problems advocate a centralised approach to environmental decision-making.<sup>305</sup> This position is reinforced by other aspects such as distributive justice, the need to create economies of scale and the advantage of speaking with one voice on the international level.

### **1. Removal of Competitive Distortions**

One of the most important arguments in favour of a centralised approach to environmental standard-setting is that uniform, nation-wide regulation prevents competitive distortions that may arise under a decentralised regime.<sup>306</sup>

Thus, whereas some states might impose high environmental standards on their local industry, others might try to attract industry by implementing lower ones.<sup>307</sup> As environmental standards tend to be financially burdensome for the industry affected by them, any high environmental standard in one state that is not valid in another imposes inconsistent and unequitable economic burdens on producers throughout the federation,<sup>308</sup> thereby impairing the competitiveness of the industry in the environmentally friendly states.

This result is not only triggered by distinct environmental regulation as such, but also by different monitoring and enforcement schemes. Whilst one state might

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<sup>304</sup> Reh binder and Stewart, above n 51, 5.

<sup>305</sup> Pfander, above n 52, 60.

<sup>306</sup> Middeke, above n 269, 67.

<sup>307</sup> Shapiro, above n 9, 135.

<sup>308</sup> Reh binder and Stewart, above n 51, 3-4.

strictly control industrial processes and natural resource development, another state might conduct only lax supervisions if at all.<sup>309</sup>

Accordingly, environmentally friendly states will try to balance these competitive disadvantages of higher production costs for industry by adopting protectionist measures against environmentally laxer states, which again will have detrimental effects on the freedom of trade and commerce among states.<sup>310</sup>

As a consequence, such competitive distortions resulting from decentralised environmental decision-making impede free trade and commerce among states, diminishing the economic welfare of the community as a whole.<sup>311</sup>

## 2. Prevention of a 'Race to the Bottom'

Elaborating further on this just mentioned advantage of nation-wide standard-setting, it becomes obvious that it features another dimension as well. The competitive distortions resulting from decentralised standard-setting and enforcement are likely to lead to a re-allocation of production sites from environmentally friendly states to states that possess less strict standards and/or lax controls.<sup>312</sup> This mechanism is likely to be exploited by the states through entering into a competition among one another of lowering environmental standards in order to attract industry.<sup>313</sup>

Since most natural resources such as air, water and soil are public goods that are freely available, any pollution or degradation of these resources does not involve direct costs for either the polluter or the regulating authority. As a consequence, higher environmental protection standards produce only additional production costs without having tangible benefits.<sup>314</sup>

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<sup>309</sup> Ibid 4.

<sup>310</sup> Renner, above n 270, 47 and Reh binder and Stewart, above n 51, 3-4.

<sup>311</sup> Reh binder and Stewart, above n 51, 3-4.

<sup>312</sup> Ibid 4.

<sup>313</sup> See Dan Tarlock, 'Federalism Without Preemption: A Case Study in Bioregionalism' (1996) 27 *Pacific Law Journal* 1629, 1636.

<sup>314</sup> Renner, above n 270, 46.

In such a situation, which is a classical example of a ‘prisoners’ dilemma’<sup>315</sup> or a ‘tragedy of the commons’ situation,<sup>316</sup> states that act independently from each other and that are in competition for industry and development opportunities will try to reduce costs for the potential industry.<sup>317</sup> This reduction can be achieved most easily by lowering environmental standards, since this solution does not involve directly measurable detrimental effects for other parts of the society, as would be the case with tax cuts that needed to be balanced by the reduction of public services.<sup>318</sup>

Therefore, this theoretical mechanism, the so-called ‘race to the bottom’,<sup>319</sup> describes a situation in which

a large number of firms, individuals, or other economic entities – such as states – all consume a single, finite, jointly owned resource at a faster rate than a single owner of the resource would use it, and the resource is unable to replenish itself. (...) None of the (actors) has any incentive to conserve or replenish the (...) resource (as this would only lead to benefits for the other actors).<sup>320</sup>

Thus, the policy decisions made within this context are individually rational for a single state, but collectively irrational for the federation as a whole.<sup>321</sup>

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<sup>315</sup> See, eg, ‘To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation’ (1989) 102 *Harvard Law Review* 842, 844-6.

<sup>316</sup> Butler and Macey, above n 274, 18. See also Doreen Barrie, *Federal Research Centre, Discussion Paper No. 18, Environmental Protection in Federal States, Interjurisdictional Cooperation in Canada and Australia* (1992) 3-4.

<sup>317</sup> Stewart, above n 268, 1211-2.

<sup>318</sup> Renner, above n 270, 46.

<sup>319</sup> This term originates from William L. Cary, ‘Federalism and Corporate Law: Reflections upon Delaware’ (1974) 83 *Yale Law Journal* 663, 705.

<sup>320</sup> Butler and Macey, above n 274, 18.

<sup>321</sup> Rüdiger Pethig, ‘Non-Cooperative National Environmental Policies and Capital Mobility’ in John Braden, Henk Folmer and Thomas Ulen (eds) *Environmental Policy with Political and Economic Integration, The European Union and the United States* (1996) 175, 175 and Butler and Macey, above n 274, 18.

Hence, federal nation-wide regulation is essential to correct this political market failure at the state level, making a race for industry and low environmental quality unnecessary.<sup>322</sup>

Apart from the prevention of this mechanism, it can be also argued that nation-wide standard-setting is a precondition for stricter environmental regulation and enforcement anyhow. This is because central bureaucracies and political actors are less subject to short-term political accountability and therefore more keen to develop long-term solutions.<sup>323</sup>

Additionally, the federal level does not depend as much on industrial development as do states and local governments that must fulfil the economic expectations of their respective electorates. As a consequence, the federal government is more indifferent to the imposition of costs upon industrial projects and to restrictions of environmentally harmful development proposals.<sup>324</sup>

Another reason that uniform and consistent environmental standards are desirable throughout the federation<sup>325</sup> is that states are often tempted to make concessions to powerful local industries on which the prosperity of that state largely depends. Such industries are able to threaten state and local governments with re-allocating their production-sites, making them willing to implement low environmental standards.<sup>326</sup>

### **3. Transboundary Effects of Environmental Degradation**

Returning to the implications of the ‘race to the bottom’ argument, it becomes apparent that states or local authorities have few incentives to consider the

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<sup>322</sup> Jonathan Macey and Henry Butler, ‘Federalism and the Environment’ in Roger Meiners and Andrew Morriss (eds) *The Common Law and the Environment, Rethinking the Statutory Basis for Modern Environmental Law* (2000) 158, 174 and Butler and Macey, above n 274, 19.

<sup>323</sup> Rehbinder and Stewart, above n 51, 4.

<sup>324</sup> Ibid 6.

<sup>325</sup> Stuart Harris and Frances Perkins, ‘Federalism and the Environment: Economic Aspects’ in R. L. Mathews (ed) *Federalism and the Environment* (1985) 35, 35.

<sup>326</sup> Rose-Ackerman, above n 40, 116.

benefits and costs of their development policies for other states or out-of-state-residents.<sup>327</sup> It follows from this that neighbouring states will often bear the costs for combating environmental degradation caused by the policies of another state, without being able to profit from the respective benefits.<sup>328</sup>

As a consequence, it cannot be denied that these so-called inter-state externalities<sup>329</sup> are best internalised on the federal level by uniform standard-setting.<sup>330</sup> Although this approach might not be able to prevent transboundary spill-overs as such, it is capable of hindering a situation in which one state intentionally benefits from transboundary spill-overs to the detriment of another state.

Apart from that, it is especially obvious that the current problems of environmental degradation such as climate change, threats to biodiversity and ozone depletion no longer have a regional character, but a national and even global one. Thus, these environmental concerns do not have any connection with the existing state boundaries or with the existing body of law.<sup>331</sup> Even on a smaller scale, problems such as air or river pollution are very likely to affect more than one state within a federal system.<sup>332</sup>

In consequence, the need for national and international, interdependent and overall solutions clearly demonstrates that the competent regulatory body must have the ability to engage in activities and to adopt policies that go beyond the scope of local, state and sometimes even national decision-making.<sup>333</sup> Accordingly, this task can be fulfilled best by centralised measures enacted on the national level within a federation.<sup>334</sup>

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<sup>327</sup> Ibid 38, 47.

<sup>328</sup> Butler and Macey, above n 274, 17.

<sup>329</sup> Ibid.

<sup>330</sup> Rose-Ackerman, above n 40, 38.

<sup>331</sup> Saunders, above n 195, 70.

<sup>332</sup> Renner, above n 270, 47.

<sup>333</sup> Hendrichske, above n 55, 1090 and Butler and Macey, above n 274, 16.

<sup>334</sup> Kloepfer, above n 56, 654-5 and Hendrichske, above n 55, 1090.

#### 4. Distributive Justice

Considering the arguments outlined above, it is clear that most of the reasons for centralised regulation are related to the high probability that individual states will behave in an egoistic way.<sup>335</sup> Not only the attraction of industry by lowering environmental standards and producing trade distortions, but also attempts to shift the costs of environmental degradation to another state through accepting transboundary spill-overs of pollution are results of selfish decision-making on the state level.<sup>336</sup>

Taking this attitude of state and local decision-makers as a starting point, it becomes apparent that the allocation of environmental power to the central level involves an equity aspect as well.

Whilst some states might lower their standards in such a drastic way that toxic hotspots will arise involving significant health hazards for the population, wealthier states might be able to afford outstanding environmental quality by subsidising their industry for environmentally friendly production methods. Hence, serious inequities can result from the allocation of too much regulatory power to the states.<sup>337</sup> Even though differences in living conditions might shift overtime, since states with toxic hotspots will get wealthier through the increase in industry and therefore will be able to afford higher environmental protection, the overall goal in a federation is to grant at least similar living conditions throughout the country.<sup>338</sup>

This trend towards an inequitable distribution of environmental quality through egoistic decision-making on the state level is even reinforced by the so-called ‘not in my backyard principle’ according to which people do not want unpleasant things to happen in their close surroundings. Thus, the electorate also acts in a

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<sup>335</sup> For the German context see Charlie Jeffery ‘From Cooperative Federalism to a “Sinatra Doctrine” of the Länder?’ in Charlie Jeffery (ed) *Recasting German Federalism, The Legacies of Unification* (1999) 329, 337-8.

<sup>336</sup> Harris and Perkins, above n 275, 4.

<sup>337</sup> Rose-Ackerman, above n 40, 49.

<sup>338</sup> Harris and Perkins, above n 275, 5.

self-centered way forcing their government to produce the desired policy decision. This can mean that an economically weak electorate would not want environmental protection in their region, since it might drive away industry. But it can also involve a wealthy electorate that does not want a refuse incinerator or a power station to be built in their area. In any case, the overall result will be an inequitable distribution of environmental degradation. Allocating the power to the central level will ensure that decision-makers are independent from the local electorate and thereby able to protect minority interests and to grant similar living conditions within the federation through implementing minimum standards of environmental protection.<sup>339</sup>

Bearing in mind these two components - egoistic decisions-makers on the one hand and selfish communities on the other, it becomes clear that only the federal level has the ability to prevent serious inequities and discrimination in the distribution of environmental quality.<sup>340</sup>

## 5. Economies of Scale

Considering the common nature of environmental problems throughout a federation, it becomes obvious that the establishment of a centralised process for acquiring and processing the necessary information in science and technology is more cost-efficient than a decentralised one.<sup>341</sup> Apart from this, it is usually the federal level that has the required financial resources to conduct very costly and comprehensive scientific research and analysis for the development of sound environmental standards.<sup>342</sup>

Accordingly, the allocation of scientific research and analysis to the federal level is advantageous, because it reduces costs through allocating the common tasks to a

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<sup>339</sup> Renner, above n 270, 48.

<sup>340</sup> Brosio, above n 274, 1; Rose-Ackerman, above n 40, 49 and Harris and Perkins, above n 275, 5-6.

<sup>341</sup> Reh binder and Stewart, above n 51, 4.

<sup>342</sup> Ibid. See also Renner, above n 270, 49.

single authority which is then able to provide information for all other regulatory bodies.

## **6. Role in International Negotiations**

Furthermore, it is of particular importance to take into account the international dimension of environmental problem solving.

Since the most pressing environmental issues such as climate change, ozone depletion and biodiversity protection can only be resolved by the international community as a whole, it is crucial for a federation to speak with one voice on the international scene. This strengthens not only the bargaining power of that nation, but more importantly, it facilitates the implementation of global environmental standards on a national level, which again furthers sound environmental protection.<sup>343</sup>

Thus, it is desirable in a federation that the centralist level is responsible and competent for environmental decision-making, as this safeguards a common environmental policy, which can be successfully presented and even accomplished on the international stage.

## **III. The Cooperative Federalism Approach**

Considering these above-mentioned arguments in favour of both a strict decentralist and a strict centralist approach, it is obvious that they are all based upon a competitive and confrontational notion of federalism, in the scope of which federal and state levels fight for competences. In contrast to this, it could also be put forward that a more cooperative approach to federalism is the golden mean.

Although generally this concept could be implemented in any part of a federal system, it is most likely to be adopted in legal areas in which the constitutional

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<sup>343</sup> Rehinder and Stewart, above n 51, 4 and Renner, above n 270, 50.



allocation of powers between the states and the federal level is not completely clear-cut. In these situations the cooperative approach is meant to provide an unambiguous, though non-enforceable and political definition of powers. Describing the concept in more detail, cooperative federalism puts in place an understanding of federalism in which state and federal levels work together in order to reduce tensions and avoid duplication, while promoting efficient and sound policies.<sup>344</sup>

Pursuing these aims, state and federal levels have various tools at hand in order to implement this approach. First, states and even the federal level can enact mirror or complementary legislation, leading to a uniform law throughout the country that is derived from several legislators.<sup>345</sup> Secondly, the states could refer specific powers to the federal level, which would then be able to exercise these powers on behalf of the states, without depriving them of their constitutional competences. Finally, another means of cooperation is the conclusion of an intergovernmental agreement between or among the different governments in which mutual responsibilities are defined.

### **1. Nation-Wide Standard-Setting**

The great advantage of the cooperative approach is said to be its ability to combine the advantages of the centralist option with the benefits of its decentralist counterpart.

Accordingly, the cooperative approach allows for nation-wide standard-setting with all the advantages already discussed within the framework of the centralist approach without the need for allocating an all consuming power to the federal level.<sup>346</sup>

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<sup>344</sup> Longo, above n 44, 147-8.

<sup>345</sup> Lindell, above n 1, 132 and French, above n 11, 9.

<sup>346</sup> Harris and Perkins, above n 275, 11 and Longo, above n 44, 159.

## 2. Preservation of State Rights

Thus, whilst granting nation-wide standard-setting, the cooperative federalism approach preserves the constitutional rights of the states and allows at least partially for the consideration of state and local peculiarities. The reason for this is not only that the states are involved in the whole decision-making process as an equally entitled partner, but also that the cooperative approach enables the federal government to adopt a regulatory framework only, leaving the power of detailed implementation to states and local communities.<sup>347</sup>

## 3. Accommodation of Community Interests

This state involvement is also an aspect that safeguards the accommodation of community interests within the decision-making process by providing for enhanced public participation on a local level, which is implemented in the decision-making through the states.<sup>348</sup>

## IV. Discussion of these Approaches

Having outlined both the three distinct approaches to the allocation of regulatory power within the context of environmental protection in a federation and the arguments speaking in favour of them, a critically assessment of these arguments becomes essential in order to find out which approach is not only most feasible, but also promotes sound environmental protection.

Pursuant to the traditional federalist theory underlying both the Australian and the German federations, wherever possible and appropriate, state or even local government regulation should be preferred vis-à-vis federal regulation, because all regulation should reflect the preferences of the affected community and it should also allow for diversity and competition.<sup>349</sup>

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<sup>347</sup> Renner, above n 270, 603.

<sup>348</sup> Cranston, above n 242, 122-3.

<sup>349</sup> Butler and Macey, above n 274, 48; Felix Ekardt and Raphael Weyland, 'Föderalismusreform und europäisches Verwaltungsrecht' (2006) 25 *Neue Zeitschrift für Verwaltungsrecht* 737, 737; Macey and Butler, above n 322, 160 and Christine Fletcher, *Federalism Research Centre, Discussion Paper No. 3, Responsive Government, Duplication and Overlap in the Australian Federal System* (1991) 1-14.

Elaborating on this statement, it is arguable that any nation-wide uniform decision-making within the scope of environmental protection legislation would lead to a situation in which not only the preferences of the local community are neglected,<sup>350</sup> but also in which an accommodation of particular local conditions is completely impossible. Since state and local authorities know best what the community preferences are and what geographic, ecological and economic peculiarities exist in their area, they are also best equipped to find the right local solution.<sup>351</sup> Although the central level might also be able to consider some local peculiarities on the basis of respective information, the research and information costs involved would be much too high and the ability of the central level to consider all local differences would be very limited indeed.<sup>352</sup>

Accordingly, it could be held that these negative features of the centralised approach are fundamentally opposed to a system that acknowledges the idea that local problems need local solutions, simultaneously seeking to ensure public participation whenever possible.<sup>353</sup>

Apart from this, the potentiality of state and local communities to function as 'laboratories' of the federation would be completely eliminated by exclusive central decision-making.<sup>354</sup>

These negative aspects would be triggered by centralist decision-making, although there is no proof that the federal legislator would do a better job in environmental politics than its state or local counterpart.<sup>355</sup> This result is also suggested by the fact that the interest/lobby group domination on the federal level is much more intense than on the state or local level, making environmental protection dependent on the strength of the lobby groups involved.<sup>356</sup>

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<sup>350</sup> Butler and Macey, above n 276, 65.

<sup>351</sup> Crommelin, above n 266, 20.

<sup>352</sup> Volkert, above n 288, 256.

<sup>353</sup> Renner, above n 270, 53, 54.

<sup>354</sup> Butler and Macey, above n 276, 65.

<sup>355</sup> Butler and Macey, above n 274, 21.

<sup>356</sup> Butler and Macey, above n 276, 65.

Moreover, the argument that a ‘race to the bottom’ would be the consequence of decentralised environmental decision-making is not true. Although theoretically conceivable, the ‘race to the bottom’ is very unlikely to occur in practice.<sup>357</sup> Not only would such a race presuppose an extreme mobility of industries and citizens, which is not possible in practice due to the high costs of information and re-allocation; but the ‘race to the bottom’ argument also neglects the balancing effects of economic growth over time. Whereas an economically weak population is keen to attract industry even if this means lower environmental quality, wealthier populations usually seek to enhance environmental protection even if this involves less economic growth. Assuming this as a fact, lower environmental standards in economically weak areas are likely to attract industry in the long run, raising the welfare in this region. The resulting higher income of the population will increase their desire for higher environmental quality, which will again lead to higher standards. Thus, the ‘race to the bottom’ does not happen in practice, since community preferences always tend to develop in the direction of higher environmental standards.<sup>358</sup>

As a consequence, it could be argued that any allocation of extensive powers to the federal government within the sphere of environmental protection will necessarily prompt an unacceptable erosion of state rights without granting significant benefits for sound environmental protection.<sup>359</sup> Therefore, the job of the federal government should be confined to providing a framework for facilitating cooperation between the state, local and federal level as well as amongst the state and local level.<sup>360</sup>

Responding to this argumentation, it must be admitted that the allocation of comprehensive environmental competences to the federal level will lead to a

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<sup>357</sup> Han Somsen, ‘Dynamics, Process, and Instruments of Environmental Decision-Making in the European Union’ in Tim Jewell and Jenny Steele (eds) *Law in Environmental Decision-Making, National, European, and International Perspectives* (1998) 161, 168-9.

<sup>358</sup> Macey and Butler, above n 322, 159.

<sup>359</sup> Rehbinder and Stewart, above n 51, 6.

<sup>360</sup> Butler and Macey, above n 274, 57.

certain erosion of state rights. But simultaneously, it needs to be emphasized that the allocation of rights and responsibilities to the states cannot, and above all, should not be an end in itself. Accordingly, within the context of the Australian debate, *Saunders* replies to the reproach that Commonwealth legislation on environmental matters will lead to an erosion of state rights

So it is; but it is a claim that serves no other purpose than to perpetuate the anachronistic distinction between centralism and States rights, a distinction that bedevils debate on almost any aspect of Australian federalism. It is time the debate moved to another plane: to consider, for example, the role which it is appropriate for the different levels of government to play in relation to particular matters and how any necessary co-ordination between them should be achieved.<sup>361</sup>

Consequently, the question that must be answered is which level of government is best equipped and willing to enact sound environmental protection measures in the most effective way. In discussing this issue, it must be possible to consider the advantages of centralist decision-making in a non-ideological way, even if this involves a reduction of state rights.

In doing so, the starting point must be the ability of centralist decision-making to enact uniform, high environmental standards, since this is its major benefit.

Even if the 'race to the bottom' does not happen in practice in the simple fashion that a centralist approach wants one to believe, the serious economic implications of environmental decision-making cannot be neglected. Since states are and have always been very eager to attract industry in order to promote economic growth, the achievement of strict environmental standards within a decentralist framework is rather unlikely. Thus, sometimes the financial welfare of state or local communities is heavily dependant on a special industry or investor. This situation might render state or local authorities willing to make concessions in

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<sup>361</sup> Saunders, above n 199, 30.

favour of this industry and to the detriment of the environment. In contrast to this, a centralist government is less prepared to focus exclusively on economic growth and development or to make concessions irrespective of what negative impacts this might have on the environment.<sup>362</sup>

Furthermore, states often try to exploit environmental decision-making powers for protectionist measures vis-à-vis out-of-state-products so that a uniform and consistent regulation prevents competitive distortions, which leads to higher economic welfare of the nation as a whole. And even if some states act as 'laboratories' of the federation, such experiments usually take place in a sporadic and ad hoc fashion only, which is not able to justify a devolution of powers despite all arguments suggesting the opposite.<sup>363</sup>

Apart from that, uniform nation-wide standards significantly diminish search and information costs for industries, as economic actors do not have to analyse and to compare various inconsistent state regulations in order to find the applicable or the most favourable one.

These potential sources of the enhanced efficiency resulting from the substantive aspect of centralist regulation are reinforced by the higher efficiency of the centralist decision-making process itself. This is because a centralist process avoids fragmentation, duplication and overlap between the different levels of government and it reduces the costs of drafting legislation for a multitude of diverse state and local committees instead of for a single federal one.<sup>364</sup>

Moreover, the centralist approach is also able to balance serious inequities and imbalances between different regions within a federation, preventing the emergence of toxic hotspots and discrimination in the living conditions of people.

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<sup>362</sup> Rose-Ackerman, above n 40, 116.

<sup>363</sup> Anne-Kathrin Fenner, 'Umweltföderalismus – Föderalismus in Deutschland: Motor oder Bremse für den Umweltschutz?' (2001) 23 *Natur und Recht* 577, 579.

<sup>364</sup> Longo, above n 44, 169.

In an attempt to diminish these benefits of centralist decision-making, it is often said that the major disadvantage of this approach would be its inability to provide opportunities for public participation. Although it must be acknowledged that public participation is fundamental for a democratic society and cannot be easily accommodated in the regulatory process at a central level, it must not be forgotten that public participation within the context of environmental regulation has serious drawbacks.

First of all, the ‘not in my backyard principle’ suggests that public participation might hinder sound environmental decision-making on a larger scale, since people act in an egoistic manner without taking into consideration the environment as a whole. Secondly, it is very difficult to ascertain community preferences reliably.<sup>365</sup> This is because some interests are always overrepresented, while others are underrepresented.<sup>366</sup> Thus, the viability of public participation as a form of direct democracy should not be overestimated. Thirdly, public participation that has the ability to influence the final decision requires a respective decision-making process, providing information and fora for interested citizens. Putting such a decision-making process in place will lead to excessive legalism, since it will necessarily be characterised by a high density of procedural formality.<sup>367</sup> Fourthly, this form of decision-making inevitably involves high costs and is extremely time-consuming, which renders the whole regime inefficient.<sup>368</sup> Finally, the argument that the public would be able to provide for a huge pool of ideas and expertise must be doubted, since the public is neither an expert nor in the position to recognize, analyse and assess all interdependencies involved in environmental decision-making.<sup>369</sup> Consequently, the lack of public participation in centralised environmental decision-making can be an opportunity for rather than an obstacle to sound environmental protection policy.

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<sup>365</sup> Shapiro, above n 9, 133.

<sup>366</sup> Robinson, above n 286, 321.

<sup>367</sup> Ibid 322, 326.

<sup>368</sup> Ibid 321, 323-4.

<sup>369</sup> Ibid 323.

Therefore, there is only one argument left that speaks in favour of the decentralist approach and has not yet been discussed. This argument states that local problems needed local solutions or, understood in a broader way, that political competence allocation should reflect the underlying spatial structure of the environmental problem concerned.<sup>370</sup> But quite to the contrary, most of the current environmental problems are not of a strictly local or regional nature. Rather environmental degradation - especially in the most pressing spheres of water and air pollution, climate change or decrease in biodiversity - crosses boundaries, calling for national, if not international measures. Furthermore, it is only very rarely the case that political and environmental boundaries correspond.<sup>371</sup> Quite apart from this, different environmental problems have different geographic boundaries so that each problem would require a new allocation of competences.<sup>372</sup>

Accordingly, the need for interdependent, overall solutions in the field of environmental protection legislation considering ecosystems as a whole<sup>373</sup> coupled with the fact that distinct environmental problems have different boundaries that do not necessarily correspond with political frontiers are further arguments strongly advocating a centralist approach.<sup>374</sup>

In conclusion, it must be stated that the advantages of uniform, nation-wide standard-setting in the sphere of environmental regulation greatly outweigh its drawbacks.

Although it is true that the allocation of an environmental competence to the federal level will not only diminish the rights of the states and local communities,

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<sup>370</sup> Crommelin, above n 266, 19 and Rose-Ackerman, above n 40, 37.

<sup>371</sup> See Kerry Smith, Kurt Schwabe and Carol Mansfield, 'Does Nature Limit Environmental Federalism?' in Arvind Panagariya, Paul Portney and Robert Schwab (eds) *Environmental and Public Economics, Essays in Honor of Wallace E. Oates* (1999) 126, 127.

<sup>372</sup> Max Frenkel, *Federal Theory* (1986) 123.

<sup>373</sup> Hendrischke, above n 55, 1090.

<sup>374</sup> See Smith, Schwabe and Mansfield, above n 371, 127.



but will also prevent the states from acting as ‘laboratories’ of the federation,<sup>375</sup> it is obvious that the benefits of central decision-making compensate for that.

Uniform standard-setting leads to a consistent regulatory system avoiding fragmentation as well as duplication and enabling citizens and industry to diminish costs for ascertaining the legal situation. Similarly, the decision-making process as such reduces costs since only one legislative body is involved. Apart from that, the uniform standards applicable throughout the whole country prevent trade distortions between the states. Moreover, the whole process is likely to promote higher environmental standards, since the federal level is less dependent on the attraction of industry than is the case at the state and local level.

Having reached the conclusion that sound environmental protection is best promoted through centralist standard-setting and decision-making, arguably this result does not necessarily mean that the whole competence for environmental regulation must be allocated to the federal level. Quite to the contrary, it could also be held that a cooperative federalism approach is the best way to regulate environmental issues.<sup>376</sup>

But although the cooperative approach claims that it would combine the advantages of both centralised and decentralised decision-making, it is not a convincing alternative to the centralist approach.

Even though it may be true that the cooperative approach prevents an erosion of state rights, while simultaneously enabling nation-wide standard-setting, it is also obvious that there are serious pitfalls lying in wait for its practical implementation.<sup>377</sup>

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<sup>375</sup> Butler and Macey, above n 276, 65.

<sup>376</sup> Harris and Perkins, above n 275, 11.

<sup>377</sup> Geoffrey Sawer, *Cooperative Federalism and Responsible Government in Australia, The Fourth Alfred Deakin Lecture 16 September 1970* (1970) 6.

Since cooperative federalism depends on reaching a unanimous agreement both between state and federal level as well as among the states, the whole process is highly fragile.<sup>378</sup> All states and the federal level, perhaps even the local governments, have to negotiate the issues in question in order to find a workable and agreeable solution. After finally having concluded an agreement, every involved government must take action in order to implement the consensus into its respective jurisdiction. This process is time-consuming and it involves high bargaining and transaction costs.<sup>379</sup>

Apart from this, it is also likely that differences in the bargaining positions of the involved governments render the negotiations difficult. Not only the sheer size or the economic prosperity of a state might make it a more powerful party within the negotiation process, but such a ‘rambo situation’ might also emerge when one state is polluting a natural resource without having to suffer from the negative impacts resulting from it. Such an inequality in bargaining power between the governments might lead to no solution at all or it might trigger the lowest common denominator effect.<sup>380</sup> Describing the latter in more detail, it means a situation in which the state with the lowest environmental standard becomes the benchmark for the others, since a unanimous agreement on higher standards is blocked by the state with the low standards. And because this low standard is and will be in place in one state, the other states do not dare to impose or maintain higher standards, as this might lead to ‘forum shopping’ by industry, in which a re-allocation of production sites to states with less stringent standards is likely to occur. Thus, a spiralling effect will probably arise in which the state with the least stringent standards maintains the balance of power, hindering better environmental protection by other states.<sup>381</sup>

In addition to these problems within the decision-making process, the cooperative approach is also questionable in the context of implementation. As

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<sup>378</sup> See Tricia Caswell, ‘The Environmental Agenda’ (1994) 19 *Alternative Law Journal* 11, 12.

<sup>379</sup> Shapiro, above n 9, 137.

<sup>380</sup> Harris and Perkins, above n 275, 11 and Lindell, above n 1, 132.

<sup>381</sup> Hughes, above n 255, 312.

already mentioned above, the agreement concluded by the involved governments needs to be implemented by local and/or state authorities.<sup>382</sup> Resulting from the inequality in bargaining power, it is very likely that a situation will emerge in which governments are willing to implement the adopted policies to different degrees. As a consequence, some states might try to thwart the compromise by implementing it in a less stringent or even lax way. Since an intergovernmental agreement is not enforceable, there is no possibility to compel the recalcitrant states to implement the environmental protection policy, on which they have agreed on, properly.<sup>383</sup>

## V. Conclusion

In view of the drawbacks of the cooperative federalism approach as well as those of the centralist and decentralist approach, it is apparent that neither of the three positions is without pitfalls. Additionally, the soundness of the environmental decisions made under either of these approaches depends heavily on the attitude, preferences and commitment of the decision-makers in charge.<sup>384</sup> As a consequence, the task can only be to identify a regulatory process that enables and facilitates sound environmental decision-making to the largest extent possible.

Bearing this in mind, it can be derived from the discussion above that a centralist approach offers the highest chance for the promotion of sound environmental decision-making. It prevents not only a detrimental 'race to the bottom', but it is also much better equipped and competent to cope with the transboundary effects of most current environmental problems. But even if one would doubt these advantages of the centralist approach, it cannot be denied that its huge potential to remove competitive distortions, to avoid duplication and legal fragmentation as well as to lower the costs of the decision-making and implementation process are,

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<sup>382</sup> Wilcher, above n 242, 208.

<sup>383</sup> Concerning the further serious drawback of the cooperative approach, namely, the erosion of responsible government and political accountability see Sawyer, above n 377, 7-13 and Cranston, above n 242, 124-5.

<sup>384</sup> Longo, above n 44, 157.

even on their own, compelling enough to state that the centralist approach is to be preferred in the sphere of environmental decision-making.

## **D. Assessment of the Current Constitutional Situation in Germany and Australia in Consideration of the Theoretical Approach to Sound Environmental Decision-Making**

### **I. Assessment of the German Reform of Federalism in 2006**

As the theoretical discussion suggests, a centralist approach is preferable for the promotion of sound environmental decision-making in a federation. Having reached this conclusion, the German reform of federalism needs to be scrutinised as to whether it puts such an environmentally sound centralist decision-making process in place and as to whether the constitutional amendment is suitable for remedying the shortcomings encountered under the old system of competence allocation.

#### **1. Preliminary Remarks**

Considering the new system of environmental competence allocation after the 2006 reform of German federalism, the sheer variety of the new federal concurrent competence is striking, let alone its complexity.<sup>385</sup>

Just to call the confusing character of the re-allocated powers back to mind<sup>386</sup> - there is a concurrent federal competence not bound by the necessity requirement and without the right of the *Länder* to enact divergent legislation and there is also a concurrent federal competence not limited by the necessity requirement, but granting the *Länder* a right to deviate, aside from the exclusive federal and the exclusive state competences.<sup>387</sup>

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<sup>385</sup> Cornelia Ziehm, *Stellungnahme zur beabsichtigten Föderalismusreform, insbesondere zum Gesetzentwurf der Fraktionen der CDU/CSU und SPD vom 7. März 2006*, BT-Drs. 16/813 (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Dr\\_Cornelia\\_Ziehm.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Dr_Cornelia_Ziehm.pdf)> at 22 September 2006, 1.

<sup>386</sup> Ginzky and Rechenberg, above n 68, 344.

<sup>387</sup> See chapter B. I. 3. b), d).

Apart from this perplexing state of affairs, the competence allocation is spelled out with several exceptions and counter-exceptions. This method, which can be found, for instance, in Art. 72 II, 72 III 1 no. 1, 2, 5 and Art. 74 I no. 24 *Basic Law* (new), is highly complicated, preventing any interested citizen from relating legislative responsibility or accountability to the respective body in an easy or feasible way.

Thus, it seems obvious that the constitutional amendment did not succeed in fulfilling its major goal of disentangling the German policy- and decision-making processes, simultaneously rendering them more transparent.<sup>388</sup>

## 2. The Allocation of Legislative Competences

### a) Exclusive State and Federal Legislative Competences

In assessing the substantive aspect of the new allocation of legislative competences within the context of the environment, both the re-allocation of the power over nuclear energy as well as over social noise abatement provide for a rather clear-cut division of powers. While the former has been transferred to the exclusive federal competence,<sup>389</sup> the latter belongs now to the exclusive state competence.<sup>390</sup>

The allocation of the power over nuclear energy to the federal level cannot be criticized, since this subject-matter is a classic example of an issue that can only be regulated on the federal level. The reason for this is that local and state governments are too anxious to agree to the building of a nuclear power plant on their territory because of the safety concerns of their electorate, while the federal legislator is able to consider and to accommodate the overall distribution of power plants and their risks throughout the country.<sup>391</sup>

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<sup>388</sup> Köck and Ziehm, above n 6, 337.

<sup>389</sup> See Art. 73 I no. 14 *Basic Law* (new).

<sup>390</sup> See Art. 74 I no. 24 in connection with Art. 70 I *Basic Law* (new).

<sup>391</sup> Rose-Ackerman, above n 40, 42.

The allocation of the power concerning conduct-related noise abatement to the state level could be welcomed as well, since noise is always named as a particular example of a matter that can be regulated on a local level.<sup>392</sup> Indeed, this general assumption is not doubted. However, since there is no explanation available as to what will be encompassed by ‘conduct-related noise’, it will be problematic to define this term, let alone to differentiate conduct-related noise that is regulated by the *Länder* from the residual noise that underlies the federal authority.

Since the original proposal of the legislative initiative referred to noise caused by sports or recreational activities as well as by facilities that serve social purposes,<sup>393</sup> it could be argued that the new provision of conduct-related noise is meant to include noise which is produced by activities that belong typically to societal and recreational behaviour as opposed to noise caused by factories or other industrial plants as well as by commercial activities. Thereby, this explanation corresponds with the underlying rationale that mere social noise can be resolved best at the local level, whereas the noise related to industrial sites is intertwined with other environmental hazards for which the site might also be responsible and which should be assessed by the higher federal level as a consequence. Notwithstanding this, it is hardly neglectable that noise caused by the operation of an industrial site is also related to the conduct of operating it, so that literally it would also be entailed by conduct-related noise as would be true for virtually any other source of noise.

Apart from this extremely vague and unclear wording, it is also obscure, to which level the competence must be allocated in cases in which the noise is caused by a multitude of reasons.<sup>394</sup>

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<sup>392</sup> Neumann and von der Ruhr, above n 59, 303.

<sup>393</sup> See the proposed Art. 74 I no. 24 *Basic Law*, Deutscher Bundestag, above n 135, 3.

<sup>394</sup> Johannes Dietlein, *Stellungnahme zur Neuordnung der umweltrelevanten Gesetzgebungskompetenzen unter besonderer Berücksichtigung des Immissionschutzrechts sowie des Jagd- und Naturschutzrechts* (2006) Bundestag

<[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Johannes\\_Dietlein.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Johannes_Dietlein.pdf)> at 22 September 2006, 3.

These difficulties indicate that the new division of powers within the context of noise abatement unnecessarily complicates the competence allocation,<sup>395</sup> whilst it contributes only minimally to an expansion of the *Länder's* rights. Thus, it would have been better not to interfere with the allocation of the concurrent federal power over noise abatement under the old *Basic Law*.<sup>396</sup>

## **b) Unregulated Areas**

Apart from this, it is remarkable that many important facets of environmental protection today such as renewable energies, climate change or non-ionizing rays have not been included in the amended competence titles. Consequently, the legislator will have to rely on other non-purposive powers such as the federal concurrent competence to regulate the law concerning economic affairs<sup>397</sup> in order to adopt measures in these fields.<sup>398</sup>

## **c) Abolition of the Framework Legislation**

The complete abrogation of the framework legislation coupled with the transferral of these powers to the federal concurrent competence must be welcomed,<sup>399</sup> since it abolishes the very costly and time-consuming requirement of two consecutive legislative acts.<sup>400</sup>

Apart from this, these federal competences are completely excepted from the necessity requirement under Art. 72 II *Basic Law* (new) so that the adoption of a federal regulation in these fields will be more easily achievable. Accordingly, the removal of sixteen different pieces of legislation on the state level filling in the same federal framework will avoid not only duplication and fragmentation, but it will also enable the federal legislator to adopt an integral approach to environmental protection, which is already dictated by the EC environmental

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<sup>395</sup> Reh binder and Wahl, above n 104, 25.

<sup>396</sup> See Art. 74 I no. 24 *Basic Law* (old).

<sup>397</sup> See Art. 74 I no. 11 *Basic Law* (new).

<sup>398</sup> Ziehm, above n 385, 1 and Sachverständigenrat Umwelt, above n 54, 5.

<sup>399</sup> Köck and Ziehm, above n 6, 337.

<sup>400</sup> Haug, above n 4, 193.

regulation. Thereby, Germany will be capable of adopting European directives within the set time frame and in a suitable manner.

Furthermore, this broad concurrent competence will make the enactment of an environmental codification (the so-called ‘*Umweltgesetzbuch*’) possible,<sup>401</sup> leading to comprehensive, consistent and uniform environmental legislation which will then be able to reduce search and information costs for industry and citizens.

#### **d) Right of the States to Deviate from Federal Laws**

Having praised these theoretical advantages of the abolition of the framework legislation coupled with the transferral of the environmental competences it embraced to the federal level, it must now be emphasized that they are immediately thwarted by other parts of the constitutional amendment, namely, the establishment of a right of the *Länder* to deviate from federal legislation.<sup>402</sup>

Although the federal legislator has the concurrent legislative competence over hunting, nature conservation and landscape management, land distribution and regional planning, as well as water resource management<sup>403</sup> even without being bound by the necessity requirement under Art. 72 II *Basic Law* (new), Art. 72 III 1 no. 1 to 5 *Basic Law* (new) grants the *Länder* the right to deviate from the federal legislation in these areas. This new feature is meant to preserve the function of the *Länder* as ‘laboratories of the federation’ and to provide for a mechanism that

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<sup>401</sup> Hans-Jörg Dietsche, ‘Die “konkurrierende Gesetzgebung mit Abweichungsrecht für die Länder” – Zu den verschiedenen Modellen der verfassungsrechtlichen Ausgestaltung eines neuen materiell-rechtlichen Gesetzgebungsinstrumentes’ in *Jahrbuch des Föderalismus 2006, Band 7, Föderalismus, Subsidiarität und Regionen in Europa* (2006) 182, 183.

<sup>402</sup> Wilfried Erbguth, *Anbörung zur Föderalismusreform/ Teil III.: Umwelt/Landwirtschaft am 18.05.2006, Thesen* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Wilfried\\_Erbguth.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Wilfried_Erbguth.pdf)> at 22 September 2006, 3 and Wagner, above n 65, 60.

<sup>403</sup> See Art. 74 I no. 28 to 32 *Basic Law* (new).



allows them to accommodate local peculiarities<sup>404</sup> and to prompt a beneficial competition among the *Länder* for the best and new solutions.<sup>405</sup>

But even though this might be beneficial to some extent, it is clear that this mechanism has many pitfalls. Statutory deviations by the *Länder* will be possible without any need to give reasons.<sup>406</sup> Furthermore, the *Länder* will be able to enact both higher and lower standards,<sup>407</sup> while the federal legislator will not even be able to implement a regulatory framework for canalising the divergent state laws anymore.<sup>408</sup>

As a consequence, the lack of a unifying federal law is even likely to lead to an increase in the level of fragmentation and duplication compared with the status quo under the old framework regulation.<sup>409</sup> Therefore, there might again be a situation in which sixteen different pieces of legislation regulate the same subject-matter within Germany divergently, maybe even inconsistently. It follows from this that the rationale of European directives and regulations, which is the achievement of legal harmonisation throughout the European community, cannot be easily attained under these premises.<sup>410</sup>

Moreover, there is a high probability that state laws will undermine any integral approach to environmental protection adopted by the federal level.<sup>411</sup> The result will be an insufficient implementation of European environmental directives that

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<sup>404</sup> Deutscher Bundestag, above n 135, 11.

<sup>405</sup> Walter Frenz, 'Föderalismusreform im Umweltschutz' (2006) 25 *Neue Zeitschrift für Verwaltungsrecht* 742, 746; Kloepfer, above n 4, 567; Heike Jochum, 'Ist die legislative Kompetenzordnung des Grundgesetzes reformbedürftig? – Eine kritische Betrachtung der Vorschläge zur Reform der konkurrierenden Gesetzgebung sowie der Rahmengesetzgebung des Bundes' (2002) 35 *Zeitschrift für Rechtspolitik* 255, 256 and Kloepfer, above n 86, 338.

<sup>406</sup> Ziehm, above n 385, 3.

<sup>407</sup> Ginzky and Rechenberg, above n 68, 346.

<sup>408</sup> Ziehm, above n 385, 6.

<sup>409</sup> Ekardt and Weyland, above n 349, 741; Kloepfer, above n 105, 3 and Sachverständigenrat Umwelt, above n 54, 6.

<sup>410</sup> Hans-Joachim Koch, *Schriftliche Stellungnahme zur öffentlichen Anhörung des Rechtsausschusses des Deutschen Bundestages und des Ausschusses für Innere Angelegenheiten des Bundesrates zur Föderalismusreform, Teil III: Bereich Umweltschutz/Landwirtschaft am 18.05.2006* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Hans-Joachim\\_Koch.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Hans-Joachim_Koch.pdf)> at 22 September 2006, 4.

<sup>411</sup> *Ibid* 4-5.

might prompt an increase in the infringement procedures against Germany before the European Court of Justice according to Art. 226 *EC Treaty*.

Apart from this European dimension, the fragmentation could lead to a rise in search and information costs for industry and citizens, to competitive distortions<sup>412</sup> as well as to an obscuration of political responsibility and accountability. Furthermore, the right of the *Länder* to deviate from the federal standards might also trigger a race to the bottom or a process of eco-dumping, in that *Länder* might try to attract industry to the detriment of the environment without being stoppable by the federal level.<sup>413</sup>

This suggests that the situation that existed under the framework legislation has even been aggravated by the re-allocation of legislative competences within the ambit of the reform.<sup>414</sup>

In response to this statement, the proponents of the reform argue that, according to Art. 104a VI *Basic Law* (new), the *Länder*, together with the federation, are now liable for pecuniary penalties adjudicated by the European Court of Justice within the scope of infringement procedures against Germany pursuant to Art. 226 *EC Treaty*. This new obligation is thereby supposed to hinder the *Länder* from thwarting binding European regulations.<sup>415</sup> Furthermore, it is stated that a situation of fragmentation and highly divergent state laws will not arise, since the European environmental directives are so detailed that they do not leave the

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<sup>412</sup> Kloepfer, above n 105, 3.

<sup>413</sup> Köck and Ziehm, above n 6, 338; Ginzky and Rechenberg, above n 68, 350 and Kloepfer, above n 105, 3.

<sup>414</sup> Nierhaus and Rademacher, above n 87, 389-90.

<sup>415</sup> Walter Frenz, *Föderalismus im Umweltschutz* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Walter\\_Frenz.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Walter_Frenz.pdf)> at 22 September 2006, 18.

*Länder* any scope for individual decision- and policy-making.<sup>416</sup> But even assuming this as a fact, it needs to be asked why the new competence allocation grants the *Länder* this opportunity to deviate, if they cannot use it in a substantial way.

Apart from this critique, it must also be insisted that the right of the *Länder* to deviate from federal environmental laws under Art. 72 III 1 no. 1 to 5 *Basic Law* (new) is neither logical nor consistent with the overall system. Explaining this in more detail, the fact that the subject-matters of the concurrent competence under Art. 74 I no. 28 to 32 *Basic Law* (new) are excepted from the necessity requirement of Art. 72 II *Basic Law* (new) seems to indicate that these areas always call for a nation-wide response, making a separate examination of the necessity requirement superfluous. Granting this to be so, it is absolutely unintelligible why the *Länder* should be allowed to enact divergent legislation in exactly these spheres.

Obscuring this even more, some areas of the spheres in which the *Länder* are allowed to deviate are excluded from this right. These excluded areas are: the law concerning hunting licenses,<sup>417</sup> the general principles of nature conservation, the law concerning the protection of species, the sea nature conservation<sup>418</sup> and the material as well as the facility part of water resource management.<sup>419</sup>

Apart from the fact that this mechanism complicates the whole system of competence allocation significantly, it also triggers other problems.

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<sup>416</sup> Eppler, above n 61, 219; Kloepfer, above n 86, 339; Josef Ruthig, *Schriftliche Stellungnahme zur Anhörung 'Föderalismusreform', III. Umwelt/Landwirtschaft* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Josef\\_Ruthig.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Josef_Ruthig.pdf)> at 22 September 2006, 8 and Michael Kloepfer, *Öffentliche Anhörung des Rechtsausschusses des Deutschen Bundestages zur Föderalismusreform – Umweltschutz am 18.5.2006 – schriftliche Stellungnahme* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Michael\\_Kloepfer.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Michael_Kloepfer.pdf)> at 22 September 2006, 10.

<sup>417</sup> See Art. 72 III 1 no. 1 *Basic Law* (new).

<sup>418</sup> See Art. 72 III 1 no. 2 *Basic Law* (new).

<sup>419</sup> See Art. 72 III 1 no. 5 *Basic Law* (new).

First of all, the above-mentioned exceptions are neither defined within the law itself nor does the reasoning of the legislative initiative provide for clear-cut suggestions concerning their content or scope.<sup>420</sup> The initiative merely states that the competence over the general principles of nature conservation,<sup>421</sup> which cannot be deviated from by the *Länder*, is supposed to offer the federal level the chance to adopt general, nation-wide and binding principles for the protection of nature and especially for the preservation of biodiversity and the safeguarding of the functioning of natural life.<sup>422</sup> In contrast to this, the more detailed issues such as landscape planning or the concrete requirements for the establishment of protected areas are not part of this federal competence without deviation right of the *Länder*.<sup>423</sup> The sea nature conservation<sup>424</sup> should enable the federal legislator to enact binding regulations for the protection of biodiversity in the sea.<sup>425</sup>

In contrast to this unprofitable explanation, the law concerning the material or facility part of water resource management,<sup>426</sup> from which the *Länder* are also not allowed to deviate,<sup>427</sup> is defined as to encompass all regulation concerned with material impacts or impacts resulting from the facilities of water resource management. This aspect is further illustrated by the explanation that pollutions and dangers belong to the core of any water protection, which is in need of a federal uniform legislation.<sup>428</sup>

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<sup>420</sup> Sachverständigenrat Umwelt, above n 54, 7.

<sup>421</sup> See Art. 72 III 1 no. 2 *Basic Law* (new).

<sup>422</sup> Deutscher Bundestag, above n 135, 11.

<sup>423</sup> Ibid. Concerning the serious problems that might be triggered by the right of the *Länder* to deviate from federal laws in the area of nature conservation with respect to the Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (92/43/EEC) see Ekardt and Weyland, above n 349, 739-42.

<sup>424</sup> See Art. 72 III 1 no. 2 *Basic Law* (new).

<sup>425</sup> Deutscher Bundestag, above n 135, 11. For a detailed description of these areas see Hans Walter Louis, 'Die Gesetzgebungszuständigkeit für Naturschutz und Landschaftspflege nach dem Gesetzentwurf zur Föderalismusreform' (2006) 17 *Zeitschrift für Umweltrecht* 340, 341-2.

<sup>426</sup> For a detailed description of this area see Ginzky and Rechenberg, above n 68, 346-8.

<sup>427</sup> See Art. 72 III 1 no. 5 *Basic Law* (new).

<sup>428</sup> Deutscher Bundestag, above n 135, 11. Agreeing to this allocation of powers Terry Dinan, Maureen Cropper and Paul Portney, 'Environmental Federalism: Welfare Losses from Uniform National Drinking Water Standards' in Arvind Panagariya, Paul Portney and Robert Schwab (eds) *Environmental and Public Economics, Essays in Honor of Wallace E. Oates* (1999) 13, 13-14, 17, 29.

Having summarized the only available explanations as to what these exceptions could embrace, it becomes obvious that they are construed in a very unclear and rather narrow way.<sup>429</sup> As a consequence, constitutional debates and even legal disputes before the Federal Constitutional Court, in the scope of which state and federal level will try to expand their powers, are very likely to arise.<sup>430</sup> But since such disputes are time-consuming and costly as the Australian experiences with the World Heritage Disputes suggest,<sup>431</sup> this prospect can only be seen as a major drawback of the new regulation.

Apart from this, as hitherto the jurisdiction of the Federal Constitutional Court indicates, the rights of the *Länder* to deviate will probably be interpreted in a broad way, whilst the exceptions enabling the federal legislator to regulate areas exclusively will be construed narrowly.<sup>432</sup>

In conclusion, it is very likely that the level of fragmentation in the area of environmental protection legislation will further increase.

In scrutinising the procedure laid down in Art. 72 III 2 *Basic Law* (new), it is advanced that the six-month-period before federal concurrent legislation that gives the *Länder* a right to deviate enters into force would prevent changing legal commands to citizens.<sup>433</sup> Even though this might be true, the mechanism will most likely cause delay, legal uncertainty and a waste of financial resources. Not only is six months an excessively long period for legislation that implements European directives to enter into force, but it also encourages individual regulation by the *Länder*. This regulation involves again up to sixteen drafting committees conducting expert hearings *et cetera* in order to enact a divergent law.<sup>434</sup>

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<sup>429</sup> Ginzky and Rechenberg, above n 68, 349, 350.

<sup>430</sup> Deutscher Bundestag, Drucksache 16/654, 2 and Sachverständigenrat Umwelt, above n 54, 3.

<sup>431</sup> Bates, above n 195, 73.

<sup>432</sup> Erbguth, above n 402, 2.

<sup>433</sup> Deutscher Bundestag, above n 135, 11.

<sup>434</sup> Epiney, above n 108, 411.

Although it could be objected that in cases of pressing obligations under European law, the six-month-period could be shortened due to Art. 72 III 2 *Basic Law* (new), it must be emphasized that this provision requires a *Bundesrat* approval.<sup>435</sup> Despite the fortunate fact that the original intention to require even a two-thirds majority in the *Bundesrat* has been abandoned,<sup>436</sup> the experiences of the last decades suggest that even a simple majority will be extremely difficult to achieve once the Grand Coalition has ceased to exist on the federal level.<sup>437</sup>

After the *Länder* may have enacted their divergent legislation, the federal legislator is again entitled to pass a new law, which will then, due to Art. 72 III 3 *Basic Law* (new), prevail over the previous deviating state law. This right of the federal legislator to call back the competence (so-called ‘*Rückholklausel*’) is also feared to lead to a ping-pong-situation in which state and federal laws continuously alternate.<sup>438</sup> Even bigger problems will arise, though, when the federal legislator passes a new law, which affects a contradicting state law only partially.<sup>439</sup> It will be extremely difficult to figure out which part of the state law will be overridden by the federal law according to Art. 72 III 3 *Basic Law* (new) and what happens to the residual subject-matter that was regulated under the state law without being regulated under the conflicting federal law.

In a situation like this, the citizens are under the pitiable obligation to find out which law is applicable. Thus, according to the *lex posterior* rule laid down in Art. 72 III 3 *Basic Law* (new), they need to compare the date on which the acts entered into force. But since a partial prevailing of an act seems possible as well, it is not yet clear how this situation should or will be dealt with.

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<sup>435</sup> Deutscher Bundestag, above n 135, 11.

<sup>436</sup> See the proposed Art. 72 III 2 *Basic Law*, Deutscher Bundestag, above n 135, 2.

<sup>437</sup> Kloepfer, above n 86, 340.

<sup>438</sup> Edzard Schmidt-Jortzig, *Schriftliche Stellungnahme zur Anhörung ‚Föderalismusreform‘, Teil III: Umwelt/Landwirtschaft (Donnerstag, 18. Mai 2006)* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Edzard\\_Schmidt-Jortzig.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Edzard_Schmidt-Jortzig.pdf)> at 22 September 2006, 8.

<sup>439</sup> Dietlein, above n 394, 2.

It follows from this that the complex process laid down in Art. 72 III 2, 3 *Basic Law* (new) will trigger not only significant legal uncertainty about which law to apply, but also a large amount of search and information costs for citizens, thereby wasting resources without providing an efficient or convincing system of legislative competence allocation.<sup>440</sup>

### 3. The Allocation of the Administrative Competences

As outlined above, the 2006 reform of German federalism grants the federal legislator the power to establish the authorities and their administrative procedure even without the consent of the *Bundesrat* due to Art. 84 I 1, 2 *Basic Law* (new). This measure is intended to reduce the rate of laws that require *Bundesrat* approval from currently 60 % to approximately 35 to 40 %.<sup>441</sup>

Even though this result would be very positive, since it would allow the federal legislator to enact procedural issues complementing the material ones and thereby accelerate and streamline the decision-making process, it will come at a high price.

First of all, the dispensing with the consent requirement is balanced by a newly established right of the *Länder* to deviate from the federal regulation of the authorities and their procedure.<sup>442</sup> With the consent of the *Bundesrat*,<sup>443</sup> this deviation right of the *Länder* can be excluded only in regard to the administrative procedure and only in exceptional cases, in which a nation-wide regulation is necessary.<sup>444</sup>

Admitting that the effective implementation of environmental protection law is crucial for its success, the coalition agreement of the Grand Coalition stated that there was an agreement between the federal and state levels on the fact that regulations of the administrative procedure in the field of the environment were

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<sup>440</sup> Nierhaus and Rademacher, above n 87, 390.

<sup>441</sup> Deutscher Bundestag, above n 135, 14.

<sup>442</sup> See Art. 84 I 2 *Basic Law* (new).

<sup>443</sup> See Art. 84 I 6 *Basic Law* (new).

<sup>444</sup> See Art. 84 I 5 *Basic Law* (new).

regularly an exceptional case within the meaning of Art. 84 I 5 *Basic Law* (new).<sup>445</sup> This would mean that the federal legislator could always establish the administrative procedure in the field of the environment without giving the *Länder* a right to deviate, if the *Bundesrat* consented.

If this understanding was true, it would reverse the relationship between rule and exception as laid down in Art. 84 I 5 *Basic Law* (new). This assumption also gives rise to the question of why the execution and implementation of environmental laws was not regulated separately in the *Basic Law* Amendment as an exclusive federal competence in the first place. Such regulation would have acknowledged that a centralist implementation of environmental protection laws is crucial for successfully combating environmental degradation, it would have made the whole process much more transparent and would have granted the federal legislator a feasible power to enforce environmental measures.

Thus, even though it must be welcomed that the federal legislator now has the power to regulate the establishment of authorities and their procedure without the consent of the *Bundesrat*, it must not be forgotten that any establishment within this context that does not grant the *Länder* a right to deviate still requires the approval of the *Bundesrat* pursuant to Art. 84 I 6 *Basic Law* (new). Contrariwise, in cases in which such approval is dispensable,<sup>446</sup> the *Länder* have the right to deviate and the federal level is not capable of establishing a uniform system of implementation and enforcement.

Therefore, it needs to be asked whether this amendment is really a significant step forward in enabling uniform implementation of environmental laws. Thus, in cases in which the approval of the *Bundesrat* is required, it is no different to the problematic constitutional situation prior to the reform, whilst in cases in which the consent of the *Bundesrat* is dispensable, the *Länder* have the right to regulate

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<sup>445</sup> Coalition Agreement between CDU, CSU and SPD, *Gemeinsam für Deutschland. Mit Mut und Menschlichkeit*. (11 November 2005) SPD at <<http://koalitionsvertrag.spd.de/servlet/PB/menu/-1/index.html>> at 27 September 2006, attachment 2, no. 31, page 203. See also Deutscher Bundestag, above n 135, 15.

<sup>446</sup> See Art. 84 I 2 *Basic Law* (new).



the implementation process divergently, therefore hindering the establishment of an environmentally sound nation-wide administrative process.<sup>447</sup>

Apart from this, Art. 104a IV *Basic Law* (new) calls for the approval of the *Bundesrat* in cases in which federal laws oblige the *Länder* to supply a third party with cash benefits or with other services of a monetary value. Since such obligations are often caused by federal laws that are executed by the *Länder* in their own right, this provision is likely to reveal itself as major trigger for the requirement of a *Bundesrat* approval to federal laws.

In conclusion, it is extremely doubtful whether the amended provisions of the *Basic Law* concerning the execution of federal laws by the *Länder* will both reduce the number of federal laws that require the consent of the *Bundesrat* and enable the federal legislator to implement a uniform nation-wide implementation and enforcement process for environmental law.<sup>448</sup>

#### 4. Conclusion

Summing up, the new allocation of legislative and administrative competences concerning the environment under the amended German *Basic Law* is not at all likely to promote sound environmental decision-making.

Rather, the re-allocation relies on a highly complex division of powers, which hinders any clear-cut relation of responsibility and accountability to the relevant level of government.<sup>449</sup> Therefore, the main goals of the reform – to reduce fragmentation and duplication whilst streamlining the decision-making processes and increasing transparency – are not achieved.<sup>450</sup>

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<sup>447</sup> Concerning the procedural part of the deviation right, namely, the *lex posterior* rule, it must be stated that Art. 84 I 4 *Basic Law* (new) refers to Art. 72 III 3 *Basic Law* (new) so that the same objections applicable to the latter are valid for the former as well. See chapter D. I. 2. d).

<sup>448</sup> Schmidt-Jortzig, above n 438, 6.

<sup>449</sup> Köck and Ziehm, above n 6, 337.

<sup>450</sup> *Ibid* 337-8.

Apart from these procedural aspects, the material part of the reform is not satisfactory either. Although the main objective of the reform was to make the German system fit for the European challenges, a right of the *Länder* to deviate from federal laws was implemented. This deviation right is not only diametrically opposed to any attempt to achieve legal harmonisation, but also to the successful and consistent adoption of an integral approach. Thus, although it is argued that the federal level would now be able to adopt an integral approach and enact a comprehensive environmental code (*Umweltgesetzbuch*),<sup>451</sup> it is obvious that the deviation right of the *Länder* will thwart any federal efforts within this context.<sup>452</sup> It is therefore absurd to claim the federal level now has the chance to successfully implement an integral, cross-sectoral and cross-medial nation-wide approach to environmental protection.

Rather, it is likely that the *Länder* will use their deviation right in order to attract industry to the detriment of the environment, making any federal effort such as a federal environmental code obsolete. Furthermore, the interdependencies of environmental media and the transboundary effects of environmental degradation cannot be accommodated by the federal level if the *Länder* have the right to counteract federal measures.<sup>453</sup>

Apart from this, it is also apparent that the current reform does not remedy the other drawbacks of decentralist decision-making such as the lack of timeliness and cost-efficiency as well as the provision of legal certainty for citizens and industry.<sup>454</sup>

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<sup>451</sup> Volker Kröning, "Bestehende föderale Ordnung überholt" Präsidiale Mahnung und Parteienverantwortung' (2006) 42 *Recht und Politik* 9, 14.

<sup>452</sup> Christian Schrader, *Schriftliche Stellungnahme als Sachverständiger für die Anhörung des Rechtsausschusses des Deutschen Bundestages sowie des Bundesrates zur Föderalismusreform im Umweltbereich am 18. Mai 2006* (2006)

Bundestag  
<[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Christian\\_Schrader.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Christian_Schrader.pdf)> at 22 September 2006, 8-9, 10-1 and Erbguth, above n 402, 1.

<sup>453</sup> Kloepfer, above n 105, 2.

<sup>454</sup> See chapter C. II. 5., IV., V..

In the end, the rights of the *Länder* to regulate environmental issues have been strengthened, whilst the power of the federal level to adopt a unifying approach has been significantly weakened.

## II. Assessment of the Australian Cooperative Federalism Approach under the *EPBC Act*

### 1. Preliminary Remarks

As already outlined above,<sup>455</sup> the development of federal-state-relations within the context of Australian environmental decision-making culminated in the enactment of the *EPBC Act 1999* (Cth) as an expression of the cooperative federalism approach.<sup>456</sup>

But although the *EPBC Act* is currently regarded as the heart of Commonwealth environmental law, it has minimal effect on the dynamics of environmental management in Australia.<sup>457</sup> Quite to the contrary, the *EPBC Act* confines the scope of possible Commonwealth involvement in environmental decision-making to a small number of matters of national environmental significance.<sup>458</sup> This extremely narrow ambit of potential Commonwealth engagement suggests that the *EPBC Act* in fact promotes a process of increasing decentralisation from the Commonwealth to the state and territory level.<sup>459</sup>

In assessing the implications that the *EPBC Act* is likely to have on sound environmental decision-making in light of the theoretical discussion above,<sup>460</sup> it becomes apparent that exactly such a devolution of powers is risky in terms of successful environmental protection.

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<sup>455</sup> See chapter B. II..

<sup>456</sup> For a detailed explanation of the *EPBC Act* see Chris McGrath, 'Key Concepts of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2004) 22 *Environmental and Planning Law Journal* 20 and Ogle, above n 259.

<sup>457</sup> Peel and Godden, above n 10, 682.

<sup>458</sup> Hughes, above n 255, 307.

<sup>459</sup> Chapple, above n 257, 524 and Longo, above n 245, 242.

<sup>460</sup> See chapter C..

Apart from the main argument that such a narrow scope of central decision-making neglects the inherent inter-connections between all ecosystems as well as the consequential impossibility of localising any environmental degradation,<sup>461</sup> another pivotal point is that the Australian states and territories might be unwilling to tackle environmental problems to the extent necessary.<sup>462</sup>

The principle reason for this, dating back to colonial times, is that the Australian states have always been and still are highly active in the field of development and economic policy,<sup>463</sup> rendering them rather unenthusiastic about costly environmental protection measures. Since the federation deprived the states of the primary revenue raising powers such as tariffs that are necessary to attract investment and foster industrial development, without simultaneously eliminating citizens' expectations that the state government will provide for economic growth, it is highly unlikely that states will favour environmental protection that turns out to be detrimental for development and investment.<sup>464</sup> The inevitable consequence of this attitude is that states focus on promoting economic growth and development that is beneficial for their citizens, while displacing the environmental costs of this development onto the nation as a whole or onto future generations.<sup>465</sup>

It follows from this, that the one-sided allocation of powers to regulate environmental matters to the state level is not likely to prompt sound environmental decision-making. Quite to the contrary, it suggests that the Commonwealth should take a strong leadership role in environmental decision-making to protect the environment for future generations, since the implementation of strict protection measures cannot necessarily be expected from the states.<sup>466</sup> This is especially indicated, because the policy considerations at the

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<sup>461</sup> Hughes, above n 255, 308 and Laura Hughes, 'Environmental Impact Assessment in the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (1999) 16 *Environmental and Planning Law Journal* 441, 445.

<sup>462</sup> Lindell, above n 1, 134 and Longo, above n 245, 242.

<sup>463</sup> Galligan and Fletcher, above n 4, 8-9.

<sup>464</sup> Kellow, above n 167, 137.

<sup>465</sup> *Ibid* 137-8.

<sup>466</sup> Hughes, above n 255, 308.

Commonwealth level are significantly different from their state and territory counterparts, enabling the Commonwealth to neglect economic considerations in favour of environmental ones.<sup>467</sup>

But in contrast to this reasoning and although the Commonwealth possesses the necessary constitutional powers to do otherwise, the current political situation under the *EPBC Act* reveals that the Howard government prefers the adoption of a cooperative approach. In this approach, the principal areas of environmental protection are either assigned to the states and territories as their direct responsibility or as a responsibility that is delegated to them by the Commonwealth.<sup>468</sup>

In conclusion, there is a discrepancy between the desirability of a more centralist approach to environmental decision-making, requiring the Commonwealth government to become more active in this area of policy-making, and the actual willingness of the current Commonwealth government to do so.

## 2. The *Booth Case*

Pursuing the aim of forcing the Commonwealth government into a more active role in environmental protection policies, environmentalists initiated two test cases concerning the application of the *EPBC Act*.<sup>469</sup>

The central issue in the case *Booth v Bosworth*<sup>470</sup> was whether the triggers in the *EPBC Act*, that prompted a Commonwealth approval requirement within the environmental impact assessment, needed to be interpreted in a broad rather than in a narrow way.<sup>471</sup> If a broad interpretation was decided upon, it would mean

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<sup>467</sup> Ibid.

<sup>468</sup> See chapter B. II. 3. d). See also Hughes, above n 255, 326.

<sup>469</sup> Peel and Godden, above n 10, 683.

<sup>470</sup> See *Booth v Bosworth* (2001) 114 FCR 39.

<sup>471</sup> See especially Chris McGrath, 'The Flying Fox Case' (2001) 18 *Environmental and Planning Law Journal* 540.

that the number of cases in which Commonwealth approval was needed would significantly increase.

*Booth v Bosworth* concerned a farmer who operated an electric grid, which he used to electrocute large numbers of Spectacled Flying Foxes in order to protect his lychee orchard. The particular significance of this case was that the lychee orchard was situated in close proximity to the Wet Tropics World Heritage Area in Queensland without being part of it.<sup>472</sup>

Since the relevant trigger in the *EPBC Act* is World Heritage properties, a narrow interpretation would have concluded that the lychee orchard was not part of a World Heritage property, thereby not triggering the requirement for Commonwealth approval for the operation of the electric grid. It is obvious that such an interpretation would significantly limit the scope of Commonwealth involvement in environmental decision-making.

Contrariwise, the Federal Court adopted a much broader approach to interpreting the trigger in the *EPBC Act*. Arguing that the Spectacled Flying Fox is a species that is itself an integral part of the Wet Tropics World Heritage Area enhancing its biodiversity, it held that any activity that is likely to have a significant impact on this species is also likely to have a significant impact on the World Heritage property of which it is a part.<sup>473</sup>

Thus, the Federal Court adopted a broad interpretation, accepting indirect triggers for the Commonwealth approval requirement under the *EPBC Act* and paving the way for an extended Commonwealth role in environmental management.

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<sup>472</sup> *Booth v Bosworth* (2001) FCA 1453.

<sup>473</sup> *Ibid* paragraphs 67-8, 103, 105.

### 3. The *Nathan Dam Case*

Encouraged by this promising judgment of the Federal Court, in 2002 the Queensland Conservation Council together with the World Wide Fund for Nature (Australia) challenged yet another dam project in order to broaden the scope of the Commonwealth's involvement in the environmental impact assessment under the *EPBC Act*.<sup>474</sup>

Enjoying the strong support of the Queensland government,<sup>475</sup> the proposal for the Nathan Dam envisaged the erection of an 880,000 mega-litre dam with 27 m high walls which would have rendered it the fourth largest in Queensland.<sup>476</sup> The site of the Nathan Dam was conceived to be in Central Queensland near Taroona on the Dawson River with the latter flowing into the Fitzroy River and eventually after a distance of 500 kilometres into the Great Barrier Reef lagoon near Rockhampton.<sup>477</sup> After the completion of the project, which was intended to be in 2005, the dam would have discharged water for agricultural, industrial, urban and environmental uses once in operation.<sup>478</sup>

The driving force behind this whole project was economic considerations that were triggered by the substantial development potential of the lower Dawson River Valley. But due to the significant lack of reliable water supply in this region, it was unable to realise its agricultural and industrial potential for cotton ginning, food processing, growing industry and diversified cash crops.<sup>479</sup> This capacity to attract more industry and investment was supposed to be realised by the erection of the Nathan Dam, which would have provided water for the irrigation of 60,000 hectares of land that had been identified as suitable for sustainable

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<sup>474</sup> Peel and Godden, above n 10, 684.

<sup>475</sup> *Ibid.*

<sup>476</sup> WWF-Australia, *Nathan Dam Court Win Confirms Major Expansion of Federal Environmental Powers* (2004) WWF-Australia <<http://www.wwf.org.au/news/n142/>> at 11 September 2006 and Queensland Conservation Council, *Summary of the Nathan Dam Case* <[http://www.qccqld.org.au/rivers\\_alive/newsletter/December/NathanDamCaseSummary.pdf](http://www.qccqld.org.au/rivers_alive/newsletter/December/NathanDamCaseSummary.pdf)> at 21 September 2006.

<sup>477</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190, paragraph 10.

<sup>478</sup> *Ibid* paragraph 58.

<sup>479</sup> *Ibid* paragraph 59.

irrigation. The dam would have made possible a threefold increase in cotton production from 24,000 to 60,000 hectares,<sup>480</sup> let alone the potential for the growth of other industries, significantly enhancing employment opportunities for the inhabitants of this region.

But it was exactly this prospect of a booming cotton industry that triggered the serious concern of environmentalists with regard to the adverse impacts an industry like this would have on the Great Barrier Reef World Heritage Area.

Their particular concern was that cotton growing requires a high usage of fertilisers and pesticides such as endosulfan, which needs to be applied aerially and which is toxic to many fauna, especially to fish.<sup>481</sup> Moreover, the intensified use of this pesticide would lead to a noteworthy increase in the phosphorus and nitrogen levels in the water,<sup>482</sup> having a major influence on the riverine developments, the floodplains and the estuarine habitats downstream of the dam. Ultimately, a major increase in the nutrient loading to the Great Barrier Reef had to be expected, which was again likely to cause algal blooms that are responsible for the killing of marine mammals and plants.<sup>483</sup>

According to the Great Barrier Reef Marine Park Authority, in 2004 the endosulfan, atrazine, phosphorus, nitrogen and sediment levels already exceeded the standard that had been deemed acceptable by the Australian and New Zealand Environment and Conservation Council.<sup>484</sup> But since the Nathan Dam would have led to a huge expansion of agriculture in the region, the amount of toxic substances would have exploded and this would pose a major threat to the fragile ecosystem downstream in the Great Barrier Reef.<sup>485</sup>

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<sup>480</sup> Melissa Sullivan, *Will Damming the Dawson Hurt the Reef?* ABC News <<http://www.abc.net.au/news/features/ocean/rockhampton.htm>> at 11 September 2006.

<sup>481</sup> Queensland Conservation Council, above n 476.

<sup>482</sup> *The Nathan Dam: Queensland's First Private Water Development* (1999) ABC Radio <<http://abc.net.au/rn/science/earth/stories/s19518.htm>> at 17 August 2006.

<sup>483</sup> Sullivan, above n 480.

<sup>484</sup> *Ibid.*

<sup>485</sup> Peel and Godden, above n 10, 685.



Apart from these potential impacts of an increased sediment, nutrient, and pesticide pollution of the Great Barrier Reef, the Nathan Dam would have also changed the flow of the Fitzroy River affecting the salinity and mangrove systems and thereby disrupting the breeding and migration patterns of tropical and temperate fish species.<sup>486</sup>

But despite all these indicators, in 2002 the Federal Minister for Environment and Heritage, then Dr David Kemp, decided not to consider up to 30,000 hectares of associated irrigated agriculture on the Dawson Floodplain and the resultant likely impacts on the Great Barrier Reef World Heritage Area when conducting the impact assessment under the *EPBC Act*.<sup>487</sup> Arguing that the scope of the necessary inquiry was legally confined to impacts that are ‘inextricably involved’ with the proposed action,<sup>488</sup> the Minister was of the opinion that the proposed action was unlikely to have a significant impact on the World Heritage values of the declared World Heritage property and subsequently decided not to nominate ss 12, 15A or ss 20 and 20A *EPBC Act*<sup>489</sup> as the controlling provisions for the proposed action of building the Nathan Dam.<sup>490</sup>

The legal question that emerged in this case was whether the impact assessment of the proposed dam could ignore the impacts that the anticipated development projects would have on the environment, even though the activities for which the dam was built would have hazardous effects on the environment.<sup>491</sup> To put it another way, the Federal Court had to specify the scope of the impacts on the

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<sup>486</sup> Sullivan, above n 480.

<sup>487</sup> Queensland Conservation Council, above n 476.

<sup>488</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190, paragraph 35.

<sup>489</sup> Whilst ss 12 and 15A *EPBC Act* prescribe civil and criminal penalties for persons taking an action that has or will have a significant impact on the world heritage values of a declared World Heritage property, ss 20 and 20A *EPBC Act* trigger the same consequence as a result of taking an action that has or is likely to have a significant impact on listed migratory species.

<sup>490</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190, paragraph 18.

<sup>491</sup> D. E. Fisher, ‘The Meaning of Impacts – The Nathan Dam Case on Appeal’ (2004) 21 *Environmental and Planning Law Journal* 325, 325.

matters of national environmental significance that had to be considered as relevant by the federal Minister for the impact assessment under the *EPBC Act*.<sup>492</sup>

Taking a strictly narrow view, the federal Minister for Environment and Heritage argued that the relevant impacts requiring consideration could only be impacts that are subject to the control of the project's proponent.<sup>493</sup> Allegedly, the reason for this was that the *EPBC Act* triggered criminal and civil liability of persons taking prohibited actions without approval of the Commonwealth minister.<sup>494</sup> And since such liability could only attach to voluntary actions that underlie the control and influence of the liable party, the federal Minister was not allowed to take other issues into consideration that did not underlie the control of the respective proponents.<sup>495</sup> Applying these thoughts to the *Nathan Dam Case*, the federal Minister neglected to take into consideration the use of fertilisers by third parties, notably by the agricultural industry, as this was not subject to the control of the proponents of the project, namely of Sudaw Developments Limited, the builders of the dam.

Contradicting this view, the environmental groups were of the opinion that the assessment of the federal Minister under the *EPBC Act* should take all impacts into account that were relevant on grounds of the factual situation of the specific case, even if this would include agriculture or other development projects of third parties. Elaborating on this, their argumentation regards all acts of third parties relevant, if they are intended to follow or occur in conjunction with the proponent's action or if these impacts are normal and ordinary. Applying these deliberations to the case in question, it becomes apparent that the dam was not only absolutely necessary for the anticipated agriculture and development projects, but that it solely aimed at making development and economic growth in this region possible. Therefore, the dam intended both to facilitate an expansion

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<sup>492</sup> See generally D. E. Fisher, 'Dams, Irrigation and World Heritage Areas – The Nathan Dam Case' (2004) 21 *Environmental and Planning Law Journal* 85.

<sup>493</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190, paragraph 36.

<sup>494</sup> See ss 12, 15A, 20, 20A *EPBC Act*.

<sup>495</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190, paragraph 36.

of agriculture coupled with an increase in pesticide use and to realise a huge variety of other development projects.

From this point of view, it is arguable that the adverse impacts of the agricultural development proposals had to be taken into account when assessing the impacts of the dam, while the Minister's approach would mean an artificial isolation of the proposed construction and operation of the dam from the downstream development it would enable.<sup>496</sup>

Ultimately in July 2004, the Full Federal Court of Australia decided that the Commonwealth Minister had to consider potential downstream impacts of irrigated agriculture and other development projects arising from the erection of the proposed Nathan Dam.<sup>497</sup>

The Federal Court based its decision upon the meaning of the term 'impact' within the *EPBC Act*. Thus, due to its ordinary meaning, the word 'impact' could encompass indirect consequences of an action as well as the results done by persons other than the principal actor.<sup>498</sup> In this sense, 'impact' was not confined to direct physical effects of the action on the matter protected by the relevant provision of Chapter 2, Part 3 *EPBC Act*, namely the Great Barrier Reef World Heritage Area. Quite to the contrary, it included effects that were sufficiently close to the action to allow it to be said, without straining the language, that they were or would be the consequences of the action on the protected matter.<sup>499</sup>

Accordingly, s 75 (2) *EPBC Act* requires the federal Minister to consider each way in which a proposed action will, or is likely to, adversely impact on or affect the World Heritage values of a declared World Heritage property or a listed migratory species. Within this context, the phrase 'all adverse impacts' encompasses each

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<sup>496</sup> Queensland Conservation Council, above n 476.

<sup>497</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190.

<sup>498</sup> *Ibid* paragraph 53.

<sup>499</sup> *Ibid* paragraph 53.

consequence, which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not.<sup>500</sup> In the end, the width of the enquiry in each case will depend on its facts and on what may be inferred from the description of the ‘action’ which the Minister is required to consider at the threshold of the process that leads to the permitting or proscribing of the action.<sup>501</sup>

As a result, this judgment did not declare that the Nathan Dam project had to be stopped, but it required the proponent Sudaw to conduct an assessment with regard to the downstream impacts of the envisaged dam on the Great Barrier Reef World Heritage Area. Thereby, this judgment ensured that all decisions taken under the *EPBC Act* have to consider all impacts of the action in question, including any cumulative and continuing effects.<sup>502</sup>

Apart from this direct and practical outcome, the judgment of the Full Federal Court in the *Nathan Dam Case* coupled with the one in the *Booth v Bosworth Case*<sup>503</sup> has had more far-reaching implications for the allocation of environmental competences in Australia.

Both judgments indicate that the scope of the Commonwealth environmental impact assessment regime under the *EPBC Act* as interpreted by the jurisdiction of the Federal Court is significantly broader than the one that had originally been envisaged by the drafters of the act as a response to the policy commitments of the cooperative federalism approach.<sup>504</sup> Elaborating on this finding, the *Nathan Dam Case*<sup>505</sup> could have provided the stimulus for the Commonwealth government to take greater responsibility in managing the environmental impacts

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<sup>500</sup> Ibid paragraph 57.

<sup>501</sup> Ibid paragraph 61.

<sup>502</sup> Nicole Sommer, ‘Note, Queensland Conservation Council Inc v Minister for the Environment and Heritage (2003) FCA 1463 (“Nathan Dam Case”)’ (2004) 9 *The Australasian Journal of Natural Resources Law and Policy* 145, 152.

<sup>503</sup> See chapter D. II. 2.. See also *Booth v Bosworth* (2001) FCA 1453.

<sup>504</sup> Peel and Godden, above n 10, 689.

<sup>505</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190.

of development proposals in Australia.<sup>506</sup> And indeed, the judicial interpretation of the Commonwealth's role under the *EPBC Act* was welcomed by many environmental groups as yet another confirmation of the immense power the Commonwealth had gained over the regulation of environmental subject-matters.

But despite these promising judgments that encouraged a greater Commonwealth involvement in environmental management in Australia, and despite the far-reaching expectations of the environmental movement, the current Commonwealth government has shown little interest in expanding its role.

#### 4. Conclusion

As a result of the cooperative federalism approach underlying policy instruments such as the IGAE or the CoAG, a devolution of powers occurred, allocating the competences to regulate environmental matters and to conduct environmental management to the state rather than to the federal level.<sup>507</sup> Accordingly, the Commonwealth retained only the powers over matters of national environmental significance under the environmental impact assessment scheme of the *EPBC Act*.<sup>508</sup>

Against this background of an increasing decentralisation, the two emerging cases of *Booth v Bosworth*<sup>509</sup> and the *Nathan Dam*<sup>510</sup> intended to expand the scope of Commonwealth involvement in environmental management. But even though these two judgments of the Federal Court significantly broadened the ambit of the Commonwealth's responsibility for conducting environmental impact assessments under the *EPBC Act*, the present Commonwealth government has refused to take over this extended responsibility for the environment by adopting legislative or administrative means.<sup>511</sup>

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<sup>506</sup> Peel and Godden, above n 10, 691.

<sup>507</sup> Kate Crowley, 'Environmental Policy' in John Summers, Dennis Woodward and Andrew Parkin (eds) *Government, Politics, Power and Policy in Australia* (7<sup>th</sup> ed, 2002) 483, 497.

<sup>508</sup> See chapter 2, part 3, division 1 of the *EPBC Act*.

<sup>509</sup> *Booth v Bosworth* (2001) FCA 1453.

<sup>510</sup> *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) FCAFC 190.

<sup>511</sup> Peel and Godden, above n 10, 691.

### III. Comparison and Conclusion

Elaborating on the deliberations outlined above, it becomes apparent that in both Australia and Germany the debate on whether a centralist or a decentralist approach promotes sound environmental decision-making has been revived in recent years.

Since the outcome of the theoretical discussion above strongly advocates the adoption of a centralist approach to efficient environmental decision-making,<sup>512</sup> the degree to which the German and the Australian allocation of powers puts this suggestion into action must be scrutinised.

In Germany, on grounds of the traditional importance of the framework competence in the field of environmental protection legislation under the old *Basic Law*,<sup>513</sup> the *Länder* possessed a large margin for making individual decisions on environmental management. This devolutionary trend was opposed to the overall tendency in German decision-making, according to which an increasing centralisation evolved from the *Länder* to the federal level especially in the sphere of economic policy.<sup>514</sup>

As a result of these circumstances coupled with the willingness of the *Länder* to use their constitutional powers for individual decision-making, significant problems arose such as the fragmentation of both statutory regulations and implementation processes, let alone the problems triggered by the inability of the old German system to accommodate the responsibilities of Germany as a Member State of the EC. Consequently, the old German constitutional system featured decentralist traits in the field of environmental protection, which are diametrically opposed to the implications of the theoretical discussion emphasising

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<sup>512</sup> See chapter C..

<sup>513</sup> See chapter B. I. 1. a) and chapter B. I. 2. a), d).

<sup>514</sup> Nierhaus and Rademacher, above n 87, 389 and Michael Kloepfer, 'Aspekte eines Umweltstaates Deutschland – eine umweltverfassungsrechtliche Zwischenbilanz' in Klaus-Peter Dolde (ed) *Umweltrecht im Wandel, Bilanz und Perspektiven aus Anlass des 25-jährigen Bestehens der Gesellschaft für Umweltrecht (GfU)* (2001) 745, 762.

the benefits of a strictly centralist approach for effective environmental protection.

This discrepancy between theory and practice became increasingly problematic, particularly within the context of the growing amount of European environmental regulation, thereby prompting calls for a constitutional reform from both federal and state level.

The result of this debate was the enactment of the reform of federalism in July 2006 by *Bundestag* and *Bundesrat* that provided for a more centralised allocation of environmental powers on the one hand, while conceding the *Länder* a right to deviate from both federal laws and federal implementation processes.

But, as outlined above, this reform of the German federalism does not adopt a convincingly centralised approach to environmental decision-making, since the extensive right of the *Länder* to deviate from federal regulations thwarts the centralising feature that the re-allocation of environmental powers from the framework to the concurrent federal competence has sought to achieve. Furthermore, the fact that the reform has even been hailed to promote a federalism, in the scope of which the *Länder* are deemed to be in constant competition (*Wettbewerbsföderalismus*) for better or more efficient solutions,<sup>515</sup> it is obvious that an effectively centralist decision-making capacity at the federal level is neither intended nor attained.

Quite to the contrary, sixteen *Länder* now have the right to enact divergent environmental legislation without having to fit into a confining federal framework. Thus, the severe drawbacks of the decentralist approach under the framework competence are likely to continue or even to increase.

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<sup>515</sup> Ginzky and Rechenberg, above n 68, 344.

In this situation of fragmented, inconsistent environmental regulation and laxer standard-setting, it could be suggested that the German federalist system under the amended *Basic Law* should adopt the Australian cooperative federalism approach as a means of coordinating its environmental protection policy and management.

Elaborating on this proposal, the adoption of the Australian cooperative approach would allow a consultation process between the federal government and the sixteen *Länder* governments aiming at the conclusion of an intergovernmental agreement. Within the Australian context, the cooperative approach encompasses the conclusion of agreements, allocating, clarifying and defining the respective roles and responsibilities of the Commonwealth and its state and territory counterparts in the field of the environment. Assigning this approach to the German situation, it could involve a federal-state-consensus concerning a specific piece of legislation that is either passed by the federal level without any divergent legislation on the side of the *Länder* despite their legal ability to do otherwise, or the consensus could be implemented by sixteen pieces of identical *Länder* legislation.

But even though such a cooperative approach seems to be a ready-made remedy for counteracting excessive decentralist features within a federal system, it should not be forgotten that it is not without drawbacks. Its potential pitfalls are evident not only in the general problem of the lowest common denominator principle,<sup>516</sup> but also in the Australian experience with the cooperative approach to environmental decision-making.

Thus, the period of cooperative federalism in Australia was characterized by an increasing withdrawal of the Commonwealth from environmental management and policy-making, allocating the main competences in this field to the states and territories, while confining the Commonwealth's responsibility to matters of

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<sup>516</sup> See chapter C. IV.. See also Lindell, above n 1, 132.



national environmental significance.<sup>517</sup> This overall trend in Australian environmental politics ultimately culminated in the enactment of the *EPBC Act*, which is regarded as the centrepiece of Commonwealth environmental law. In fact, this act manifested the strictly limited nature of the Commonwealth's involvement in environmental decision-making to very narrowly defined matters of national environmental significance.

This development towards a devolution rather than towards a centralisation of environmental competences in Australia, coupled with the traditional focus of the states and territories on economic development and growth, can be seen as a process that puts the integrity of the environment at risk by surrendering this crucial political field to states and territories that have shown an unwillingness to tackle environmental issues that are costly to businesses and industry.

Accordingly, the *Nathan Dam Case* made it clear that a reliance on states and territories as protector of the environment is likely to backfire in the presence of promising development proposals irrespective of their detrimental environmental implications. But simultaneously, this case also provided an excellent vehicle for environmental groups to force the Commonwealth to adopt a more active and decisive role in environmental policy and management under the *EPBC Act*, thereby prompting a reawakening of the general debate on the advantages and disadvantages of centralist decision-making and control over environmental protection and natural resource management.<sup>518</sup>

Fulfilling the expectations of the environmental groups, the Full Federal Court expanded the Commonwealth's responsibilities under the environmental impact assessment of the *EPBC Act* by taking a broad approach to interpreting the triggers for Commonwealth involvement. But despite this expanded legal ability of the Commonwealth to get involved in environmental management, the present

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<sup>517</sup> Love, above n 252, 16-7.

<sup>518</sup> Peel and Godden, above n 10, 683-4.

Howard government has shown little interest in extending its engagement in environmental decision-making.<sup>519</sup>

It must be concluded from this that even though policy documents such as the IGAE contradicted the assumption that one level of government would ever be able to combat environmental degradation on its own, the subsequent development of the *Nathan Dam Case* showed that a strictly centralist approach to decision-making is necessary to provide for efficient environmental protection. Hence, it goes without saying that the cooperative approach in Australia would be enhanced by greater Commonwealth involvement, thereby profiting from more of the benefits encompassed in a centralised approach to environmental decision-making.

In conclusion, the Australian cooperative approach with its current strong focus on state decision-making coupled with a Commonwealth reluctance to expand its role within this area has not proved to be convincing in ensuring efficient environmental protection.

Apart from this, the more general conclusion that can be drawn from the early Australian experience as well as from the German experience under the old *Basic Law* suggests that any division of environmental competences between different layers of government will either lead to a situation of disputes and debates, causing costly frictions without promoting sound environmental decision-making, or it will lead to a situation of fragmentation prompting problems such as competitive distortions, neglect of the inherent inter-connectedness of ecosystems, high search costs and different standards in environmental protection, let alone the promotion of economic growth and development to the detriment of the environment.

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<sup>519</sup> Crowley, above n 507, 483.

It follows from this that both the new German approach under the amended *Basic Law* as well as the Australian cooperative federalism approach are in need of further reform.

Whilst the Australian cooperative approach should give way to an extensive role for the Commonwealth in environmental decision-making and management, reflecting the extensive powers the Commonwealth currently enjoys according to the judicial interpretation of both the *Commonwealth of Australia Constitution Act* and the *EPBC Act*, Germany should implement a concurrent federal competence concerning the environment as a whole (*Recht der Umwelt*) without giving the *Länder* a right to deviate and without being bound by the necessity requirement.<sup>520</sup>

Even though some might object that such a strict centralisation would make it impossible for the decision-makers to accommodate local peculiarities, this argument can be defeated by enabling the federal level to implement statutory deviation rights for the states or the local level in areas in which either local peculiarities are significant or in areas in which local or state regulation is innocuous for the efficiency of environmental protection.<sup>521</sup>

All in all, it must be stated that the main thrust of the German reform of federalism within the context of the environment must be welcomed as an effort to implement a more centralist decision-making regime, since this corresponds with the implications of the theoretical discussion on that issue. But despite this promising aim, the actual content of the reform, conferring the *Länder* an extensive right to deviate from federal legislation, follows an approach that is very likely to promote even more decentralist decision-making instead of furthering centralism.

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<sup>520</sup> Fenner and Wustlich, above n 6, 604.

<sup>521</sup> Sachverständigenrat Umwelt, above n 54, 3 and Astrid Epiney, *Föderalismusreform und Europäisches Umweltrecht, Einige Bemerkungen zur Kompetenzverteilung Bund – Länder vor dem Hintergrund der Herausforderungen des europäischen Gemeinschaftsrechts* (2006) Bundestag <[http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03\\_Umwelt/Stellungnahmen/Prof\\_Dr\\_Astrid\\_Epiney.pdf](http://www.bundestag.de/ausschuesse/a06/foederalismusreform/Anhoerung/03_Umwelt/Stellungnahmen/Prof_Dr_Astrid_Epiney.pdf)> at 22 September 2006, 4.

Therefore, the reform of German federalism must be criticised for not adopting a concurrent federal competence concerning the environment as a whole. This approach is now working its way out increasingly in Australia, where the judicial interpretation of the *EPBC Act* forces the Commonwealth to take a more general and much more active role in environmental management and decision-making to the detriment of the rights of the states and territories. This centralist thrust is driven by environmental groups that regard such an approach as crucial to successfully combating environmental degradation, in view of the inability and lack of political will of the Australian states to ensure effective environmental protection.

Accordingly, even though the prospect of a re-reform of the competence allocation under the German *Basic Law* in the near future is infinitesimal, a further expansion of the federal power within the area of environmental decision-making, leading to a more centralist system without deviation rights on side of the *Länder*, is pivotal for efficient environmental protection. Therefore, the only direction of further reform efforts can be the adoption of a concurrent federal competence for the environment as a whole.<sup>522</sup> But as long as the prospects of such reform efforts remain poor, the task is to encourage the *Länder* to exercise restraint in using their right to deviate from federal legislation for the sake of the environment.

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<sup>522</sup> Fenner and Wustlich, above n 6, 604.

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