Commonwealth v Tasmania ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1 (1 July 1983)

HIGH COURT OF AUSTRALIA

THE COMMONWEALTH OF AUSTRALIA v. TASMANIA. THE TASMANIAN DAM CASE [1983] HCA 21; (1983)

158 CLR 1

Constitutional Law (Cth) - International Law

High Court of Australia

Gibbs C.J.(1), Mason(2), Murphy(3), Wilson(4), Brennan(5), Deane(6) and Dawson(7) JJ.

CATCHWORDS

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - External affairs - International Convention - Implementation by statute - International obligation - International concern - Subject-matter of Convention not within specific head of Commonwealth legislative power - Convention for the Protection of the World Cultural and Natural Heritage - Inconsistency between Commonwealth and State laws - State statute authorizing construction of dam in described area - Commonwealth statute and regulations prohibiting works likely to damage or destroy national heritage - Application of statute and regulations to dam construction area - The Constitution (63 & 64 Vict. c. 12), ss. 51(xxix), 109 - National Parks and Wildlife Conservation Act 1975 (Cth), ss. 69, 171 - World Heritage Properties Conservation Act 1983 (Cth), ss. 3, 6, 9 - Gordon River Hydro-Electric Power Development Act 1982 (Tas.) - World Heritage (Western Tasmania Wilderness) Regulations 1983 (Cth).

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - Trading corporations formed within the Commonwealth - Prohibition of certain acts by trading corporation done for purposes of its trading activities - Acts not inherently concerned with trade - Trading corporation - State hydro-electricity authority incorporated by special statute - The Constitution (63 & 64 Vict. c. 12), s. 51(xx) - World Heritage Properties Conservation Act 1983 (Cth), ss. 3, 7, 10 - Hydro-Electric Commission Act 1944 (Tas.).

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - People of any race for whom deemed necessary to make special laws - Declaration of necessity to enact law as special law for the people of Aboriginal race - Prohibition of certain acts on site within specified area without ministerial consent - Specified area to form part of cultural or natural heritage - Sites to have special significance to people of Aboriginal race - Prohibited acts: damage destruction or removal of artefacts or relics on site - The Constitution (63 & 64 Vict. c. 12), s. 51 (xxxi) - World Heritage Properties Conservation Act 1983 (Cth), ss. 3, 8, 11, 13.

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - World Heritage Properties Conservation Act 1983 (Cth), ss. 6(e), 9.

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - Prohibition of use of land within specified areas without ministerial consent - Whether acquisition of property - Whether just terms - Provision for determination of compensation - Failure to accept compensation recommended by Commission of Inquiry a condition to right for judicial determination - The Constitution (63 & 64 Vict. c. 12), s. 51 (xxxi) - World Heritage Conservation Properties Act 1983 (Cth), ss. 6-11, 17, 20 - World Heritage (Western Tasmania Wilderness) Regulations.

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - Trade and commerce - Use of waters of rivers for conservation or irrigation - Right of State or residents thereof - Prohibition of abridgment by Commonwealth law or

regulation of trade and commerce - Commonwealth statute and regulations prohibiting certain works within specified area without ministerial consent - State statute authorizing damming of river for hydro-electricity generation - Works prohibited without Commonwealth ministerial consent - Whether Commonwealth laws are laws or regulations of trade or commerce - The Constitution (63 & 64 Vict. c. 12), s. 100 - National Parks and Wildlife Conservation Act 1975 (Cth), s. 69 - World Heritage Properties Conservation Act 1983 (Cth), ss. 6-11 - World Heritage (Western Tasmania Wilderness) Regulations 1983 (Cth).

Constitutional Law - Commonwealth power - Implied prohibitions - Laws impairing legislative or executive functions of State - Laws affecting State prerogative concerning Crown land.

International Law - International Convention - Interpretation - Obligations of States Parties - Ratification and adoption - Federal state clause - Convention for the Protection of the World Cultural and Natural Heritage - Vienna Convention on the Law of Treaties, Arts. 31, 32.

HEARING

Canberra, 1983, May 31; June 1-3, 7-10;

Brisbane, 1983, July 1. 1:7:1983

QUESTIONS reserved pursuant to the Judiciary Act 1903 (Cth), s. 18.

DECISION

July 1.

THE COURT published the following statement and the following written judgements were delivered:

STATEMENT

Court to the questions asked in these actions. The questions concern the validity of certain Commonwealth Acts, regulations and proclamations which have been brought into being for the immediate purpose of preventing the construction of the Gordon below Franklin Dam. They are strictly legal questions. The Court is in no way concerned with the question whether it is desirable or undesirable, either on the whole or from any particular point of view, that the construction of the dam should proceed. The assessment of the possible advantages and disadvantages of constructing the dam, and the balancing of the one against the other, are not matters for the Court, and the Court's judgment does not reflect any view of the merits of the dispute.

The effect of the decision of the Court, reached in relation to each question by a majority, is as follows"

1. The World Heritage (Western Tasmania Wilderness) Regulations made under s. 69 of the National Parks and Wildlife Conservation Act 1975 are wholly invalid.

2. Section 9(1)(h) of the World Heritage Properties Conservation Act 1983 is valid. In consequence, except with the consent in writing of the Commonwealth Minister, it is unlawful for any person to do the following acts in relation to particular specified property adjacent to the Franklin River, including Kutikina Cave and Deena Reena Cave: (a) carrying out works in the course of constructing or continuing to construct a dam that, when constructed, will be capable of causing the inundation of that peroperty or any part of it; (b) carrying out works preparatory to the construction of

such a dam; (c) carrying out works associated with the construction or continued construction of such a dam.

3. Section 10(4) of the World Heritage Properties Conservation Act 1983 is valid. In consequence, except with the written consent of the Commonwealth Minister, it is unlawful for a trading corporation for the purpose of its trading activities to do any of the acts specified in s. 10(2)(d)-(m). The Hydro-Electric Commission of Tasmania is held to be a trading corporation and the acts specified in s. 10(2) would, if done by he Commission for the purpose of its trading activities.

4. Certain other operative provisions of the Act are invalid.

This statement is published for convenience only and is not intended to provide a complete or authoritative exposition of the effect of the decision, which must be gathered from the judgments published by the Court.

GIBBS C.J.

Introduction (at p456)

1. The question of immediate practical importance which falls for decision in these three cases is whether it is lawful for the Hydro-Electric Commission of Tasmania (the Commission) to construct a dam on the Gordon River, downstream of its junction with the Franklin River, in south-western Tasmania. The construction of the dam, and of associated works, including a power station, is authorized by the Gordon River Hydro-Electric Power Development Act 1982 (Tas.), a law of Tasmania which came into force on 12th July, 1982. The construction work commenced on 14th July, 1982. The dam proposed to be constructed will dam the waters of the Gordon River to a maximum depth, at the toe of the dam, of approximately 84 metres, will raise the levels of the Franklin River and other tributaries and will have a storage capacity of about 2,700 million cubic metres. The power station will add about 180 megawatts on average to the capacity of the Tasmanian electricity generating system and will have an installed generator capacity of about 300 megawatts. The Government of Tasmania wishes to proceed with the Gordon below Franklin Scheme (as it is called) since it considers that the ability to generate electricity at low cost by this means is necessary to enable the State to achieve economic growth and to increase the opportunities for employment. However, the Government of the Commonwealth wishes to stop the construction of the dam, which it considers will inundate significant Aboriginal archaeological sites, and will cause damage to a wilderness area which is of great natural significance, and which satisfies the criteria for listing on the World Heritage List maintained under the Convention for the Protection of the World Cultural and Natural Heritage (the Convention). In conformity with the policy of the Government to stop the construction of the dam, the Governor-General, acting in intended exercise of the power conferred by s. 69 of the National Parks and Wildlife Conservation Act 1975 (Cth), has made the World Heritage (Western Tasmania Wilderness) Regulations (S.R. Nos. 31 and 66 of 1983) and the Parliament has enacted the World Heritage Properties Conservation Act 1983 (Cth) (the Act). Either the Regulations or the Act, if valid, will render it unlawful to construct the dam, except with the consent of a Commonwealth Minister. The important legal question that now falls for decision is whether the Regulations and the Act are valid. (at p457)

2. No lawyer will need to be told that in these proceedings the Court is not called upon to decide whether the Gordon below Franklin Scheme ought to proceed. It is not for the Court to weigh the economic needs of Tasmania against the possible damage that will be caused to the archaeological sites and the wilderness area if the construction of the dam proceeds. The wisdom and expediency of the two competing courses are matters of policy for the Governments to consider, and not for the Court. We are concerned with a strictly legal question - whether the Commonwealth

regulations and the Commonwealth statute are within constitutional power.

History (at p457)

3. In the west and south-west of Tasmania are three large national parks, now proclaimed as such under the National Parks and Wildlife Act (1970) (Tas.), although originally constituted under earlier legislation. They are the Cradle Mountain-Lake St. Clair National Park, the Franklin Lower Gordon Wild Rivers National Park and the Southwest National Park. The area occupied by the three parks is now known as the Western Tasmania Wilderness National Parks (the Parks) and until 17th August, 1982, was of a total area of 769,355 hectares, almost the whole of which consisted of Crown land which had not previously been alienated. The Parks are almost wholly surrounded by an area known as the Southwest Conservation Area, proclaimed as such under the National Parks and Wildlife Act 1970 (Tas.) and consisting of 665,645 hectares. On 22nd September, 1981, the then Premier of Tasmania (Mr Lowe) wrote to the then Prime Minister (Mr Fraser) requesting that a nomination of the Parks for listing in the World Heritage List should be forwarded to the World Heritage Committee. A nomination was submitted by the Commonwealth to the World Heritage Committee on 13th November, 1981. The International Union for Conservation of Nature and Natural Resources (IUCN), a body recognized by the Convention and entitled to send a representative to attend meetings of the World Heritage Committee in an advisory capacity (see Art. 8.3 of the Convention), reported to the World Heritage Committee on 15th April, 1982, recommending that the Parks be listed. The report reveals that the question whether the Gordon below Franklin dam should be built was already a controversial issue in Australia. On 28th June, 1982, the Gordon River Hydro-Electric Power Development Act 1982 was assented to and on the same day the Premier of Tasmania (by that time Mr Gray) requested the Prime Minister to withdraw the nomination of the Parks for inclusion in the World Heritage List. The Prime Minister declined to do so, and Mr Gray strongly objected to this rejection of his request. (at p457)

4. On 17th August, 1982, by proclamation made under the National Parks and Wildlife Act 1970 (Tas.), an area of 14,125 hectares was excised from the Franklin Lower Gordon Wild Rivers National Park as from 2nd September, 1982, and a further area of 780 hectares is to be excised from that National Park as from 1st July, 1990. By a proclamation made on 7th September, 1982, under the Hydro-Electric Commission Act 1944 (Tas.) the area of 14,125 hectares was vested in the Commission on 16th September, 1982, and the area of 780 hectares is to vest in the Commission on 2nd July, 1990. By further proclamations, two other areas, one within the Southwest Conservation Area and one to the north of the Southwest Conservation Area, were also vested in the Commission on 16th September, 1982, but those areas are not within the Parks and therefore not material for present purposes. The Commission intends to construct the works authorized by the Gordon River Hydro-Electric Power Development Act 1982 on the area of 14,125 hectares already mentioned. The water storage reservoir will have a surface area of 12,000 hectares, of which 9,500 hectares (including the area of 780 hectares already mentioned) will be within the Parks and 2,500 hectares will be outside their boundaries. (at p457)

5. In the meantime the Bureau of the World Heritage Committee had met in June 1982, to consider nominations which had been received for the inclusion of a number of properties on the World Heritage List, and in relation to the nomination of the Parks had resolved to request the Australian authorities to provide (inter alia) a statement of intent regarding the construction of dams and the possibility of extending the protected area. On 8th December, 1982, the World Heritage Committee received from the Australian Government a response to this request. The Government stated that the Tasmanian Government is constructing a hydro-electric power scheme in the nominated area, and that the Australian Government has been and is discussing the scheme with the Tasmanian Government. The Government further stated that the possibility of extension of the protected area was considered at the time of the original nomination and that it was decided that it was inappropriate to include further areas. It was added that the nominated area lies mostly within the Southwest Conservation Area which provides an adequate buffer zone. The response concluded:

"The Australian Government considers that the Committee should inscribe the Western Tasmania Wilderness National

Parks on the World Heritage List at its current session." (at p457)

6. The World Heritage Committee met from 13th to 17th December, 1982, and decided to enter in the World Heritage List a number of properties including the Parks. The Committee made the following comment:

"The Committee is seriously concerned at the likely effect of dam construction in the area on those natural and cultural characteristics which make the property of outstanding universal value. In particular, it considers that flooding of parts of the river valleys would destroy a number of cultural and natural features of great significance, as identified in the ICOMOS and IUCN reports. The Committee therefore recommends that the Australian authorities take all possible measures to protect the integrity of the property. The Committee suggests that the Australian authorities should ask the Committee to place the property on the List of World Heritage in Danger until the question of dam construction is resolved." (at p458)

7. ICOMOS is the International Council of Monuments and Sites, a body which, like IUCN, is recognized by Art. 8.3 of the Convention as having an advisory capacity. As the Committee's comment reveals, both ICOMOS and IUCN had submitted reports on the nomination of the Parks. IUCN, in its report, relied both on the fact that the area of the Parks is "one of the world's last great remaining temperate pristine wildernesses" and on the archaeological and anthropological importance of the area. It recommended that the Parks be added to the World Heritage List and that the Committee should express concern about the deleterious impact of the dam on the property. The report by ICOMOS contained only a provisional recommendation in support of the listing of the Parks, and was based on information concerning aboriginal sites within the Parks. However, in April 1983, ICOMOS reaffirmed its support for the listing of the Parks and stated that it was of the opinion "that the integrity of the cultural sites which justified the inscription of these Parks on the World Heritage List (in particular, Fraser Cave, Cave Bay Cave, Beginner's Luck Cave, etc.) must absolutely be maintained, along with the considerable archeological (sic) reserves which are in the process of being prospected". Although it is not material for present purposes, it may be remarked in the interests of accuracy that neither Cave Bay Cave nor Beginner's Luck Cave is within the area of the Parks. (at p458)

8. The World Heritage (Western Tasmania Wilderness) Regulations were notified in the Gazette on 31st March, 1983 and amending Regulations were notified in the Gazette on 27th May, 1983. The World Heritage Properties Conservation Act was assented to on 22nd May, 1983. Regulations (S.R. No. 65 of 1983) made under that Act were notified on 25th May, 1983, and amending Regulations (S.R. No. 67 of 1983) were notified on 27th 7ay, 1983. Ten proclamations made under the Act were published in the Gazette on 26th May, 1983. Before I discuss the effect of the Act, Regulations and proclamations, it is convenient to refer to some other facts and allegations some of which are disputed, whose relevance is in question.

Further facts and disputed allegations (at p458)

9. In the nomination submitted by the Commonwealth to the World Heritage Committee in November 1981, and in the reports received by the World Heritage Committee from its advisory bodies, it was said that the listing of the Parks in the World Heritage List is justified because the Parks form part of the cultural and natural heritage, and have "outstanding universal value".The Convention draws a distinction between the cultural heritage and the natural heritage. By Art. 1, the following shall be considered as "cultural heritage":

"monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

"groups of buildings:. . .

"sites: works of man or the combined works of nature and of man, and areas

including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view." (at p458)

10. By Art. 2, for the purposes of the Convention, the following shall be considered as "natural heritage": "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

"geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

"natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty." (at p458)

11. The Commonwealth contends, as the World Heritage Committee has accepted, that the Parks satisfy the criteria for listing under both heads. So far as the natural heritage is concerned, the Commonwealth contends that the Parks, including the 14,125 hectares which are now vested in the Commission and to which I shall henceforth refer as "the subject area", comprise "most of the last great temperate wilderness remaining in Australia and one of the last remaining in the world". It alleges that the Parks satisfy all the criteria required for nomination to the World Heritage List, and goes into some detail in describing the features which it alleges make the Parks of outstanding universal value. (at p458)

12. The State of Tasmania acknowledges the significance and beauty of the area of the Parks as a whole, but points to the fact that of the 769,355 hectares which constitute the total area of the Parks, only 9,500 hectares (1.23 per cent of the total area) will be flooded, whereas the whole of the Parks (11.3 per cent of the total area of Tasmania) is or may be affected by the World Heritage Properties Conservation Act and regulations thereunder. It asserts that the natural features which justify the listing of the Parks are to be found in the Parks as a whole, and that the flooding of the small proportion of the Parks that will be affected by the dam will not destroy or significantly affect the whole. On any view of the law it is unnecessary to go into the details of the dispute as to these facts, or to resolve the dispute. It is not contended that the validity of either the Act or the World Heritage (Western Tasmania Wilderness) Regulations depends on the answer to the question whether the construction of the dam will significantly endanger, or detract from the value of, the area of the Parks as a whole. Evidence directed to the question whether the value and significance of the Parks as a whole will be diminished by the construction of the dam is not relevant to any issue in the case. (at p459)

13. The subject area is said to be part of the cultural heritage because it contains significant Aboriginal archaeological sites. It is not clear that there are significant sites within the subject area, although there are certainly significant sites within the Parks. Two caves, Kutikina Cave (formerly known as Fraser Cave) and Deena Reena Cave, which are situated within the area of 780 hectares which is to vest in the Commission in 1990, are alleged to be "two of the seven archaeologically richest limestone cave sites in the Western Pacific region". It is alleged that the former cave is an immensely rich archaeological site and that recent radio carbon dating of deposit at basal levels of the site indicated human occupation dated to beyond 20,000 years ago. Older material is at present being radio-carbon-dated. Carbon samples from hearths in Deena Reena Cave have been dated to about 19,000 years ago. There are other caves in the lower Franklin River valley whose contents have not yet been investigated. It is alleged that investigations suggest that archaeological deposits contained in the limestone caves along the lower Franklin River valley are likely to transform archaeological knowledge of the stone tool technology of Ice Age man in Tasmania. Those cave sites, it is said, contain evidence of the economic and cultural systems of their inhabitants, who, in prehistoric times, were the most southerly-dwelling human beings on earth. It is further alleged that archaeological sites along the river terraces of the Denison and Franklin Rivers, together with the archaeological cave sites, make it highly probable that the subject area is capable of

providing archaeologists and scholars generally with a comprehensive picture of settlement of a whole river system by early man and his more recent Aboriginal descendants. A site upon Flat Island, recently radiocarbon-dated to 15,000 years ago, is said to be the only known open archaeological site of such antiquity in Tasmania. The Commonwealth asserts that the proposed inundation would result in the loss and destruction of irreplaceable evidence concerning the occupation and settlement of an entire river system by Ice Age man and his more recent Aboriginal descendants, and that the flooding of the archaeological cave sites of the lower Franklin River valley would destroy their outstanding universal cultural and historical value. (at p459)

14. The State of Tasmania on the other hand asserts that there are no significant archaeological sites in the subject area. It says that there are archaeological sites of some significance in the area of 780 hectares already referred to but alleges that there are many sites in Tasmania and elsewhere in Australia of equal or greater significance and that the likelihood of all of these sites ever being exhaustively investigated is remote, having regard to the cost. Deposits in Beginner's Luck Cave have been dated back 20,650 years and those in Cave Bay Cave have been dated back 22,750 years; as has been mentioned, those caves are not within the area of the Parks. It is further alleged by Tasmania that if the sites are to be inundated there will be a period of at least five years before any inundation and eight years before any complete inundation and that in any case inundation will not completely destroy the sites. It is alleged that there are means available to the Commonwealth, should it choose to do so, of salvaging or protecting one or more of the sites from flooding. Finally, it is claimed that no single site is of such importance for future archaeological investigation that it could be described as unique or irreplaceable. (at p459)

15. According to the nomination made by the Commonwealth to the World Heritage Committee, although Aborigines frequented the coast during the early years of European contact, and although in 1832 and 1840 evidence of their presence was observed elsewhere in the Parks, they were not observed in the Franklin or Gordon Rivers area or inland in the southwest. No suggestion is made in the case for the Commonwealth that any Aborigines were on the subject land during the period from the earliest days of white occupation until after the construction of the dam commenced. The report made by IUCN to the meeting of the World Heritage Committee in December 1982, to which reference has already been made, suggested that the Tasmanian Aborigines were extinct, but other material before the Court indicates that there are some thousands of people of Aboriginal descent (but of mixed blood) who have been identified as the Aboriginal population of Tasmania. (at p459)

16. Evidence which is directed to the archaeological importance of the subject area, the connexion of the Aboriginal people of Tasmania with that area, and the significance of the archaeological sites for members of the Aboriginal people, need be considered only if the validity of the impugned enactments depends on the judicial determination of these disputed questions of fact. (at p459)

17. There are further allegations of fact, made by Tasmania, regarding the economic importance to the State of the generation of electricity by means of the Gordon below Franklin scheme, and the large sums of money already spent or committed in the construction of the dam. It does not appear that the validity of the enactments depends on the correctness of these allegations, which therefore need not be considered.

The World Heritage (Western Tasmania Wilderness) Regulations (at p460)

18. The National Parks and Wildlife Conservation Act 1975, under which the World Heritage (Western Tasmania Wilderness) Regulations purport to have been made, is in one respect a somewhat unusual statute. Part II of that Act enables the Governor-General to declare an area to be a park or reserve or conservation zone, and provides for the consequences of such a declaration. Part III deals with the powers and functions of the Director of National Parks and Wildlife. Parts IV, V and VI deal with the administration of the National Parks and Wildlife Service and the powers of warders and rangers and with certain matters of finance and with the transfer of certain officers and employees of the public service. Part VII, which deals with certain miscellaneous matters, contains two sections each of which confers a power to make regulations. Section 69 reads as follows:

"(1) The Governor-General may make regulations for and in relation to giving effect to an agreement specified in the Schedule. (2) Regulations made under sub-section (1) in relation to an agreement that has not entered into force for Australia shall not come into operation on a date earlier than the date on which the agreement enters into force for Australia. (3) Sub-sections 71(5),(7) and (8) apply in relation to regulations made under this section in like manner as they apply in relation to regulations made under section 71." (at p460)

19. The schedule refers to five agreements, including the Convention and a Convention on International Trade in Endangered Species of Wild Fauna and Flora signed at Washington on 3rd March, 1973. Section 71(1) provides as follows:

"The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act." (at p460)

20. Section 71(2) provides that without limiting the generality of sub-s.(1), regulations may be made for a number of specified purposes, including "(e) providing for the protection and preservation of parks and reserves and property and things in parks and reserves". Sub-sections(5) and (6) provide as follows:

"(5) The power to make regulations conferred by this Act may be exercised -

(a) in relation to all cases to which the power extends, or in relation to

all those cases subject to specified exceptions, or in relation to any specified cases or classes of case;and

(b) so as to make, as respects the cases in relation to which it is exercised, the same provision for all those cases or different provision for different cases or classes of case.

(6) The power to make regulations conferred by this Act shall not be taken, by implication, to exclude the power to make provision for or in relation to a matter by reason only of the fact that -

(a) a provision is made by this Act in relation to that matter or another matter; or

(b) power is expressly conferred by this Act to make provision by regulation for or in relation to another matter." (at p460)

21. Subsections (7) and (8) of s.71 are not material for present purposes. (at p460)

22. The World Heritage (Western Tasmania Wilderness) Regulations purport to have been made under s.69. They contain a number of recitals, which refer inter alia to the Convention, the obligations of Australia thereunder, the nomination of the Parks and their inclusion in the World Heritage List and the effect of works which are proposed to be carried out, and are being carried out, within parts of the area of the Parks. By Regulation 2, the Regulations apply to the areas therein described, which together form the subject area of 14,125 hectares. Regulation 4 provides inter alia that the Regulations bind the Crown in the right of the Commonwealth or of the State of Tasmania. Regulation 5 in its amended form provides as follows:

"(1) Except with the consent of the Minister, a person shall not, within an area to which these Regulations apply, whether by himself or by his servant or agent -

(a) construct a dam or associated works or do any act in the course of, or for the purpose of, the construction of a dam or associated works;

(b) carry out any excavation works;

(c) erect a building or other substantial structure or do any act in the

course of, or for the purpose of, the erection of a building or other substantial structure;

(d) kill, cut down, damage or remove any tree;

(e) construct or establish any road or vehicular track;

(f) use explosives; or

(g) carry out any other works.

Penalty: $5,000.

(2) Except with the consent of the Minister, a person shall not, within an

area to which these Regulations apply, whether by himself or by his servant or agent, do any act, not being an act referred to in sub-regulation (1), that is likely adversely to affect the conservation or preservation of that area as part of the world cultural heritage or natural heritage.

Penalty: $5,000.

(3) Where -

(a) within an area to which these Regulations apply, a person does an act

referred to in sub-regulation (1) without the consent of the Minister;and

(b) the controller of that area or of the relevant part of that area has failed to take reasonable steps to prevent the doing of the act,

the controller of that area or of the relevant part of that area, as the case may be, is guilty of an offence and is punishable upon conviction by a fine not exceeding $5,000.

(4) For the purposes of sub-regulation (3), a person is the controller of an area or of a part of an area if the person is -

(a) the person in whom that area or part is vested;

or

(b) if the person in whom that area or part is vested is not the occupier of that area or part - a person who is the occupier of that area or part, as the case may be." (at p461)

23. Regulation 7 (which has since ceased to have any operation by reason of s. 19(2) of the Act) provided:

"(1) Where, but for this regulation, the operation of a provision of these Regulations would result in the acquisition of property from a person otherwise than on just terms, there is payable to the person by the Commonwealth such reasonable amount of compensation as is agreed upon between the person and the Commonwealth or, failing agreement, as is determined by a court of competent jurisdiction.

(2) In sub-regulation (1), 'acquisition of property' and 'just terms' have the same respective meanings as in paragraph 51(xxxi) of the Constitution." (at p461)

24. It was submitted on behalf of Tasmania that s. 69 of the National Parks and Wildlife Conservation Act 1975, on its proper construction, authorizes the making only of regulations which carry into effect an agreement mentioned in the schedule in relation to parks and reserves which are established under Pt. II of the Act. This submission cannot be accepted. The power which s. 69 confers is to make regulations for and in relation to giving effect to an agreement specified in the schedule, and there is nothing in the section to limit the regulations that may be made to regulations which relate only to parks and reserves established under Pt. II. The section stands in sharp contrast to s. 71, which gives a wide power to make regulations necessary or convenient to be prescribed for carrying out or giving effect to the Act, including regulations to protect and preserve parks and reserves. Section 71 would give ample power to carry any of the agreements specified in the schedule into effect in relation to parks and reserves established under the Act. Moreover at least one of the Conventions mentioned in the schedule - the Convention on International Trade in Endangered Species of Wild Fauna and Flora - could not be carried into effect by regulations which relate only to parks and reserves established under Pt. II. Section 69 has for one reason or another been placed in a context to which it is alien. The clear indication of the Parliament in including the section was to give a power additional to the regulation-making power conferred by s. 71 and unrelated to any other provision of the National Parks and Wildlife Conservation Act, except those parts of s. 71 which are expressly applied by s. 69(3). (at p461)

25. The World Heritage (Western Tasmania Wilderness) Regulations will be valid if s. 69 was a valid exercise of the power given by s. 51 (xxix) of the Constitution to make laws with respect to "external affairs", and if the regulations themselves were regulations for and in relation to giving effect to the Convention.

The World Heritage Properties Conservation Act 1983 (at p461)

26. Whereas the World Heritage (Western Tasmania Wilderness) Regulations, and s. 69 of the National Parks and Wildlife Conservation Act 1975, if valid, can be sustained only as an exercise of the power conferred by s. 51(xxix) of the Constitution, the Parliament, in enacting the World Heritage Properties Conservation Act 1983, invoked other sources of power as well. There is considerable overlapping not only between the provisions of the Act themselves but also between the regulations and proclamations thereunder. The object of those who framed the Act, regulations and proclamations was apparently to endeavour to ensure that one provision, made under one source of power, might prove effective, even though the others might fail. (at p461)

27. By s. 3(2) of the Act, a reference to identified property is to be read as a reference to:

"(a) property forming part of the cultural heritage or natural heritage, being property that -

(i) the Commonwealth has, under Article 11 of the Convention, submitted to the World Heritage Committee, whether before or after the commencement of this Act, as suitable for inclusion in the World Heritage List provided for in paragraph 2 of that Article; or

(ii) has been declared by the regulations to form part of the cultural heritage or natural heritage;

(b) any part of property referred to in paragraph (a)." (at p461)

28. The whole area of the Parks answers the description contained in par.(a)(i), and therefore is "identified property" within the meaning of the Act. In addition, the Regulations have declared certain areas to form part of the cultural heritage or natural heritage, so that those areas come within par. (a)(ii) of the definition. Regulation 2 declares that the following property forms part of the natural heritage:

(a) the whole of the Parks; and

(b) an area which surrounds a stretch of the Franklin River and a small

stretch of the Gordon River and includes the dam site; this area forms part of the subject area and of the further area of 780 hectares which will be vested in the Commission and it is convenient to refer to it as "the Franklin natural area". (at p461)

29. Regulation 3 declares that the following property forms part of the cultural heritage:

(a) an area adjacent to the Franklin River which is that part of the limestone belt which contains caves and other archaeological sites - it is convenient to refer to it as the "cultural area";

(b) Kutikina Cave and Deena Reena Cave; and

(c) all other archaeological sites within the cultural area. (at p462)

30. The operative provisions of the Act are contained in three sections - ss. 9, 10 and 11. However, those sections only become effective when they are applied to particular property by proclamation made by the Governor-General under ss. 6, 7 or 8 as the case may be. A proclamation may be made only in respect of identified property as defined in s. 2, and only if certain other conditions are satisfied. The conditions are such as appear to have been thought by the Parliament to be necessary to render available the different heads of legislative power which have been invoked. Section 6 reads as follows:

"(1) A Proclamation may be made under subsection (3) in relation to identified property that is not in any State.

(2) A Proclamation may also be made under subsection (3) in relation to identified property that is in a State and is property to which one or more of the following paragraphs applies or apply:

(a) the Commonwealth has, pursuant to a request by the State, submitted to the World Heritage Committee under Article 11 of the Convention that the property is suitable for inclusion in the World Heritage List provided for in paragraph 2 of the Article, whether the request by the State was made before or after the commencement of this Act and whether or not the property was identified property at the time when the request was made;

(b) the protection or conservation of the property by Australia is a matter of international obligation, whether by reason of the Convention or otherwise;

(c) the protection or conservation of the property by Australia is necessary or desirable for the purpose of giving effect to a treaty (including the Convention) or for the purpose of obtaining for Australia any advantage or benefit under a

treaty (including the Convention);

(d) the protection or conservation of the property by Australia is a matter of international concern (whether or not it is also a matter of domestic concern), whether by reason that a failure by Australia to take proper measures for the protection or conservation of the property would, or would be likely to, prejudice Australia's relations with other countries or for any other reason;

(e) the property is part of the heritage distinctive of the Australian nation -

(i) by reason of its aesthetic, historic, scientific or social significance; or

(ii) by reason of its international or national renown,

and, by reason of the lack or inadequacy of any other available means for its protection or conservation, it is peculiarly appropriate that measures for the protection or conservation of the property be taken by the Parliament and Government of the Commonwealth as the national parliament and government of Australia.

(3) Where the Governor-General is satisfied that any property in respect of which a Proclamation may be made under this sub-section is being or is likely to be damaged or destroyed, he may, by Proclamation, declare that property to be property to which section 9 applies." (at p462)

31. The section is obviously enacted in reliance on the power conferred by s. 51(xxix) of the Constitution, and also on the implied inherent power resulting from nationhood. In fact five of the proclamations gazetted on 26th May, 1983, were made under s. 6(3). They declare that s. 9 applies to the following areas:

(1) the Franklin Lower Gordon Wild Rivers National Park;

(2) the part of the Franklin natural area that is within the total area of

14,905 hectares (the excised area) which is made up of the 14,125 hectares and the 780 hectares already mentioned;

(3) the part of the cultural area that is within the excised area;

(4) Kutikina Cave and Deena Reena Cave; and

(5) an open archaeological site within the cultural area. (at p462)

32. Section 9 reads as follows:

"(1) Except with the consent in writing of the Minister, it is unlawful for a person, whether himself or by his servant or agent -

(a) to carry out any excavation works on any property to which this section applies;

(b) to carry out operations for, or exploratory drilling in connection with, the recovery of minerals on any property to

which this section applies;

(c) to erect a building or other substantial structure on any property to which this section applies or to do any act in the course of, or for the purpose of, the erection of a building or other substantial structure on any property to which this section applies;

(d) to damage or destroy a building or other substantial structure on any property to which this section applies;

(e) to kill, cut down or damage any tree on any property to which this section applies;

(f) to construct or establish any road or vehicular track on any property to which this section applies;

(g) to use explosives on any property to which this section applies; or

(h) if an act is prescribed for the purposes of this paragraph in relation

to particular property to which this section applies, to do that act in relation to that property.

(2) Except with the consent in writing of the Minister, it is unlawful for a person, whether himself or by his servant or agent, to do any act, not being an act the doing of which is unlawful by virtue of sub-section (1), that damages or destroys any property to which this section applies.

(3) If an application of sub-sections (1) and (2) of this section in relation to particular property, being property that is relevant property by virtue of a particular paragraph or particular paragraphs of sub-section 6(2), would be within the powers of the Parliament if the property were relevant property by virtue only of that paragraph or those paragraphs, it is intended that sub-sections (1) and (2) of this section should have that application in relation to the property whether or not the property is also relevant property by virtue of another paragraph or other paragraphs of sub-section 6(2).

(4) In sub-section (3), 'relevant property' means property in respect of which a Proclamation may, by virtue of sub-section 6(2), be made under sub-section 6(3)." (at p463)

33. Sections 7 and 10 rely on the corporations power conferred by s. 51(xx) of the Constitution. Section 7 provides:

"Where the Governor-General is satisfied that any identified property is being or is likely to be damaged or destroyed, he may, by Proclamation, declare that property to be property to which section 10 applies." (at p463)

34. Section 10(1) provides:

"In this section -

'foreign corporation' means a foreign corporation within the meaning of

paragraph 51 (xx) of the Constitution;

'trading corporation' means a trading corporation within the meaning of paragraph 51 (xx) of the Constitution." (at p463)

35. Section 10(2) commences as follows:

"Except with the consent in writing of the Minister, it is unlawful for a body corporate that -

(a) is a foreign corporation;

(b) is incorporated in a Territory; or

(c) not being incorporated in a Territory, is a trading corporation formed

within the limits of the Commonwealth,

whether itself or by its servant or agent - . . . " (at p463)

36. Then follow pars. (d) to (m) which are identical with pars. (a) to (h) of s. 9(1). Subsections (3) and (4) of s. 10 provide as follows:

"(3) Except with the consent in writing of the Minister, it is unlawful for a body corporate of a kind referred to in sub-section (2), whether itself or by its servant or agent, to do any act, not being an act the doing of which is unlawful by virtue of that sub-section, that damages or destroys any property to which this section applies.

(4) Without prejudice to the effect of sub-sections (2) and (3), except with the consent in writing of the Minister, it is unlawful for a body corporate of the kind referred to in paragraph (2) (c), whether itself or by its servant or agent, to do, for the purposes of its trading activities, an act referred to in any of paragraphs (2) (d) to (m) (inclusive) or an act referred to in sub-section (3)." (at p463)

37. Three proclamations made under s. 7 and gazetted on 26th May, 1982, declare that s. 10 applies to the following property:

(1) that part of the Franklin natural area that is within the excised area;

(2) that part of the cultural area that is within the excised area; and

(3) Kutikina Cave and Deena Reena Cave. (at p463)

38. By Regulation 4 of the World Heritage Properties Conservation Regulations (made under the Act) the relevant property is defined to mean:

(a) that part of the cultural area which is within the excised area;

(b) Kutikina Cave and Deena Reena Cave; and

(c) the open archaeological site. (at p463)

39. Regulation 4(2) then provides as follows:

"For the purposes of paragraphs 9(1)(h) and 10(2)(m) of the Act, each of the following acts is prescribed in relation to each relevant property:

(a) carrying out works in the course of constructing or continuing to construct a dam that, when constructed, will be capable of causing the inundation of that relevant property or of any part of that relevant property;

(b) carrying out works preparatory to the construction of such a dam;

(c) carrying out works associated with the construction or continued

construction of such a dam." (at p463)

40. Sections 8 and 11 are enacted in reliance on s. 51(xxvi) of the Constitution. Section 8 provides:

"(1) It is hereby declared that it is necessary to enact this section, section 11 and sub-sections 13(7) and 14(5) as special laws for the people of the Aboriginal race.

(2) A reference in this section to an Aboriginal site is a reference to a site -

(a) that is, or is situated within, identified property; and

(b) the protection or conservation of which is, whether by reason of the

presence on the site of artefacts or relics or otherwise, of particular significance to the people of the Aboriginal race.

(3) Where the Governor-General is satisfied that an Aboriginal site is being or is likely to be damaged or destroyed or that any artefacts or relics situated on an Aboriginal site are being or are likely to be damaged or destroyed, he may, by Proclamation, declare that site to be a site to which section 11 applies." (at p463)

41. Section 11(1) commences "except with the consent in writing of the Minister, it is unlawful for a person, whether by himself or by his servant or agent - ". Then follow pars. (a) to (c) which are identical with pars. (a) to (c) of s. 9(1). Paragraphs (d) and (e) then provide:

"(d) to damage or destroy any artefacts or relics situated on any site to which this section applies;

(e) to remove any artefacts or relics from any site to which this section applies;". (at p463)

42. Then follow pars. (f) to (j) which are identical with pars. (e) to (h) of s. 9(1). Subsections (2) and (3) of s. 11 provide as follows:

"(2) Except with the consent in writing of the Minister, it is unlawful for a person, whether himself or by his servant or agent, to do any act, not being an act the doing of which is unlawful by virtue of sub-section (1) -

(a) that damages or destroys; or

(b) that is likely to result in damage to or the destruction of,

any site to which this section applies or any artefacts or relics on any site to which this section applies. (3) Except with the consent in writing of the Minister, it is unlawful for a person, whether himself or by his servant or agent, to do any act preparatory to the doing of an act that is unlawful by virtue of sub-section (2)." (at p464)

43. Two proclamations gazetted on 26th May, declare the following sites to which s. 11 of the Act applies:

(a) Kutikina Cave and Deena Reena Cave; and

(b) the open archaeological site. (at p464)

44. Regulation 5(1) defines the "relevant site" to mean:

(a) Kutikina Cave;

(b) Deena Reena Cave; and

(c) the open archaeological site. (at p464)

45. Regulation 5(2) then provides as follows:

"For the purposes of paragraph 11(1)(j) of the Act, each of the following acts is prescribed in relation to each relevant site:

(a) carrying out works in the course of constructing or continuing to construct a dam that, when constructed, will be capable of causing the inundation of that relevant site or of any part of that relevant site;

(b) carrying out works preparatory to the construction of such a dam;

(c) carrying out works associated with the construction or continued

construction of such a dam." (at p464)

46. Section 13(1), (5) and (7) provide as follows:

"(1) In determining whether or not to give a consent pursuant to section 9 in relation to any property to which that section applies, the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property."

"(5) Without limiting any other application of the Administrative Decisions (Judicial Review) Act 1977, for the

purposes of the application of that Act in relation to a decision of the Minister to give or refuse to give a consent pursuant to section 9 or 10 in relation to particular property -

(a) a person whose use or enjoyment of any part of the property is, or is likely to be, adversely affected by the decision shall be taken to be a person aggrieved by the decision; and

(b) an organization or association of persons, whether incorporated or not, shall be taken to be a person aggrieved by the decision if the decision relates to a matter which is included in the objects or purposes of the organization or association and to which activities engaged in by the organization or association relate,"

"(7) Without limiting any other application of the Administrative Decisions (Judicial Review) Act 1977, for the purposes of the application of that Act in relation to a decision of the Minister to give or refuse to give a consent pursuant to section 11, any member of the Aboriginal race shall be taken to be a person aggrieved by the decision." (at p464)

47. Section 14(1) gives the High Court and the Federal Court power, on the application of the Attorney-General or an interested person (including a member of the Aboriginal race: s. 14(5)), to grant an injunction to restrain acts made unlawful by ss. 9, 10 and 11. (at p464)

48. An argument advanced by Tasmania is that in any case the Act is invalid in that it brings about an acquisition of property otherwise than on just terms. Section 17 of the Act, which is relevant to that argument, provides as follows:

"(1) In this section -

'acquisition of property' has the same meaning as in paragraph 51 (xxxi) of

the Constitution;

'Regulations' means the World Heritage (Western Tasmania Wilderness) Regulations, as amended and in force from time to time under the National Parks and Wildlife Conservation Act 1975.

(2) The compensation that may be agreed upon, recommended or determined pursuant to this section in respect of an acquisition of property from a person may consist of or include all or any of the following:

(a) the payment of an amount to the person by instalments;

(b) the payment of an amount or part of an amount to the person subject to

compliance by the person with specified conditions;

(c) the making of a payment or payments to the person the amount or amounts of which is or are subject to variation in the event of specified circumstances prevailing at a particular time or times

(3) Where a person considers that the operation of this Act or of the Regulations has resulted in an acquisition of property from the person, the person may, by notice in writing sent by post to the Minister at his office at Parliament House, Canberra (being a notice that specifies an address to which a notice may be sent to the person by the Minister pursuant to sub-section (4)), request the Commonwealth to pay an amount of compensation specified in the notice (in this section referred to as the 'claimed amount') in respect of the acquisition.

(4) If, before the expiration of 3 weeks after the receipt by the Minister of a notice given by a person pursuant to sub-

section (3), the Minister sends by post to the person at the address of the person specified in that notice a notice in writing stating that he does not consider that the operation of this Act or of the Regulations has resulted in an acquisition of property from the person, the person may make an application to the High Court requesting the Court to make a declaration that the operation of this Act or of the Regulations has resulted in an acquisition of property from the person.

(5) Where the Minister does not, before the expiration of 3 weeks after the receipt by him of a notice given by a person pursuant to sub-section (3), send a notice to the person pursuant to sub-section (4), the operation of this Act or of the Regulations, as the case requires, shall be taken to have resulted in an acquisition of property from the person.

(6) Where -

(a) by virtue of sub-section (5), the operation of this Act or of the

Regulations is taken to have resulted in an acquisition of property from a person; or (b) the High Court makes a declaration that the operation of this Act or of the Regulations has resulted in an acquisition of property from a person, the Commonwealth is liable to pay to the person such compensation in respect of the acquisition as is agreed upon between the person and the Commonwealth or, failing agreement, as is determined in accordance with the succeeding provisions of this section.

(7) Where -

(a) the Commonwealth is liable, by virtue of sub-section (6), to pay

compensation to a person in respect of an acquisition of property from the person, being an acquisition in respect of which the claimed amount is equal to or exceeds $5,000,000; and

(b) the person and the Commonwealth do not, before the expiration of 6 months after - (i) in a case to which paragraph (6)(a) applies - the expiration of the period of 3 weeks referred to in sub-section (5); or (ii) in a case to which paragraph (6)(b) applies - the day on which the declaration referred to in that paragraph was made - reach agreement as to the compensation payable in respect of the acquisition, the Governor-General shall, by notice in writing published in the Gazette, state that he intends, after the expiration of 14 days after the publication of the notice, to establish a Commission of Inquiry to inquire into and report to him on the compensation payable in respect of the acquisition.

(8) Where -

(a) the Governor-General has, pursuant to sub-section (7), given notice of

his intention to establish a Commission of Inquiry to inquire into the compensation payable in respect of an acquisition of property from a person; and

(b) the person and the Commonwealth have not reached agreement as to the compensation payable, the Governor-General shall, by instrument in writing published in the Gazette, establish the Commission immediately after the expiration of the period of 14 days referred to in that sub-section and shall, by that instrument, appoint 3 persons to be the members of the Commission.

(9) Where -

(a) a Commission of Inquiry is to be established to inquire into the

compensation payable in respect of an acquisition of property that is in a State; and

(b) before the expiration of the day before the day on which the Commission is to be established, the Premier of the State, by notice in writing furnished to the Governor-General, nominates a person for appointment as a member of the Commission,

one of the persons appointed pursuant to sub-section (8) shall be the person so nominated.

(10) Where a Commission of Inquiry has been established to inquire into and report on the compensation payable in respect of an acquisition of property from a person, the Commission shall, as soon as practicable, commence to conduct an inquiry into that matter and, unless the person and the Commonwealth reach agreement as to the compensation payable, shall, before the expiration of 12 months after the establishment of the Commission, give a report in writing to the Governor-General setting out its recommendation as to the compensation that is fair and just in respect of the acquisition and setting out the reasons for its recommendation.

(11) If, after the establishment of a Commission of Inquiry to inquire into and report on the compensation payable in respect of an acquisition of property from a person and before the Commission has given a report in writing to the Governor-General under subsection (10), the person and the Commonwealth reach agreement as to the compensation payable, the Governor-General shall, by instrument in writing, abolish the Commission and terminate the appointments of the members of the Commission.

(12) Before the expiration of 3 months after the day on which he receives a report of a Commission of Inquiry in relation to the payment of compensation in respect of an acquisition of property from a person, the Governor-General shall, if the person and the Commonwealth have not reached agreement as to the compensation payable, having regard to the report of the Commission and to such other matters as the Governor-General considers relevant, determine the compensation that the Governor-General considers to be fair and just in respect of the acquisition.

(13) Where the Governor-General makes a determination pursuant to sub-section (12) in relation to an acquisition of property from a person, the Minister shall, before the expiration of 14 days after that determination is made, give notice in writing to the person setting out the terms of the determination.

(14) Where the operation of this Act or of the Regulations has resulted in or is taken to have resulted in an acquisition of property from a person and -

(a) the acquisition is an acquisition in respect of which the claimed amount is less than $5,000,000;

(b) a Commission of Inquiry does not give a report in writing to the Governor-General in accordance with sub-section (10) before the expiration of the period of 12 months referred to in that sub-section otherwise than by reason of the person and the Commonwealth having reached agreement as to the compensation payable; or

(c) the person considers that the compensation determined by the Governor-General pursuant to subsection (12) in respect of the acquisition is not fair and just,

the Federal Court may, on the application of the person, determine the compensation that is fair and just in respect of the acquisition.

(15) The Royal Commissions Act 1902 applies to, and in relation to, an inquiry by a Commission of Inquiry established under this section as if the Commission of Inquiry were a Commission of Inquiry issued by the Governor-General by Letters Patent pursuant to that Act.

(16) A reference in this section to the operation of this Act shall be read as including a reference to the operation of an act done pursuant to this Act." (at p466)

49. Section 20 provides as follows:

"(1) The High Court has jurisdiction with respect to matters arising under section 14 and sub-section 17(4).

(2) The Federal Court has jurisdiction with respect to matters arising under section 14 and sub-section 17(14)." (at p466)

50. A regulation-making power is conferred by s. 21.

The Convention (at p466)

51. As has already appeared, the Commonwealth, in seeking to uphold the validity of the World Heritage (Western Tasmania Wilderness) Regulations-and of the Act, relies in part upon the external affairs power (s.51(xxix)) and on its obligations under the Convention. On 16th November, 1972, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention, which was ratified by Australia on 22nd August,1974, and which came into force on 17th December, 1975. At present, seventy-four countries are parties to the Convention. (at p466)

52. The preamble to the Convention recites that the General Conference (by):

"Noting that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction;

"Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world;

"Considering that protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific and technical resources of the country where the property to be protected is situated;

"Recalling that the Constitution of the Organization provides that it will maintain, increase and diffuse knowledge, by assuring the conservation and protection of the world's heritage, and recommending to the nations concerned the necessary international conventions;

"Considering that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong;

"Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole;

"Considering that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an effective complement thereto;

"Considering that it is essential for this purpose to adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods;

"Having decided, at its sixteenth session, that this question should be made the subject of an international convention,

"Adopts this sixteenth day of November, 1972, this Convention." (at p466)

53. The definitions of Arts. 1 and 2 have already been mentioned. Article 3 provides: "it is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above." (at p466)

54. Part II of the Convention, which is headed "National Protection and International Protection of the Cultural and Natural Heritage", is of sufficient importance to be set out in full. Its provisions are as follows:

"Article 4

Each State Party to this Convention recognizes that the duty of ensuring the

identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

"Article 5

To ensure that effective and active measures are taken for the protection,

conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

"Article 6

1. Whilst fully respecting the sovereignty of the States on whose territory

the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and preservation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.

3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention. "Article 7 For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage." (at p467)

55. Article 8 provides for the establishment of the World Heritage Committee and for the recognition of ICOMOS and IUCN. Article 11 is important. It reads as follows:

"1. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.

2. On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List", a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years.

3. The inclusion of a property in the World Heritage List requires the consent of the State concerned. The inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute.

4. The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of "List of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods, and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately.

5. The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this article.

6. Before refusing a request for inclusion in one of the two lists mentioned in paragraphs 2 and 4 of this article, the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated.

7. The Committee shall, with the agreement of the States concerned, co-ordinate and encourage the studies and research needed for the drawing up of the lists referred to in paragraphs 2 and 4 of this article." (at p467)

56. Article 12 provides that the fact that a property belonging to the cultural or natural heritage has not been included in either of the lists mentioned in Arts. 11.2 and 11.4 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists. Article 13 provides, inter alia, as follows:

"1. The World Heritage Committee shall receive and study requests for international assistance formulated by States Parties to this Convention with respect to property forming part of the cultural or natural heritage, situated in their territories, and included or potentially suitable for inclusion in the lists referred to in paragraphs 2 and 4 of Article 11. The purpose of such requests may be to secure the protection, conservation, presentation or rehabilitation of such property.

2. Requests for international assistance under paragraph 1 of this article may also be concerned with identification of cultural or natural property defined in Articles 1 and 2, when preliminary investigations have shown that further inquiries would be justified.

3. The Committee shall decide on the action to be taken with regard to these requests, determine where appropriate, the nature and extent of its assistance, and authorize the conclusion, on its behalf, of the necessary arrangements with the government concerned.

4. The Committee shall determine an order of priorities for its operations. It shall in so doing bear in mind the respective importance for the world cultural and natural heritage of the property requiring protection, the need to give international assistance to the property most representative of a natural environment or of the genius and the history of the peoples of the world, the urgency of the work to be done, the resources available to the States on whose territory the threatened property is situated and in particular the extent to which they are able to safeguard such property by their own means." (at p468)

57. By Art. 15 a trust fund, called the World Heritage Fund, is established. It is provided that its resources shall consist, inter alia, of compulsory and voluntary contributions made by the States Parties to the Convention. Articles 16, 17 and 18 are as follows:

"Article 16

1. Without prejudice to any supplementary voluntary contribution, the States

Parties to this Convention undertake to pay regularly, every two years, to the World Heritage Fund, contributions, the amount of which, in the form of a uniform percentage applicable to all States, shall be determined by the General Assembly of States Parties to the Convention, meeting during the sessions of the General Conference of the United Nations Educational, Scientific and Cultural Organization. This decision of the General Assembly requires the majority of the States Parties present and voting, which have not made the declaration referred to in paragraph 2 of this Article. In no case shall the compulsory contribution of States Parties to the Convention exceed 1 per cent of the contribution to the Regular Budget of the United Nations Educational, Scientific and Cultural Organization.

2. However, each State referred to in Article 31 or in Article 32 of this Convention may declare, at the time of the deposit of its instruments of ratification, acceptance or accession, that it shall not be bound by the provisions of paragraph 1 of this Article.

3. A State Party to the Convention which has made the declaration referred to in paragraph 2 of this Article may at any time withdraw the said declaration by notifying the Director-General of the United Nations Educational, Scientific and Cultural Organization. However, the withdrawal of the declaration shall not take effect in regard to the compulsory contribution due by the State until the date of the subsequent General Assembly of State Parties to the Convention.

4. In order that the Committee may be able to plan its operations effectively, the contributions of States Parties to this Convention which have made the declaration referred to in paragraph 2 of this Article, shall be paid on a regular basis, at least every two years, and should not be less than the contributions which they should have paid if they had been bound by the provisions of paragraph 1 of this Article.

5. Any State Party to the Convention which is in arrears with the payment of its compulsory or voluntary contribution for the current year and the calendar year immediately preceding it shall not be eligible as a Member of the World Heritage Committee, although this provision shall not apply to the first election.

The terms of office of any such State which is already a member of the Committee shall terminate at the time of the elections provided for in Article 8, paragraph 1 of this Convention.

"Article 17

The States Parties to this Convention shall consider or encourage the

establishment of national, public and private foundations or associations whose purpose is to invite donations for the protection of the cultural and natural heritage as defined in Articles 1 and 2 of this Convention.

"Article 18

The States Parties to this Convention shall give their assistance to

international fund-raising campaigns organized for the World Heritage Fund under the auspices of the United Nations Educational, Scientific and Cultural Organization. They shall facilitate collections made by the bodies mentioned in paragraph 3 of Article 15 for this purpose." (at p468)

58. Articles 19 and 20 provide as follows:

"Article 19

Any State Party to this Convention may request international assistance for

property forming part of the cultural or natural heritage of outstanding universal value situated within its territory. It shall submit with its request such information and documentation provided for in Article 21 as it has in its possession and as will enable the Committee to come to a decision.

"Article 20

Subject to the provisions of paragraph 2 of Article 13, sub-paragraph (c) of

Article 22 and Article 23, international assistance provided for by this Convention may be granted only to property forming part of the cultural and natural heritage which the World Heritage Committee has decided, or may decide, to enter in one of the lists mentioned in paragraphs 2 and 4 of Article 11." (at p468)

59. Articles 22 and 23 provide:

"Article 22

Assistance granted by the World Heritage Committee may take the following

forms:

(a) studies concerning the artistic, scientific and technical problems raised by the protection, conservation, presentation and rehabilitation of the cultural and natural heritage, as defined in paragraphs 2 and 4 of Article 11 of this Convention;

(b) provision of experts, technicians and skilled labour to ensure that the approved work is correctly carried out;

(c) training of staff and specialists at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage;

(d) supply of equipment which the State concerned does not possess or is not in a position to acquire;

(e) low-interest or interest-free loans which might be repayable on a long-term basis;

(f) the granting, in exceptional cases and for special reasons, of non-repayable subsidies.

"Article 23

The World Heritage Committee may also provide international assistance to

national or regional centres for the training of staff and specialists at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage." (at p469)

60. Articles 27 and 28 are as follows:

"Article 27

1. The States Parties to this Convention shall endeavour by all appropriate

means, and in particular by educational and information programmes, to strengthen appreciation and respect by their peoples of the cultural and natural heritage defined in Articles 1 and 2 of the Convention.

2. They shall undertake to keep the public broadly informed of the dangers threatening this heritage and of activities carried on in pursuance of this Convention.

"Article 28

States Parties to this Convention which receive international assistance

under the Convention shall take appropriate measures to make known the importance of the property for which assistance has been received and the role played by such assistance." (at p469)

61. By Art. 29, the States Parties to the Convention are obliged, in the reports which they submit to the General

Conference of UNESCO, to give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of the Convention, together with details of the experience acquired in the field. The reports are to be brought to the attention of the World Heritage Committee which will itself report to the General Conference of UNESCO. (at p469)

62. Article 34 is a so-called "federal clause". It provides as follows:

"The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;

(b) with regard to the provisions of this convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption."

The effect of the Convention (at p469)

63. It is convenient at this stage to point out certain material features of the Convention. In the first place, the cultural heritage and natural heritage (which in this summary I shall together describe as "the heritage") comprises only properties "of outstanding universal value". Secondly, the words used in describing the obligations which the States Parties to the Convention assume differ materially from one article to another. By some articles, the States Parties to the Convention "undertake" to do or not to do certain things (see Arts. 6.2, 6.3 and 16.1 and cf. Art. 27.2) and by other articles it is provided, without qualification, that a State Party to the Convention "shall" do certain things; see Arts. 17, 18 and 29.1. At first sight, these obligations might appear to be absolute, although in some cases a further examination of their provisions and of the context in which they appear makes it doubtful whether an absolute obligation is intended to be created. For example, the undertaking given in Art. 6.2 is "in accordance with the provisions of this Convention, to give their help . . .", and the other provisions of the Convention do not make it clear what help one State Party to the Convention is required to give to another. Question of that kind, however, do not need to be decided in the present matter. Other articles, instead of imposing in terms an outright obligation, require a State Party to the Convention to "endeavour" to do something (see Art. 27.1) or to do something "in so far as possible"; see Art. 11. Article 5, which is important for present purposes, combines both these qualifications; it provides that, for the purpose of ensuring that effective and active measures are taken for the protection, conservation and presentation of the heritage situated on its territory, a State Party to the Convention shall endeavour, in so far as possible, and as appropriate for each country, (i) to adopt a general policy, (ii) to set up services, (iii) to develop studies and research and work out operating methods, (iv) to take appropriate legal and other measures necessary for the identification, protection, conservation, presentation and rehabilitation of the heritage, and (v) to foster the establishment or development of national or regional training centres and to encourage scientific research. Another important provision, Art.4, uses yet another formula; it recites that each State Party to the Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the heritage situated on its territory belongs primarily to that State and then provides that each State Party to the Convention will "do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation ... which it may be able to obtain". The meaning and effect of Arts. 4 and 5 will be of great importance in the present matter. (at p470)

64. Thirdly, it is made clear by the Convention that the sovereignty of a State Party to the Convention is to be fully respected; see Art.6.1. Property on the territory of a State Party to the Convention may be identified as part of the heritage only by that State: Arts.3 and 4 and see Art.5. No property may be included in the World Heritage List, or the List of World Heritage in Danger, unless the State on whose territory the property is situated has consented to its

inclusion in the former list: Art.11. Fourthly, the recognition which the States Parties to the Convention give to the principle that the heritage is the heritage of the world, for whose protection the international community should cooperate, is not only subject to full respect for the sovereignty of the State on whose territory the heritage is situated, but is also "without prejudice to property rights provided by national legislation": Art.6.1. (at p470)

65. Fifthly, the fact that a property is listed on the World Heritage List imposes no duties on the State on whose territory that property is situated. The only obligations which are cast upon a State Party to the Convention by reason of the listing of a property are those set out in Art. 6.2. The undertaking in Art.6.2. is to help in the identification, protection, conservation and preservation of the heritage referred to in pars.2 and 4 of Art. 11 - which seems to mean the properties forming part of the heritage and included in the World Heritage List or the List of World Heritage in Danger - if the States on whose territory it is situated so request. Article 6.2 imposes an obligation on one State to help another, on whose territory a property included in one or other of the lists is situated, if the latter State requests it, and does not impose any obligation on a State to do anything with regard to heritage (listed or otherwise) within its own territory. Article 6.3 imposes an obligation not to take deliberate measures which might damage directly or indirectly the heritage situated on the territory of another State; again the duty is imposed on one State in respect of property situated on the territory of another, although in this case any property forming part of the heritage, whether listed or not, is covered by the paragraph. The practical importance of listing a property on the World Heritage List is that the listing satisfies a condition precedent to the grant of assistance by the World Heritage Committee; see Arts.13.1 and 20. It is true that assistance may be granted in some other cases - in particular, in relation to the identification of cultural or natural property, or for the training of staff and specialists, or where the property is potentially suitable for listing and the World Heritage Committee may decide to enter it on the list - but the fact that the property is listed makes it clear that the World Heritage Committee must receive and study a request for assistance with respect to that property. (at p470)

66. Sixthly, the Convention contains a federal state clause: Art.34. Finally, the Convention contains no provision whereunder a State Party to the Convention which considers that another State Party is not giving effect to the Convention may bring the matter to the attention of the World Heritage Committee, or may otherwise ventilate its grievances, and no provision for the resolution of disputes or complaints as to an alleged failure to observe the Convention - no such provision as, for example, appears in Arts. 11-16 of the International Convention on the Elimination of All Forms of Racial Discrimination. (at p470)

67. In the light of this survey of the relevant provisions of the Convention it is now possible to consider the nature of the obligations imposed by Arts.4,5 and 6. It has already been remarked that whereas some other articles use the language of a formal promise ("undertake") or that of command ("shall"), the expressions uses in Arts.4 and 5 appear designed to leave it to the States Parties to the Convention to determine what steps, if any, they will take to achieve its objectives. Although Art.4 recites that each State Party recognizes that the duty of ensuring, inter alia, the protection of the heritage situated on its territory belongs primarily to that State, the operative words of the article provide that each State Party "will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation ... which it may be able to obtain". Article 5 provides that each State Party "shall endeavour, in so far as possible, and as appropriate for each country" to do the various things specified in the succeeding paragraphs of the article. The words of those paragraphs themselves indicate the width of the discretion left to the States Parties to the Convention. Thus each State Party is required to endeavour, in so far as possible, and as appropriate, to adopt a general policy with the aim described in par. (a). That obligation could hardly be more vaguely expressed. The services to be set up under par. (b) are to have "an appropriate" staff. The legal measures which the State Party is to endeavour, in so far as possible, and as appropriate, to take under par. (d) are "appropriate legal ... measures". (at p470)

68. The question that then arises is whether Arts. 4 and 5 impose any legal obligation upon State Parties to the Convention. "Not all treaties are enforceable, this depends upon the intention of the Parties": O'Connell, International Law, (2nd ed., 1970), vol. 1, p. 246. "It is often impossible to distinguish between pronouncements of political intent and declarations giving rise to legal obligations. One instrument might well be a combination of both types of undertaking. Or, indeed, what is apparently a treaty may be devoid of legal content ... The fact that a treaty does not prescribe conduct in a manner enforceable by law is a common enough occurence for international law to recognise and accept". Greig, International Law, (2nd ed.), pp. 460-1. (See also International Law Being The Collected Papers of Hersch Lauterpacht, vol. 4, at pp. 110-113.) J.E.S. Fawcett, the learned author of an article, "The Legal Character of International Agreements" (1953), B.Y.B.I.L. vol. 30 381, has said, at p. 390: "Certain provisions in international

agreements appear to negative any intention to create legal relations. These are provisions which in one way or another leave it to the parties themselves to determine the extent of the obligations they have assumed and the mode of performance." He went on, at p. 391, to say: "Similarly, it is doubtful whether undertakings 'to use best endeavours' or 'to take all possible measures' can in most cases amount to more than declarations of policy, or of good will towards the objects of the agreement." (at p471)

69. It is unnecessary to consider whether if the words of Arts. 4 and 5 which purport to impose an obligation had appeared in, for example, a commercial contract, they would, in an appropriate context have imposed a duty to do what was reasonably possible and fitting in the circumstances. It is however impossible to conclude that Arts. 4 and 5 were intended to impose a legal duty of that kind on the States Parties to the Convention. If the conduct which those articles purport to prescribe was intended to be legally enforceable, the obligations thereby created would be of the most onerous and far reaching kind. The obligations would extend to any property which might reasonably be regarded as cultural or natural heritage within the meaning of Arts. 1 and 2 of the Convention, whether or not it was included on the World Heritage List, and would require a State Party to the Convention to take all legal measures within its constitutional power that might reasonably be regarded as appropriate for the identification and protection of such property, and to apply all of its financial resources that it could possibly make available for the same purpose; there would of course be further obligations, but what I have said suffices to indicate the nature of the burden which the articles would impose. The very nature of these obligations is such as to indicate that the States Parties to the Convention did not intend to assume a legal obligation to perform them. (at p471)

70. On the proper construction of the articles, the questions what a State Party can do, how far its resources extend, what is possible and what is appropriate are clearly left to the State Party itself to decide. This conclusion is strongly supported by the contrast already mentioned between the language of Arts. 4 and 5 and that used in other articles which appear to express an intention to create a strictly binding obligation. It is true that some of those other articles which use language of that kind present difficulties of their own. In addition to Art. 6.2, to which I have already referred, it is sufficient to mention Art. 16, under which, it has been said, "obligatory contributions become voluntary and voluntary ones become obligatory and even attract a penalty": Goy, "The International Protection of the Cultural and Natural Heritage" (1973), Neth. Y.B.I.L., 4 117, at p. 135. Nevertheless the change in terminology between the various articles indicates that Arts. 4 and 5 were not intended to give rise to an undertaking. Indeed, any binding obligation to perform Arts, 4 and 5 would be inconsistent with the emphatic recognition of the respect for the sovereignty of each State Party, and with the recognition of the undoubted right of each State Party to decide, for itself, in the first instance, whether or not any property on its territory should be listed on the World Heritage List, or whether any international assistance should be provided for the identification and protection of any such property. (at p471)

71. Whether or not the undertakings in pars. 2 and 3 of Art. 6 (which are not relevant for present purposes) are enforceable, it seems clear that Art. 6.1 does not oblige a State Party to the Convention to take any particular individual action for the protection of the heritage. Article 6.1 recognizes the duty of the international community as a whole to cooperate for the protection of the heritage, although at the same time it reveals an intention to respect national sovereignty and not to prejudice property rights. Article 6.1, like Art. 7, appears designed to further the securing of international cooperation which is an important aim of the Convention. The importance of that objective is shown by the preamble to the Convention, since the purpose for which, according to the last paragraph of the preamble, the Convention is adopted is the purpose mentioned in the penultimate paragraph, namely that "the international community as a whole" should "participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an effective complement thereto". (at p471)

72. The conclusion which I have reached is that although the Convention imposes on the States Parties to the Convention certain obligations, Arts. 4, 5 and 6 do not impose on any State Party an obligation to take any specific action, and there is no other provision of the Convention which imposes any legal obligation on Australia to take action to protect the Parks from possible or actual damage. In my opinion the relevant articles of the Convention leave it to each State Party "to determine the extent of the obligations ... and the mode of performance", or in other words to decide whether it shall take any action at all to carry out what purport to be the obligations imposed by the relevant articles. In the language of domestic law, the words of the Convention show that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise and in those circumstances the promise is illusory and

no binding obligation is created: see Loftus v. Roberts (1902), 18 T.L.R. 532; Thorby v. Goldberg [1964] HCA 41; (1964), 112 C.L.R. 597, at p. 605; and Placer Development Ltd. v. The Commonwealth [1969] HCA 29; (1969), 121 C.L.R. 353, at pp. 356, 360-1. The obligations imposed by the Convention are political or moral, but not legally binding. (at p472)

73. Finally, it is necessary to refer to the effect of Art. 34, the federal clause. Paragraphs (a) and (b) of that article are not necessarily mutually exclusive. It is of course possible that in a federal state the implementation of the provisions of the Convention may come under the legal jurisdiction of both the federal legislative power and that of individual constituent states. In the present case, assuming that any legal obligations were created, there is no doubt that their implementation would come within the legal jurisdiction of Tasmania. It would be a question whether they would also come within the legal jurisdiction of the Commonwealth. Further reference will be made to that question. (at p472)

74. The significance of these conclusions in relation to the questions which arise under s. 51(xxix) of the Constitution remains to be considered.

Travaux preparatories (at p472)

75. The question arises whether it is permissible to consider the preparatory work (travaux preparatoires) of the Convention as an aid to its interpretation. The interpretation of treaties is now governed by the Vienna Convention on the Law of Treaties. The general rule of interpretation is laid down in Art. 31 of that Convention, pars. 1 and 2 of which are as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." (at p472)

76. Article 32, which is headed "Supplementary means of interpretation" provides as follows:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable." (at p472)

77. The Vienna Convention had not come into force on 16th November, 1972, when UNESCO adopted the Convention, or for that matter on 22nd August, 1974, when Australia deposited its instrument of ratification, or on 17th December, 1975, when the Convention entered into force; it therefore did not apply to the Convention (see Art. 4 of the Vienna Convention). However, it has been said that the Vienna Convention, in this respect, did no more than endorse or confirm the existing practice: see Fothergill v. Monarch Airlines Ltd., [1980] UKHL 6; (1981) A.C. 251, at pp. 276 and 282, and see the references in an article by J.G. Merrills, "Two Approaches to Treaty Interpretation", (1968-9) A.Y.B.I.L. 55, at p. 57. The actual question decided in Fothergill v. Monarch Airlines Ltd., whether in considering a Convention which had been given the force of law by an English statute, it was right to use the travaux preparatoires, is different from that which arises in the present case, whether it is necessary to consider the effect of the Convention, not as part of the law of Australia, but as an international agreement which is said to assist in making available the power conferred by s. 51(xxix). There has been some controversy as to the exact part to be played by travaux preparatories in the process of construction - it is discussed in many places, including McNair, Law of Treaties (1961), at pp. 411- 423; Elias, The Modern Law of Treaties (1974), at pp. 79-84 and Sinclair, The Vienna Convention on the Law of Treaties (1973), at pp. 71-6 - but it is a controversy which I need not join. If there is an ambiguity, the travaux preparatoires may help to resolve it. Even if there is no ambiguity, it appears that the travaux preparatoires may be used as a supplementary means of interpretation, to confirm the meaning which appears from the treaty itself. (at p472)

78. During the course of the preparatory work in connexion with the Convention, the strength of the obligations which the original draft sought to impose was considerably diminished. In the preliminary draft, Art. 4 (then numbered Art. 3) read as follows:

"The States Parties to this Convention recognize that the duty of ensuring the protection, development and transmission to future generations of the property referred to in Article 2 situated on their territory is primarily theirs. To this end, they undertake to work to the utmost of their own resources and with any international assistance and co-operation, in particular financial, artistic, scientific and technical, which they may be able to obtain." (at p472)

79. The introductory words of Art. 5 (numbered 4 in the preliminary draft) read:

"To ensure as effective a protection and as active a development as possible of all monuments, groups of buildings and sites on their territory, as appropriate for each country and in conformity with the relevant provisions of existing international conventions and recommendations, they undertake in particular..." (at p472)

80. Paragraph (d) of that article then read:

"to take all legal, scientific, technical, administrative and financial measures necessary for the upkeep, restoration and rehabilitation of this heritage." (at p472)

81. The preliminary report prepared for UNESCO stated that Art.3 (as it then was) "places States on whose territory the immovable cultural property is situated under a formal obligation to ensure its protection". The report went on to say: "Under the terms of Article 4 the States Parties to the Convention undertake a certain number of commitments to provide the most effective protection possible. . . " However, a number of nations proposed amendments to these articles; in particular, Italy considered that "to preclude the possibility of interference in the domestic affairs of States Parties to the Convention, Articles 3 and 4 should not be presented in the form of statutory commitments", and Australia considered that "Article 4, defining the arrangements for national protection, is inappropriate to the convention and

should appear only in the recommendation". These observations were taken into account, and in the revised draft what were originally intended as undertakings were replaced by promises less strict. The Secretariat, in its comments on the revised draft said:

"The revised draft convention has considerably reduced the scope of commitments to be undertaken by States with regard to national activities." (at p473)

82. In Art. 6, what is now the duty of the international community to cooperate for the protection of the heritage was originally a duty to protect the heritage; and among other amendments the reference to property rights was inserted, and it was made clear that help is to be given only on request by the State concerned. Other changes during the preparatory work showed a consistent tendency to weaken the force of the original draft. The provisions requiring the consent of the State Party concerned before a property is included in the World Heritage List did not appear in Art. 11 in its original form but was inserted in the course of the preparatory work. There was no federal clause of the present kind in the preliminary draft. (at p473)

83. In the final report furnished to UNESCO by a committee of experts it was said, by way of comment on Art. 5:

"Some delegations raised the question whether a provision relating to protection at the national level should not be included in the Recommendation rather than in the Convention. Some delegations would have preferred a provision contaning no details with regard to the form that national protection should take. The majority of the Committee members, however, believed that a provision stipulating that protection should be afforded at the national level and specifying the best methods of ensuring such protection should be included in the Convention." (at p473)

84. In relation to Art. 6 it was said:

"While expressly retaining their sovereignty and any existing property rights to the cultural and natural heritage situated on their territory, the States Parties to the Convention recognize that the cultural and natural heritage included in the lists referred to in Article 11 constitutes a universal heritage and that they consequently have responsibilities for it on the international level." (at p473)

85. On 16th November, 1972, the day on which the Convention was adopted, UNESCO also adopted a recommendation concerning the protection, at national level, of the cultural and natural heritage. For the purposes of the recommendation, the heritage comprised property of "special value" - not necessarily "of outstanding universal value" (see pars. 1 and 2). Paragraph 3 of the recommendation stated that "in conformity with their jurisdictional and legislative requirements, each State should formulate, develop and apply as far as possible a policy whose principal aim should be to co-ordinate and make use of all scientific, technical, cultural and other resources available to secure the effective protection, conservation and presentation of the cultural and natural heritage". Paragraph 18 provided:

"Member States should, as far as possible, take all necessary scientific, technical and administrative, legal and financial measures to ensure the protection of the cultural and natural heritage in their territories. Such measures should be determined in accordance with the legislation and organization of the State." (at p473)

86. Legal measures were dealt with by pars. 40-48. (at p473)

87. The fact that a recommendation was adopted at the same time as the Convention, and the comments (included) in the final report, suggest that Arts. 4 and 5 were intended to have higher status than a mere recommendation, and were, to

use the words of the report, intended to create "responsibilities. . . on the international level". On the other hand, the changes that occurred in the course of the preparatory work, and in particular the abandonment of the word "undertake", and the substitution of the present words of the articles, support the view that it was not intended by those articles to bind the States Parties to any course of action upon which they themselves were not prepared to embark. Similarly the changes made to Art. 6 show that the performance of the duty of international cooperation was not intended to override national sovereignty or individual proprietary rights. (at p473)

88. On the whole, the travaux preparatories confirm the meaning which the words of the relevant articles of the Convention themselves reveal.

The external affairs power (at p473)

89. It is now possible to consider whether s.69 of the National Parks and Wildlife Conservation Act 1975 and ss. 6 and 9 of the World Heritage Properties Conservation Act 1983, or either of them, is validly enacted under the power given by s. 51(xxix) to make laws for the peace order and good government of the Commonwealth with respect to external affairs, and whether the World Heritage (Western Tasmania Wilderness) Regulations are validly made under the former Act. Although the scope of the power conferred by s.51(xxix) has recently been discussed in Koowarta v. Bjelke-Petersen [1982] HCA 27; (1982), 56 A.L.J.R. 625, it would be altogether too optimistic to suppose that the Court has reached a complete solution of the very real difficulties which that paragraph creates. The words of the paragraph are ambiguous, but I would respectfully adopt as accurate the paraphrase suggested by Stephen J. in Koowarta (supra), at p. 643:". . . such of the public business of the national government as relates to other nations or other things or circumstances outside Australia." That paraphrase of the words of the paragraph does not completely define the limits of the power. However, three propositions may be taken as settled by the authorities so far decided on s. 51(xxix). The power given by that paragraph is an independent one and is not merely ancillary to other powers possessed by the Parliament; it extends to enable the Parliament to legislate with regard to matters and things done entirely within Australia; and its exercise is subject to the restrictions imposed by the Constitution, whether expressly or by implication. Those propositions, however, do not go far in providing an answer to the questions in the present case. One important question which now arises is the same as that which on one view arose in Koowarta, namely, does the power enable the Parliament to legislate to give effect to any treaty to which Australia is a party, even though the law deals with matters which occur, and can occur only, within Australia, and even though the performance of the treaty in its relevant aspects involves no reciprocity or mutuality of relationship between Australia and the other parties to the treaty? Put in another way, this question is "whether this power to implement treaty obligations is subject to any and if so what overriding qualifications derived from the federal nature of our Constitution": per Stephen J. in Koowarta (supra), at p. 643. Another important question which did not arise in Koowarta, but which produced disagreement in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936), 55 C.L.R. 608, is whether legislation, to be valid, must be in conformity with the treaty which it professes to be executing or whether the fact that a treaty has been made enables the Parliament to legislate generally with regard to the subject matter with which the treaty deals. (at p474)

90. It is clear that in some circumstances the Parliament can pass a law to give effect within Australia to an international convention to which Australia is a party. It is equally clear that the existence of an international convention is not a necessary condition of the exercise of the power given by s. 51(xxix). If a matter can properly be said to relate to other nations, or to things external to Australia, the Parliament may pass laws with respect to it, even though it is not regulated by any international agreement. However, in the present case it is suggested that the power is attracted by the Convention, and possibly also by the recommendation of UNESCO, and there are no other features of the case that make it necessary to discuss in what circumstances the power may be exercised when no international agreement has been reached. (at p474)

91. Four members of the Court in Koowarta rejected the notion that s. 51(xxix) empowers the Parliament to give effect in Australia to any international agreement to which Australia is a party, whatever its subject matter and whatever the circumstances. In that case, although Stephen, Mason, Murphy and Brennan JJ. joined in holding the challenged legislation to be valid, Stephen J. differed from the other members of the majority on this question. Mason J. expressed

his opinion as follows, at p.651: "Agreement by nations to take common action in pursuit of a common objective evidences the existence of international concern and gives the subject-matter of the treaty a character which is international". The view of Murphy J. was equally wide; see at p.656. Brennan J. expressed a similar view, but suggested a possible qualification. At p.663 he said:

"When a particular subject affects or is likely to affect Australia's relations with other international persons, a law with respect to that subject is a law with respect to external affairs." (at p474)

92. A little later he said, at p.664:

"No doubt there are questions of degree which require evaluation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them . . . " (at p474)

93. Finally, he said, at p.664:

"If Australia, in the conduct of its relations with other nations, accepts a treaty obligation with respect to an aspect of Australia's internal legal order, the subject of the obligation thereby becomes (if it was not previously) an external affair, and a law with respect to that subject is a law with respect to external affairs.

"It follows that to search for some further quality in the subject, an 'indisputable international' quality, is a work of supererogation. The international quality of the subject is established by its effect or likely effect upon Australia's external relations and that effect or likely effect is sufficiently established by the acceptance of a treaty obligation with respect to that subject." (at p474)

94. Stephen J. took a different view. He held that a treaty will attract the power only if it deals with a matter of international rather than of merely domestic concern, and that "it will not be enough that the challenged law gives effect to treaty obligations"; see at p.645. He referred to the very great expansion that has occurred since the last war in areas properly the subject of international agreement, and went on to say, at p.645:

"Nevertheless the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation's 'external affairs'. A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'." (at p474)

95. My own opinion, in which Aickin and Wilson JJ. agreed, was that a law which gives effect within Australia to an international agreement will only be a valid exercise of the power conferred by s. 51(xxix) if the agreement is with respect to a matter which can itself be described as an external affair, and that any subject matter may constitute an external affair provided that the manner in which it is treated in some way involves a relationship with other countries or with persons or things outside Australia;see at p. 638. (at p475)

96. In my opinion the problem of construction that arises is whether in interpreting par.(xxix), due regard should be had to the fact that the Constitution is federal in character. The true rule of constitutional interpretation was expressed by O'Connor J. in Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association (1908), 6 C.L.R. 309, at p.368, in a passage that has often been cited:". . . where the question is whether the Constitution has used an expression in the

wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose." The federal nature of the Constitution requires that some limits be imposed on the power to implement international obligations conferred by par.(xxix), and that was, I consider, the basis of the judgement of Stephen J. in Koowarta. The external affairs power differs from the other powers conferred by s. 51 in its capacity for almost unlimited expansion. As Dixon J. pointed out in Stenhouse v. Coleman [1944] HCA 36; (1944),69 C.L.R. 457, at p.471: "In most of the paragraphs of s. 51 the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognized category of legislation (as taxation, bankruptcy)." The boundaries of those categories of power may be wide, but at least they are capable of definition. However, there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power. Whether Australia enters into any particular international agreement is entirely a matter for decision by the Executive. The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely as a device for the purpose of attracting legislative power. Section 51(xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive. To say this is of course not to suggest that by the Constitution any powers are reserved to the States. It is to say that the federal nature of the Constitution requires that "no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament": Bank of New South Wales v. The Commonwealth [1948] HCA 7; (1948), 76 C.L.R. 1, at pp.184-5, which I cited in Koowarta at p.637. In this respect, in my opinion, my views, and those of Wilson and Aicken JJ., were in substance shared by Stephen J., although they led him to suggest a different test. (at p475)

97. It is not altogether clear what Stephen J. meant when he insisted that the subject of a treaty must be of international concern if legislation with regard to it is to come within the power conferred by s. 51(xxix). He clearly did not mean that it was necessary that the subject of the agreement must itself be an external affair, for it was on that question that he differed from the minority. However, he cannot have meant that the mere fact that a matter has become the subject of an international agreement means that it is a matter of international concern, because he expressly said that it is not enough that the challenged legislation gives effect to treaty obligations. The key to the understanding of his judgment seems to me to lie in a passage, at pp.645-6, in which he drew an analogy with the defence power. He cited a passage from Andrews v. Howell [1941] HCA 20; (1941), 65 C.L.R. 255, where Dixon J. said, at p.278, that whether the defence power will suffice to authorize a given measure "will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto". Then Stephen J. went on, at p.646: "It will be open to the Court, in the case of a challenged exercise of the external affairs power, to adopt an analogous approach, testing the validity of the challenged law by reference to its connexion with international subject-matter with the external affairs of the nation." Although the words of this sentence are a little obscure they suggest (as did some of the remarks of Brennan J.) that the question is one of degree. Whether a matter is of international concern depends on the extent to which it is regarded by the nations of the world as a proper subject for international action, and on the extent to which it will affect Australia's relations with other countries. For myself, I should have preferred a more precise test. However, the result is that unlike some other powers, but like the defence power, the application of the external affairs power "depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law": Andrews v. Howell, at p.278. (at p475)

98. The Convention, and the recommendation, in their relevant aspects, and as applicable to Australia, deal with matters entirely domestic - matters which contemplate action within Australia, which involve no reciprocity of relationship with other nations (as a convention regarding the protection of historic memorials from bombardment might do) and which do not directly affect the interests of other nations, for example, by protecting them from actual or potential risks (as a convention relating to the eradication of diseases or the prohibition of the illegal export of cultural property might do). The protection of the environment and the cultural heritage has been of increasing interest in recent times, but it cannot be said to have become such a burning international issue that a failure by one nation to take protective measures is

likely adversely to affect its relations with other nations, unless of course damage or pollution extends beyond the borders. If one nation allows its own natural heritage (and no other) to be damaged, it is not in the least probable that other nations will act similarly in reprisal, or that the peace and security of the world will be disturbed - in this respect, damage to the heritage stands in clear contrast to such practices as racial discrimination;cf.Koowarta(supra), at p.651, per Mason J. The learned Solicitor-General referred us to some earlier treaties which dealt with the protection of cultural property, animals and national parks in certain limited circumstances, but none deals with the protection of the heritage generally. It cannot be said that the rules of customary international law cast any obligation on a nation to preserve the heritage within its own boundaries. Although it appears that the subject has been regarded as fit for international action, that action has fallen short of creating definite and binding national obligations. The question whether the subject matter of the Convention is one of international concern within the test propounded by Stephen J. is one of some difficulty, because, since the external affairs power, like the defence power, "applies to authorize measures only to meet facts" (cf. Australian Textiles Pty. Ltd. v. The Commonwealth [1945] HCA 35; (1945), 71 C.L.R. 161, at p.181), the Court must form its own impression of the facts, in part on the basis of judicial notice. In the present case I regard as decisive the fact that the Convention does not impose any obligation on the Commonwealth to enact legislation for the protection of any part of the national heritage within Australia; and of course the recommendation does not purport to do so. I also take into account my opinion that relations with other countries are not likely to be significantly affected by whatever action Australia takes in relation to the protection of the Parks. These considerations, and the nature of the matters with which the Convention and the recommendation deal, lead me to the conclusion that the external affairs power has not been attracted in the present case. (at p476)

99. There is another reason why the power conferred by s. 51(xxix) does not support the Act or the World Heritage (Western Tasmania Wilderness) Regulations. If it be assumed that the Convention deals with a matter of international, rather than merely domestic concern, within the test suggested by Stephen J., the consequence is that the Parliament has power to give effect to the Convention, that is, to perform the obligations or to secure the benefits which the Convention imposes or confers on Australia, but has not power to make laws which deal generally with the protection of the heritage, but which are not designed to perform an obligation or receive a benefit under the Convention. This aspect of the matter did not arise in Koowarta, where, as Murphy J. pointed out, at p.656, it was rightly conceded that the challenged sections of the Act there in question conformed to the International Convention on the Elimination of All Forms of Racial Discrimination. (at p476)

100. However, the question did arise in R. v. Burgess; Ex parte Henry. Section 4 of the Air Navigation Act 1920 provided as follows:

"The Governor-General may make regulations for the purpose of carrying out and giving effect to the Convention and the provisions of any amendment of the Convention made under article thirty-four thereof and for the purpose of providing for the control of Air Navigation in the Commonwealth and the Territories." (at p476)

101. It was held that so much of s. 4 as empowered the Governor-General to make regulations for carrying out and giving effect to the Convention (the Convention for the Regulation of Aerial Navigation made in Paris in 1919) was a valid exercise of the power conferred by s. 51(xxix). The regulations made under the Act largely followed the Convention but did not embody all its provisions and differed from it in some respects. The majority of the Court held that the regulations were invalid. The members of the majority all applied what was substantially the same test in deciding upon the validity of the regulations. Latham CJ. said, at p.646, that the regulations "must in substance be regulations for carrying out and giving effect to the convention". Dixon J. said, at pp.674-5:

"It is apparent that the nature of this power (that is, the power conferred by s. 51(xxix)) necessitates a faithful pursuit of the purpose, namely, a carrying out of the external obligation, before it can support the imposition upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth. No doubt the power includes the doing of anything reasonably incidental to the execution of the purpose. But wide departure from the purpose is not permissible, because under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates." (at p476)

102. Evatt and McTiernan JJ. said, at p.688, that "the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing". They continued:

"In other words, it must be possible to assert of any law which is, ex hypothesi, passed solely in pursuance of this head of the 'external affairs' power, that it represents the fulfilment, so far as that is possible in the case of laws operating locally, of all the obligations assumed under the convention." (at p476)

103. Starke J., who dissented, took a wider view. He said, at pp.659-660:

"All means which are appropriate, and are adopted (sic) to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power. The power must be construed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention." (at p477)

104. It is, I think, clear that the difference between Starke J. and the majority was not simply a difference as to the effect of the regulations; it was a difference as to the principle to be applied in determining whether a law made to give effect to an international convention is valid. (at p477)

105. The question arose again in Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965), 113 C.L.R. 54. One question that there fell for decision was whether two regulations (Regulations 198 and 199) which were directed to the safety, regularity and efficiency of domestic air navigation were authorized by the external affairs power. The Chicago Convention on International Civil Aviation imposed upon the contracting parties an obligation "to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation". It was held by Barwick CJ. and McTiernan, Menzies and Owen JJ. that the regulations were justified by the external affairs power (although Barwick CJ. and Menzies and Owen JJ. held that they were also justified by the trade and commerce power), by Kitto and Windeyer JJ. that they were authorized by the trade and commerce power but not by the external affairs power and by Taylor J. that they were not authorized by either power. The external affairs power was not very extensively discussed but it does appear that a majority of the Court took the same view as that accepted by the majority in R. v. Burgess; Ex parte Henry, although it is not altogether clear that all of the members of the Court perceived the difference between the view of the majority and that of Starke J. in the earlier case. Barwick CJ. said, at p.86:

"But where a law is to be justified under the external affairs power by reference to the existence of a treaty or a convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the legislative authority, it is for this Court to determine whether particular provisions, when challenged, are appropriate and adapted to that end. The Court will closely scrutinize the challenged provisions to ensure that what is proposed to be done substantially falls within the power. As Dixon J. (as he then was) said in Burgess' Case what the legislature does in such a case must be no more than 'a faithful pursuit of the purpose, namely, a carrying out of the external obligation' or, as I would respectfully add, the securing of the benefit which the treaty or convention gives. See also per Starke J. in the same case and per Evatt and McTiernan JJ." (at p477)

106. Kitto J., at p.118, made plain his view that the external affairs power supported "laws implementing the Convention" but not "laws not directed to compliance with the Convention". Taylor J., at p.126, said that R. v. Burgess; Ex parte Henry is "clear authority for the proposition that, in relation to legislation for giving effect to an international

convention of this character, the legislative power extends no further than to authorize legislation necessary to enable the Commonwealth to fulfil its obligations thereunder or reasonably incidental thereto". Menzies J. (the only member of the Court who expressly mentioned the fact that Starke J. took a different view of the law from that expressed by the other members of the Court in R. v. Burgess; Ex parte Henry: see at p. 141) said, at p. 136:

"When, as here, a party to litigation, and the Commonwealth supporting that party, rely upon s. 51(xxix) to authorize the making of the Commonwealth law in question, it must appear to this Court that the law is for the carrying out of obligations of that description. It will be so if the law can fairly be regarded as providing a way of doing what the Commonwealth has undertaken to do; the choice of ways and means being a matter essentially for the Parliament." (at p477)

107. Windeyer J. said, at p.152:

"A law necessary to give effect to a particular treaty obligation of the Commonwealth is a law with respect to external affairs. But a law that is not necessary to give effect to an international obligation cannot be brought within Commonwealth power by linking it with one that is." (at p477)

108. These cases recognize, as one might expect, that if an international convention imposes obligations on the Commonwealth, the Parliament has a discretion as to the manner in which those obligations are carried out. However, they strongly suggest that if an international convention imposes no obligations on the Commonwealth the power given by s. 51(xxix) is not available. (The case in which a convention gives a benefit may be put aside, for the enactments in the present case do not secure any benefit given by the Convention.) In other words, the external affairs power does not enable the Parliament to make laws with respect to any matter which is dealt with by an international convention to which Australia is a party, even if the matter is one of international concern, when the laws do not give effect to the convention. Once one accepts that s. 51(xxix) must be construed as part of an instrument which creates a federal system, and that the application of the power depends on questions of fact and degree, it must in my opinion follow that Dixon J. was correct in saying that "the nature of this power necessitates a . . . pursuit of the purpose, namely, a carrying out of the external obligation . . . ". If there is no obligation, but merely a recommendation, then, assuming that no other power conferred by the Constitution is available, the Commonwealth can do no more than endeavour to persuade the States to give effect to the recommendation by exercising the legislative power which they possess and the Commonwealth does not. (at p478)

109. In the present case, as I have endeavoured to show, the Convention imposed no relevant obligations on the Commonwealth. The Act does not give effect to any international obligation and is for that reason not a valid exercise of the external affairs power. Further, it fails to afford any protection to property, notwithstanding Art. 6.1 of the Convention, and for that reason also cannot be said to implement the terms of the Convention. (at p478)

110. On this view the federal clause becomes unimportant. However, in the case of a convention of international concern which did require the Commonwealth to legislate in performance of its obligations under the convention, it would be a question whether par. (a) of a federal clause in the form of Art. 34 would apply in every case, on the ground that the very existence of the obligation gave the Commonwealth power to implement it, or whether that paragraph would only apply if the Commonwealth would have had jurisdiction to pass the necessary laws without recourse to the external affairs power. The former view would mean that a federal clause would be entirely nugatory so far as Australia is concerned. However, it is unnecessary to pursue this question further in the present case. (at p478)

111. It is not possible to pronounce on the validity of s. 69 of the National Parks and Wildlife Conservation Act 1975 without considering the question of severability, since parts of the Convention, irrelevant to the present case (e.g. Art. 16) might be given effect by a Commonwealth law. However, it is unnecessary to answer the question whether s. 69 is

valid, because, even if valid, the section does not authorize the making of the World Heritage (Western Tasmania Wilderness) Regulations. Since the Convention imposes no obligation on the Commonwealth to enact laws of the kind provided by the Regulations it follows from what I have already said that the external affairs power does not extend to allow the Regulations to be made. It is unnecessary to consider a further objection raised to the Regulations, namely that they are not regulations for and in relation to giving effect to the Convention, since they relate only to part of one of the areas in Australia which have been listed on the World Heritage List. In addition to the Parks, other areas in Australia have been so listed, but the Regulations deal only with the subject area - a small proportion of the Parks. (at p478)

112. For these reasons I hold that the World Heritage (Western Tasmania Wilderness) Regulations and ss. 6(2)(a) to (d) and 9 of the Act are invalid in the present circumstances. The position might be different (at least as to ss. 6(2)(d) and 9) if Australia came under an international obligation to protect or conserve the property by taking the measures mentioned in s. 9.

The inherent power derived from nationhood (at p478)

113. It was then submitted by the Commonwealth that the provisions of s. 6(e), and those of s. 9, of the Act are validly enacted under the inherent power which is derived not from any express grant made by the Constitution but "from the very formation of the Commonwealth as a polity and its emergence as an international state": Victoria v. The Commonwealth and Hayden [1975] HCA 52; (1975), 134 C.L.R. 338, at p. 362. In that case Mason J. described the power in these words, at p. 397:

". . . the Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity . . . So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion. But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss. 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation." (at p478)

114. He gave as examples the establishment of the Commonwealth Scientific and Industrial Research Organization and the expenditure of money on inquiries, investigation and advocacy in relation to matters affecting public health, and continued, at pp. 397-8:

"No doubt there are other enterprises and activities appropriate to a national government which may be undertaken by the Commonwealth on behalf of the nation. The functions appropriate and adapted to a national government will vary from time to time. As time unfolds, as circumstances and conditions alter, it will transpire that particular enterprises and activities will be undertaken if they are to be undertaken at all, by the national government." (at p478)

115. Jacobs J. revealed that he held a wide view of the scope of this implied power when in the same case he said, at pp. 412-3:

"Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values. . . . Moreover, the complexity of society, with its various interrelated needs, requires co-ordination of services designed to meet those needs. Research and exploration likewise have a national, rather than a local, flavour." (at p478)

116. It is quite unnecessary for present purposes to consider the possible scope of this implied power but it is I think important to repeat the words of caution which Mason J. uttered in Victoria v. The Commonwealth and Hayden, at p. 398:

"It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programs can be conveniently formulated and administered by the national government." (at p479)

117. I completely agree with that statement. Mason J. was there speaking of the executive power. In the same case, at p. 378, I uttered similar cautionary words in relation to the legislative power:

"The legislative power that is said to be incidental to the exercise by the Commonwealth of the functions of a national government does not enable the Parliament to legislate with respect to anything that it regards as of national interest and concern; the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution." (at p479)

118. The implied power derived from nationhood has no possible application to the present case. The question whether and to what extent restrictions should be put on the use of lands within a State is not a matter which is peculiarly appropriate to a national government. On the contrary, it is a matter which traditionally has been considered to be within the province of the government of the State within which the lands are situated. The protection of the Parks is not so complex a matter, and does not involve action on so large a scale, that it requires national coordination to achieve, assuming that to be a test. (at p479)

119. I cannot accept the correctness of the recitals in s. 6(2)(e). It is not established that the Parks form "part of the heritage distinctive of the Australian nation". It is not established that there is a "lack or inadequacy of any other available means for its protection or conservation" although there is, of course, a controversy as to what steps should be taken in that regard. In any case, the implied powers of the Parliament, as a national Parliament, do not extend to allow it to prevent a State from making or permitting such lawful use of its lands as it chooses.

Section 51(xxvi) (at p479)

120. The nature of the power conferred by s. 51(xxvi), to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws" was recently considered in Koowarta, at pp. 631-2, 642-3, 656 and 657-8. To come within s. 51(xxvi) a law must be a law with respect to the people of a particular race, and it must be a special law. A law will be special if it has some special connexion with the people of a race; it will not answer that description if it applies equally to people of all races. History strongly supports the view that "for" in par. (xxvi) means "with reference to" rather than "for the benefit of" - it expresses purpose rather than advantage - but that is not particularly relevant in the present case. (at p479)

121. Section 11 of the Act on its face is a perfectly general law - the prohibitions which it contains are addressed to people of all races. However, a special connexion with the people of the Aboriginal race is sought to be found in s. 8. The declaration in subs. (1) of s. 8 may be ignored since the Parliament cannot, by declaring that a law has a particular characteristic, give it that characteristic. Subsections (2) and (3) show that s. 11 applies only to a site - (i)(a) that is, or is situated within, identified property that is, property forming part of the cultural heritage or natural heritage; and (b) the

protection or conservation of which is, whether by reason of the presence on the site of artefacts or relics or otherwise, of particular significance to the people of the Aboriginal race; and (ii) which the Governor-General, being satisfied that the site is being, or likely to be, damaged or destroyed or that any artefacts or relics are being, or likely to be, damaged or destroyed, has by proclamation declared to be a site to which s. 11 applies. (at p479)

122. Although the protection or conservation of a site to which s. 11 applies must be of particular significance to the people of the Aboriginal race, the site itself must be of outstanding universal value, since otherwise it cannot form part of the cultural heritage or natural heritage. A site which may be of very great significance to the people of the Aboriginal race will not be within the section if it is not of outstanding universal value. The prohibitions in s. 11 are directed to the protection of the site generally, and not to the preservation of any particular feature of the site which may give it significance to members of the Aboriginal race. What is more important, members of the Aboriginal race have no special rights or privileges, and no special obligations, in relation to a site to which s. 11 applies. They have no greater right of access to the site than anyone else, and they are affected by the prohibitions contained in s. 11 in the same way as other people. If the Minister consented to the removal of the artefacts and relics from a site, for example, to enable them to be the subject of scientific study or to be kept safe, he could allow them to be taken to a place to which people other than those of the Aboriginal race had access and members of the Aboriginal race did not. True, it is that in such a case a member of the Aboriginal race might apply to review the decision of the Minister to give his consent (see s. 13(7)) but so also could other persons and organizations (see s. 13(5)). In short, ss. 8 and 11 confer no rights and impose no duties on members of the Aboriginal race as such, or on other persons in relation to their dealings with members of the Aboriginal race. The sections are not a law with respect to people of the Aboriginal race. (at p479)

123. If this view were wrong, the validity of the law would depend on the question whether any of the sites the subject of either of the two proclamations is of particular significance to the people of the Aboriginal race. That would be a question of mixed law and fact. In my opinion the law would not be a special law for the people of the Aboriginal race only because the site contained artefacts and relics dating from prehistoric times, even though those artefacts and relics were left by the race which originally inhabited Tasmania. Artefacts and relics of such antiquity are of significance to all mankind; a law for their protection is not a special law for the people of any one race. (at p480)

124. I hold ss. 8 and 11 of the Act to be beyond power.

The corporations power (at p480)

125. Sections 7 and 10 of the Act invoke the power conferred by s. 51(xx) to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". Section 10 applies to a body corporate which is a foreign corporation, or is incorporated in a Territory, or, not being incorporated in a Territory, is a trading corporation formed within the limits of the Commonwealth, and forbids corporations of those three kinds, without the consent of the Minister, to do the acts specified in the section on property to which the section applies. We are however concerned with the validity and effect of the sections only in so far as they apply to trading corporations, for the Commission is not a foreign corporation or a body corporate incorporated in a Territory. (at p480)

126. The Commission is set up under the Hydro-Electric Commission Act 1944 (Tas.). It consists of four persons appointed by the Governor (s. 3(1)), and is a body corporate capable of suing and of being sued and holding and disposing of real and personal property (s. 4(1)). The general functions, duties and powers of the Commission are set out in s. 15 which provides, inter alia, as follows:

"(1) Subject to this Act, the Commission has and shall perform the functions and duties imposed, and has and may exercise the powers conferred, on it by this Act, including the management and control of the hydro-electric works.

(2) The Commission may, for and on behalf of the State -

(a) construct any works, and may operate, manage, control, and generally

carry on and conduct any business whatsoever, relating to or connected with the generation, reception, transmission, distribution, supply, and sale of electrical energy, and carry out any purpose in relation thereto which the Commission may deem desirable in the interests of the State;

(b) for the purposes of this Act, with the approval of the Minister, purchase from any person electrical energy on such terms as the Commission may think fit;

(c) provide, sell, let for hire, fix, repair, maintain, and remove electric lines, fittings, apparatus, or appliances for lighting, heating, and motive-power, and for all other purposes for which electrical energy can or may be used, upon such terms and conditions in all respects as the Commission shall think fit;

(d) generally, in so far as is not elsewhere in this Act sufficiently provided for, do anything that the owner of similar works might lawfully do in respect thereof, or that is authorized by by-laws under this Act;

(e) appoint, discharge, and determine the salaries, remuneration, and allowances of all officers, clerks, workmen, and servants whom the Commission may deem necessary to carry on the hydro-electric works, or otherwise for carrying out the purposes of this Act; and

(f)with the approval of the Governor, in relation to any particular matter, or class of matters, by writing under its common seal, delegate all or any of the powers of the Commission under this Act (excepting the power of delegation) to a Commissioner so that the delegated powers may be exercised by him with respect to the matters, or class or matters, specified in the instrument of delegation.

(2A) With the approval of the Minister, the Commission may enter into and carry out agreements with any authority or person for the construction by the Commission of any works that that authority or person may lawfully construct or for the giving of assistance by the Commission in the carrying out of any such works.

(2B)The Commission may enter into and carry out agreements with any authority or person for the carrying out of investigations, the preparation of designs, and the giving of other assistance by the Commission in relation to works proposed to be constructed by or on behalf of that authority or person.

(2C)References in subsections (2A) and (2B) to an authority shall be construed as including references to a Minister and to any person acting on behalf of the State or under any enactment.

(2D)The Commission may enter into and carry out agreements with a Minister, acting on behalf of the State, under which the Commission undertakes to do any one or more of the following things:-

(a)to carry out investigations or research for or in connection with-

(i)locating energy resources;

(ii)the feasibility of developing or using any energy resource, or of

generating or converting energy from, or transmitting, distributing, supplying, selling, or using energy derived from, any such resource; and

(iii)conserving energy resources;

(b)to assist and advise the Minister with respect to the matters referred to

in paragraph (a);

(c) to prepare reports for, or make recommendations to, the Minister with respect to any of the matters so referred to.

(3) Any delegation by the Commission under paragraph (f) of subsection (2) shall be revocable at will either by the Governor or the Commission, and shall not affect the exercise of any power by the Commission." (at p481)

127. By s.16(1), no new power development shall be undertaken or authorized by the Commission without the authority of Parliament. A special power given to the Commission is to require any council to supply it with any information with respect to any matter relating to the city or municipality, which it requires for carrying out the provisions of the Act:s.21(1). (at p481)

128. The Minister (who, it is agreed, is in fact the Premier of Tasmania) is given certain powers and functions in relation to the Commission. By s.14, the Minister is entitled to summon a special meeting of the Commission and to attend all special and ordinary meetings and is entitled to require the Commission to supply him with any information which he thinks necessary in relation to the operations, business and affairs of the Commission: s.14(1), (2). The Minister may report to the Governor, or to Parliament, any information supplied to him by the Commission and shall report on the operations, business and affairs of the Commission if either House of Parliament so orders:s.14(3),(4). By s.15A it is provided as follows:

"The Minister may from time to time, by instrument in writing, notify the Commission of the policy objectives of the Government of this State with respect to any matter relating to the generation, reception, transmission, distribution, supply, sale, use, or conservation of electrical energy within, or for the purposes of, this State." (at p481)

129. Section 15B(1) provides:

"Subject to subsection (2), the Minister may, after consultation with the Commission, give to the Commission in writing any direction that he considers to be in the public interest with respect to the performance or exercise by the Commission of its functions, duties, or powers under this or any other Act." (at p481)

130. That power is subject to certain limitations, not now necessary to mention, which are set out in s.15B(2). The Commission may, with the approval of the Minister, make rules for regulating the business and affairs of the Commission: s.17. The Commission shall furnish an annual report to the Minister of its operation, business and affairs:s.19. (at p481)

131. The Governor is given power to vest Crown lands in the Commission: see ss.35 and 39. The Commission may, with the approval of the Minister, acquire land other than Crown land (s.36) and such an acquisition may be made under the Public Authorities' Land Acquisition Act 1949 (ss.37,38). By s. 39A(1), for the purpose of Acts relating to rating, lands belonging to the Commission shall be deemed to belong to the Crown and lands occupied or used by the Commission for the purposes of the Act shall be deemed to be occupied or used by or on behalf of the Crown for a public purpose. (at p481)

132. By s.44, the Commission is given power to construct, maintain, repair, enlarge and use any works for the purpose of generating, transmitting or distributing electrical energy upon or in respect of any land vested in the Commission or over which it has acquired any right or authority for that purpose. By s.45, the Commission is given powers to place and use cables, electrical lines and similar apparatus upon, under, across or along any railway, road, street or land, and to do works, for the purpose of transmitting and distributing electricity. Consequential powers and duties are conferred by other sections of Pt. VII of the Act. (at p481)

133. Part IX of the Act deals with the supply of electrical energy by the Commission. Sections 54 and 55 provide as follows:

"54- (1) The Commission may sell and supply electrical energy for any purpose approved by the Commission, at such charges as may be fixed by by-law, and such charges may be fixed with reference to the particular purpose for which the electrical energy is to be used by the consumer thereof: Provided that the by-laws shall provide for the same general rates of charges for electricity sold or supplied by the Commission to consumers outside the city of Hobart as are charged in like cases to consumers within that city, but this proviso shall not apply to any special contract to which the general charges do not apply

(2)Subject to any direction given by the Minister under section 15B but otherwise notwithstanding anything to the contrary in this Act, the Commission, in any case in which in its uncontrolled discretion it thinks fit so to do, may enter into a special contract with any person for the sale to him of electrical energy, at such charges and upon such terms and conditions in all respects as the Commission may think fit.

(3)Notwithstanding anything contained in this Act, no person shall, except with the consent in writing of the Commission, sell or supply any electrical energy supplied to him by the Commission to any other person.

Penalty:$100.

55 - The Commission may sell, let for hire, or supply, under any conditions

the Commission may think fit, to any consumer of electrical energy, any meters or measuring instruments for the purpose of measuring the quantity or quality of energy supplied and consumed, and any mains, apparatus, and appliances for the conveyance, reception, or use thereof." (at p481)

134. Under Pt. X of the Act, no person shall supervise, execute, perform or be employed on any electrical wiring work unless he is the holder of an electrical mechanic's licence or a permit, and no person shall enter into a contract to execute or to perform any electrical wiring work unless he is the holder of an electrical contractor's licence and the Commission is given power to issue, cancel, suspend, endorse or reinstate such licences and permits. (at p481)

135. By Pt.XI, the Commission has the function of making recommendations to the Governor in relation to the specification of types of electrical appliances to be used for the purposes of electrical installations and in relation to the making of regulations with regard to the examination, testing and approval of electrical appliances. (at p482)

136. By Pt.XII, the Commission, with the approval of the Governor, is given power to make certain by-laws. (at p482)

137. Section 75 of the Act provides as follows:

"The Commission shall have the same rights, privileges, and priorities in all respects with regard to any sum of money owing to it by any person, as the Crown would have in the like case, but any action by the Commission against any person for the recovery at law of any sum of money shall be instituted and carried on by the Commission in its own name as plaintiff in the same manner as an ordinary action between subject and subject." (at p482)

138. Section 75A provides as follows:

"(1) The Commission may establish canteens in any area or district in which works of the Commission are constructed or are in course of construction, and may authorize the sale at any such canteen of liquor (as defined by the Licensing Act 1976), upon and subject to such terms and conditions as may be prescribed in the by-laws.

(2)No authority shall be given under subsection (1) in respect of the sale of liquor at any canteen which is situated at any place within 5 kilometres of any licensed house within the meaning of the Licensing Act 1976.

(3)The provisions of the Licensing Act 1976 shall not apply to or in respect of any canteen established by the Commission under the authority of this section." (at p482)

139. Section 75B provides as follows:

"The vehicles of the Commission are subject to the Traffic Act 1925 as if they belonged to the Crown." (at p482)

140. The Commission contributes to Tasmania's consolidated revenue 5 per cent of its total revenue from retail sales of electrical energy; see Hydro-Electric Commission (Contributions) Act 1980 (Tas.). The Commission is empowered to raise funds by debentures and the creation and issue of inscribed stock (see Hydro-Electric Commission (Loans) By-laws 1954 (S.R. No. 109 of 1954 (Tas.)) and with the approval of the Governor it may raise loans outside the Commonwealth (Public Authorities' (Overseas Borrowing) Act 1979 (Tas.)). The Commission has designed and constructed, or arranged for the design and construction of, many power stations in Tasmania. Its generating system comprises twenty-three hydro power stations and one thermal power station and these together incorporate fifty-one generators with a total installed capacity of 1860.4 megawatts. The Commission sells electricity to about 190,000 customers, mostly under retail tariffs, but some under special contracts. During the financial year ended 30th June, 1982, the Commission derived more than $55 million from the bulk sale of power, more than $105 million from the retail sale of power and more than $2 million from accrued retail sales. During the same period it made a gross profit on the trading account of $103,789,800 which was carried to the profit and loss account. For the same year net profit on the profit and loss account was $5,965,947 which was transferred from the profit and loss account in part to the rural extensions reserve and in part to the income deficiencies and contingencies reserve. In that financial year the Commission's capital expenditure was $113,171,134. Of this sum, 76 per cent was expended on the Pieman River Power Development Scheme, 6 per cent on the system for the distribution of electricity, 5 per cent on transmission lines, 4 per cent on the raising of the Great Lake, 4 per cent on the construction of substations and 5 per cent on miscellaneous capital expenditure. Of the sum expended, 38 per cent came from infrastructure loans, 31 per cent from semi-government loans, 21 per cent from Treasury loans and 10 per cent from internal sources. (at p482)

141. To say that the Commission is a "trading corporation" is to rob those words of all distinctive meaning. Of course the Commission is a corporation and it trades. But the words "trading corporations" in s.51(xx) describe corporations of a particular character. It must follow that in deciding whether a corporation answers the description, it is necessary to determine its true character. In Reg. v. Trade Practices Tribunal; Ex parte St. George County Council [1974] HCA 7; (1974),130 C.L.R. 533, I thought that the purpose for which a corporation was formed provided the discrimen by which its character should be determined: see at p.562. Subsequent cases have shown that in determining the character of the corporation the Court must consider all the circumstances relating to the corporation - its activities as well as the purposes of its formation: Reg. v. Federal Court of Australia; Ex parte W.A. National Football League (Adamson's Case) [1979] HCA 6; (1979), 143 C.L.R. 190; State Superannuation Board v. Trade Practices Commission [1982] HCA 72; (1982), 57 A.L.J.R. 89; Fencott v. Muller (28th April, 1983; unreported). I have so recently discussed this question, in Fencott v. Muller, that I need do no more than repeat what I then said, at p. 12:

". . . a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on. It may indeed be wrong to insist on finding activities that are 'primary' or 'predominant', but it is equally wrong to be satisfied with activities that are 'substantial', if the latter activities do not, in all the circumstances, show that the corporation has a character which the Constitution requires." (at p482)

142. The Commission is not a trading corporation. It is a corporation sui generis. Its activities include trading - in that it

supplies electricity for profit - and trading on a substantial scale, but they include also the construction on a large scale of generating plants and works for the distribution of electricity to enable it to keep Tasmania supplied with electricity; in that respect it discharges a public function of vital importance to the State. It performs other governmental functions of less importance (under Pts. X and XI). It is in some respects subject to ministerial power, and is accorded special powers and privileges similar to some which the Crown enjoys, although it is not the servant of the Crown: Launceston Corporation v. The Hydro-Electric Commission [1959] HCA 12; [1959] HCA 12; (1959), 100 C.L.R. 654. It is "a public authority with public purposes, as distinct from a private undertaking engaged upon a merely commercial enterprise, and. . . its powers are to be exercised for the good of the State": Launceston Corporation v. The Hydro-Electric Commission, (supra) at p. 661. Its trading activities, although significant, do not indicate its true character. (at p483)

143. I further consider that, even if the Commission were a trading corporation, the provisions of ss. 7 and 10 of the Act, if valid, could apply to the Commission only in relation to such of its activities as are properly regarded as trading activities. I adhere to the view which I expressed in Actors and Announcers Equity Association of Australia and Others v. Fontana Films Pty. Ltd. [1982] HCA 23; (1982), 56 A.L.J.R. 366, at p. 370:

"The authorities in which s. 51(xx) has been considered are opposed to the view that a law comes within the power simply because it happens to apply to corporations of the kind described in that paragraph. . . The words of par. (xx) suggest that the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws, if they are to be valid." (at p483)

144. In view of the conclusions which I reach on other aspects of the case, I need not elaborate this matter further. It is clear however that the activities of the Commission to which s. 10, if valid, would apply, are not trading activities. The trade of the Commission is in respect of the supply of electricity; the acts prohibited by s. 10 are anterior even to the generation of the electricity which is to be supplied. They may be regarded as acts preparatory to the trade; they certainly do not form part of it. (at p483)

145. It follows that in my opinion the provisions of s. 10 of the Act, if valid, would have no application to the Commission. Lest that view be not accepted, I should turn to consider the validity of the section. In my opinion, with the exception of one subsection, it is not a law with respect to trading corporations. This is made clear by the provisions of s. 7, and by the scheme of the Act as a whole. As s.7 shows, s. 10 applies only where the Governor-General is satisfied that any identified property is being or is likely to be damaged or destroyed. The object of ss. 7 and 10, as appears from their own terms, is the protection of the heritage from damage or destruction. That conclusion is supported by a consideration of ss. 9 and 11, which show that the same prohibitions as s. 10 seeks to apply to corporations are made applicable by those other sections to cases which in no way involve corporations. In other words, for the purposes of the statute the character of the person who performs the forbidden acts is immaterial. Further, the prohibited acts are not such as might naturally be performed by a corporation in the course of trading. In Fairfax v. Federal Commissioner of Taxation [1965] HCA 64; (1965), 114 C.L.R. 1 Kitto J. said, at p. 7, that the question of constitutional validity under s. 51 -

" . . . is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?" (at p483)

146. Taylor and Menzies JJ. also made clear in the same case, at pp. 16, 17-18, that the question is not what was the motive behind the enactment but whether it is in substance a law with respect to a particular legislative subject matter. Apart from s. 10(4), the connexion between ss. 7 and 10 and the topic of trading corporations is not direct and substantial - it is exiguous and unreal. It is apparent that the relationship between trading corporations and the operative provisions of s. 10 is merely incidental - the section is applied to trading corporations only in an attempt to use s. 51(xx)

as a source of power which would not otherwise exist. The true character of the section is not that of a law with respect to trading corporations. (at p483)

147. However, s. 10(4) applies only where the forbidden acts are done by a body corporate of the kind described in the section "for the purposes of its trading activity". Notwithstanding some doubts as to whether the connexion made by s. 10(4) with trading corporations by the use of those words is merely contrived, I consider that the subsection does have a sufficient connexion with the topic of power granted by s. 51(xx). I would therefore hold s. 10(4) to be valid. (at p483)

148. On this branch of the case I hold that s. 10(4) is valid, but that the remainder of the s. 10 is invalid; that the Commission is not a trading corporation and that in any case such of its activities as would fall within the scope of s. 10 if it were a trading corporation are not trading activities.

Other matters (at p483)

149. Tasmania advanced other arguments. It submitted -

(1) that the Act abridged the right of Tasmania and its residents to the reasonable use of the waters of rivers for conservation or irrigation contrary to s. 100 of the Constitution;

(2) that the Act and the World Heritage (Western Tasmania Wilderness) Regulations, as amended by s. 19 of the Act, bring about an acquisition of property otherwise than on just terms; and

(3) that the Act and the World Heritage (Western Tasmania Wilderness) Regulations invalidly interfere with or impair the legislative and executive functions of the State of Tasmania and the prerogative of the Crown in right of Tasmania in relation to its lands.

In view of the conclusion that I have reached, I need not consider any of those questions, nor need I consider a further argument of the Commonwealth that the Premier might be ordered to give a direction under s. 15B of the Hydro-Electric Commission Act 1944 to the Commission to cease construction of the dam.

Conclusions (at p484)

150. I hold the enactments on which the Commonwealth relies to be invalid, except for s. 10(4) of the Act which has no application to the Commission. It follows that the Gordon River Hydro-Electric Power Development Act (1982) (Tas.) is valid, since no question of its inconsistency with a Commonwealth Act arises. I would therefore answer the questions asked as follows.

Actions No. C6 and No. C8 of 1983

Question 1.(a) Unnecessary to answer.

Question 1.(b)"No".

Question 2."No".

Question 3."Yes".

Question 4. Unnecessary to answer.

Question 5. Unnecessary to answer.

Question 6. Unnecessary to answer.

Action No.C12 of 1983

Question 1.(a)"No, in the present circumstances".

Question 1.(b) "No - except s. 10(4), and s. 7 in so far as it operates for the purposes of s. 10(4)".

Question 1.(c) "No".

Question 1.(d) Unnecessary to answer.

Question 2. "No".

Question 3. "Yes, all except the Proclamations made under s. 7 in so far as they operate for the purposes of s. 10(4)".

Question 4. Unnecessary to answer.

Question 5. "No".

Question 6. "The Act is valid".

Question 7. Unnecessary to answer.

Question 8. "The Commission is not a trading corporation, but in any case, the acts are not done for the purposes of its trading activities". (at p484)

MASON J. The legislation, the facts and the questions for decision in these proceedings have been set out in the reasons for judgment of the Chief Justice.

The external affairs power

At the outset we must identify what Koowarta v. Bjelke-Petersen [1982] HCA 27; (1982), 56 A.L.J.R. 625 decided as to the scope of the external affairs power because the correctness of Koowarta was common ground between the parties. There the validity of ss. 9 and 12 of the Racial Discrimination Act 1975 (Cth) was upheld as an exercise of the power conferred by s. 51(xxix) of the Constitution on the footing that the enactment of the two sections was a discharge of Australia's obligation under the International Convention on the Elimination of All Forms of Racial Discrimination. By becoming a party to that Convention, Australia undertook to prohibit and eliminate racial discrimination in all its forms by appropriate means, including legislation. Sections 9 and 12 prohibited various forms of racial discrimination in Australia; in accordance with the Convention, they dealt with matters that were purely domestic affecting the conduct of people in Australia in relation to each other, having no relationship with other countries except in so far as the sections gave effect to an obligation imposed by an international convention. The purely domestic character of the matters dealt with was the point of departure between the majority and the minority, the latter taking the view that the external affairs power did not extend to the enactment of legislation on matters of that character. (at p484)

2. Although we can confidently say that the purely domestic character of the matters dealt with by the law enacted in discharge of the Convention obligation is not in itself, according to Koowarta, an objection to the exercise of the power,

it is difficult to identify what Koowarta prescribes as the essential qualifications for the validity of such a law. This is because the members of the majority were not united in the reasons by which they supported their conclusion. Murphy J., Brennan J. and I thought that it was enough that by entering into a genuine international treaty Australia had assumed an international obligation to enact domestic laws of the kind already described, notwithstanding that they were purely domestic in character; see pp. 651, 656, 664. Stephen J., the remaining member of the majority, along with the minority (Gibbs C.J., Wilson and Aickin JJ.) considered, at p.645, that it is not "enough that the challenged law gives effect to treaty obligations" and that it is necessary to show that the subject matter of the treaty and of the legislation is "of international concern", a view which seems to have its origin in the remarks of Starke and Dixon JJ. in Rex v. Burgess; Ex parte Henry [1936] HCA 52; (1936), 55 C.L.R. 608, at pp.658 and 669. Two passages from the judgement of Stephen J., at p. 645, indicate his Honour's view:

"But where the grant of power is with respect to 'external affairs' an examination of subject-matter, circumstance and parties will be relevant whenever a purported exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny." (at p484)

3. A little later his Honour said:

"Thus areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding. Nevertheless the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation's 'external affairs'. A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'. And this being so, any attack upon validity, either in what must be the very exceptional circumstances which could found an allegation of lack of bona fides or where there is said to be an absence of international subject-matter, will still afford an appropriate safeguard against improper exercise of the 'external affairs' power." (at p485)

4. His Honour did not attempt to explore the circumstances, or to give examples of circumstances, in which it might be held that the subject matter of a bona fide treaty was not of international concern or of concern to the relationship between Australia and the other party or parties to the treaty. However, his Honour stated, at p.646 that the content of the external affairs power must be determined by what is generally regarded at any particular time as a part of the external affairs of the nation, describing this as "a concept the content of which lies very much in the hands of the community of nations of which Australia forms a part". (at p485)

5. If we take the decision as turning on Stephen J.'s view of the power, because it reflects the narrowest expression of it by the Justices who constituted the majority, the case is authority for the proposition that the power authorizes a law which gives effect to an obligation imposed on Australia by a bona fide international convention or treaty to which Australia is a party, at any rate so long as the subject matter of the convention or treaty is one of international concern, or of concern to the relationship between Australia and the other party or parties. The question then is: what is meant by the requirement that the subject matter of a treaty should be of international concern or of especial concern to the relationship between Australia and the other parties? We need to know the answer to this question in order to decide whether it is an additional element in the exercise of the power and, if so, whether the requirement is satisfied in the present case. (at p485)

6. Despite the argument presented by Tasmania, the notion that the subject matter of a treaty must be of international concern remains an elusive concept. In an endeavour to give content to the concept and at the same time to give expression to essential qualifications on the exercise of the power Mr Ellicott, Q.C., for Tasmania, proposes three broad

tests which must be satisfied in a law enacted under s. 51(xxix). They are:

"1. Does the enactment of the law constitute an implementation by Australia of an obligation imposed on it by the Convention? Conversely, would Australia be in breach of an obligation imposed on it by the Convention, if it failed to enact the law or some law substantially to the same effect?

2. Does the subject-matter of the Convention to which the law gives effect in the manner in which it is treated, involve in some way a relationship with other countries or with persons or things outside Australia?

3. Is the subject-matter of the Convention to which the law gives effect, something which, although it relates to domestic activity, affects relations between Australia and another or other countries?" (at p485)

7. The first of the three tests seeks to express the idea that it is the implementation of an obligation imposed on Australia by a treaty that attracts the external affairs power, that it is the treaty obligation and its implementation that constitutes the relevant subject or matter of external affairs. To my mind this is too narrow a view. As I pointed out in Koowarta, at pp. 648-650, the treaty itself is a matter of external affairs, as is its implementation by domestic legislation. The insistence in Burgess that the legislation carry into effect provisions of the Convention in accordance with the obligation which that Convention imposed on Australia is not inconsistent with what I have said, though it does raise a question as to the scope of the legislative power in its application to a treaty, a matter to be discussed later. At this point it is sufficient to say that there is no persuasive reason for thinking that the international character of the subject matter or the existence of international concern is confined to that part of a treaty which imposes an obligation on Australia. A provision in a treaty which is designed to secure to Australia a benefit may be just as much a matter of international concern, possessing an international character, with a potential to affect Australia's relationships with other countries, as a provision in a treaty which imposes an obligation upon Australia. (at p485)

8. The recurring problem which the other tests pose is that of enunciating an instructive definition or description of the requisite subject matter or of the manner in which it is treated, one which will distinguish that which affects Australia's relations with other countries from that which does not. No doubt this problem might have been more readily answered in 1900 by reference to the world of international affairs as it stood at that time, a world devoid of international and regional institutions and agencies as we know them today, in which international discussion, negotiation, cooperation and agreement took place on a very limited scale in relation to limited subjects. But when we have regard to international affairs as they are conducted today, when the nations of the world are accustomed to discuss, negotiate, cooperate and agree on an ever widening range of topics, it is impossible to enunciate a criterion by which potential for international action can be identified from topics which lack this quality. Among the many instances of the common pursuit by nations of common objectives of a humanitarian, cultural and idealistic kind are the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Political Rights of Women, the Convention against Discrimination in Education, the Convention concerning Freedom of Association and Protection of the Right to Organize, the Convention concerning Discrimination in respect of Employment and Occupation and the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, to all of which Australia has become a party. There are so many examples of the common pursuit of humanitarian, cultural and idealistic objectives that we cannot treat subjects of this kind as lacking the requisite international character to support a treaty or convention which will attract the exercise of the power. Indeed, the lesson to be learned from this experience is that there are virtually no limits to the topics which may hereafter become the subject of international cooperation and international treaties or conventions. (at p486)

9. It is submitted that the suggested requirement that the subject matter must be "of international concern" means that it must be international in character in the sense that there is a mutuality of interest or benefit in the observance of the provisions of the convention. Thus, we are invited to say that a convention by which the contracting parties agree to

enact domestic laws requiring persons in motor vehicles to wear seat belts does not deal with a matter of international concern because no nation can derive a benefit from the wearing of seat belts in another country. This is by no means self-evident. Drivers and passengers cross international boundaries. They are likely to observe in other countries the practices which they observe at home. International cooperation resulting in a convention insisting on compliance with uniform safety standards may well benefit all countries. The illustration is instructive because it demonstrates how difficult it is to say with accuracy of any treaty or convention that observance of its provisions will not benefit a contracting party. (at p486)

10. The point is that if a topic becomes the subject of international cooperation or an international convention it is necessarily international in character - the existence of cooperation and the making of a convention establish that the subject matter is an appropriate vehicle for the creation of international relationships or, in the case of a bilateral treaty, a relationship between the parties to it. And participation in a convention indicates a judgment on the part of participating nations that they will derive a benefit from it. All this indicates an absence of any acceptable criteria or guidelines by which the Court can determine the "international character" of the subject matter of a treaty or convention. The existence of international character or international concern is established by entry by Australia into the convention or treaty. (at p486)

11. In any event, as I observed in Koowarta, at p.651, the Court would undertake an invidious task if it were to decide whether the subject matter of a convention is of international character or concern. On a question of this kind the Court cannot substitute its judgment for that of the Executive Government and Parliament. The fact of entry into, and of ratification of, an international convention, evidences the judgment of the Executive and of Parliament that the subject matter of the convention is of international character and concern and that its implementation will be a benefit to Australia. Whether the subject matter as dealt with by the convention is of international concern, whether it will yield, or is capable of yielding, a benefit to Australia, whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the Executive Government for determination. The Court should accept and act upon the decision of the Executive Government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention. (at p486)

12. The argument in support of the three tests proposed by Tasmania is largely based on implications to be drawn from the federal nature of the Constitution, and on predictions that "the federal balance" will be disturbed, indeed shattered, if the validity of the Commonwealth legislation is upheld. Arguments of this kind played a prominent part in the Queensland case which was rejected in Koowarta and little is to be gained from repeating the answers which were given in that case. (at p486)

13. In the argument which is presented in this case the expression "the federal balance" seems to mean, not so much the distribution of legislative powers effected by the Constitution, as the content, as it was understood in 1900, of the legislative powers thus distributed. The argument has a special relevance to s. 51(xxix). Koowarta makes the point that the content of the external affairs power has expanded greatly in recent times along with the increase in the number of international conventions and the extended range of matters with which they deal; see pp.645-646, 650. The same point had been made earlier by Latham C.J. in Burgess, at pp. 640-641. It is this development "that promises to give the Commonwealth an entree into new legislative fields"; see Koowarta, at p. 650. It is, of course, possible that the framers of the Constitution thought or assumed that the external affairs power would have a less extensive operation than this development has brought about and that Commonwealth legislation by way of implementation of treaty obligations would be infrequent and limited in scope. The framers of the Constitution would not have foreseen with any degree of precision, if at all, the expansion in international and regional affairs that has occurred since the turn of the century, in particular the cooperation between nations that has resulted in the formation of international and regional conventions. But it is not, and could not be, suggested that by reason of this circumstance the power should now be given an operation which conforms to expectations held in 1900. For one thing it is impossible to ascertain what those expectations may have been. For another the difference between those expectations and subsequent events as they have fallen out seems to have been a difference in the frequency and volume of external affairs rather than a difference in kind. Only if there was a difference in kind could we begin to construct an argument that the expression "external affairs" should receive a construction which differs from the meaning that it would receive according to ordinary principles and interpretation. Even then mere expectations held in 1900 could not form a satisfactory basis for departing

from the natural interpretation of words used in the Constitution. (at p487)

14. This in one sense is by way of preliminary observation, for the correct approach to the construction of a legislative power in its application to changing circumstances is well established. In Koowarta, after quoting the comment of Dixon J. in Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41; (1945) 71 C.L.R. 29, at p. 81, where his Honour said -

". . . it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances. . .". (at p487)

15. I said, at p. 650:

"There is no reason at all for thinking that the legislative power conferred by s. 51(xxix) was intended to be less than appropriate and adequate to enable the Commonwealth to discharge Australia's responsibilities in international and regional affairs. . . . As the object of conferring the power was to equip the Commonwealth with comprehensive capacity to legislate with respect to external affairs, it is not to the point to say that such is the scope of external affairs in today's world that the content of the power given to the Commonwealth is greater than it was thought to be in 1900." (at p487)

16. Accordingly, it conforms to established principle to say that s. 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900. This circumstance is often overlooked by those who are preoccupied with the impact that the exercise of the power may have in areas of legislation traditionally regarded by the States as their own. The consequences to Australia resulting from an inadequate Commonwealth legislative power with respect to external affairs - which represents the price to be paid for the preservation to the States of these areas of legislation - were emphasized in Koowarta, at pp. 650-651, 656. (at p487)

17. In the ultimate analysis the comprehensive legal answer to the general considerations which Tasmania invokes to sustain its approach to the interpretation of the constitutional power is that a grant of power in s.51 is to be construed with all the generality that the words used admit (Reg. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. [1964] HCA 15; (1964), 113 C.L.R. 207, at pp. 225- 226) or, to put it more precisely and more accurately, as it was expressed by O'Connor J. in The Jumbunna Coal Mine, No Liability v. The Victorian Coal Miners' Association (1908), 6 C.L.R. 309, at pp. 367- 368:

". . . it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

"For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose." (at p487)

18. This statement was recently adopted and applied as a correct expression of the principle by the Court in its unanimous judgment in Reg. v. Coldham; Ex parte the Australian Social Welfare Union (judgment delivered 9th June, 1983 - official pamphlet at pp. 15-16). (at p487)

19. In accordance with this principle it is well settled that it is wrong to construe a constitutional power by reference to (1) an assumption that there is some content reserved to the States (In Re Foreman & Sons Pty. Ltd; Uther v. Federal Commissioner of Taxation [1947] HCA 45; (1947), 74 C.L.R. 508, at p. 530); and (2) imaginary abuses of legislative power (Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (the Engineers' Case) [1920] HCA 54; (1920), 28 C.L.R. 129, at pp. 150- 151). (at p487)

20. The only relevant implication that can be gleaned from the Constitution, and this is called in aid independently by Tasmania, is that the Commonwealth cannot in the exercise of its legislative powers enact a law which discriminates against or "singles out" a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function. This implied prohibition - for it is in truth an implied prohibition despite the endeavour of Barwick C.J. in Victoria v. The Commonwealth (the Pay-roll Tax Case) [1971] HCA 16; (1971), 122 C.L.R. 353, at pp. 372- 373, to deal with it as a matter of characterization - has been recognized and discussed in many cases; see West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937), 56 C.L.R. 657, at pp. 682-683, 698-699, 706-707; Essendon Corporation v. Criterion Theatres Ltd. [1947] HCA 15; (1947), 74 C.L.R. 1, at p. 19; Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947), 74 C.L.R. 31, at pp. 55-60, 66, 70-75, 82-83; the Pay-roll Tax Case, esp. at pp. 386-393, 402-403, 406-411, 417-424; Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982), 41 A.L.R. 71, at pp. 116-118; Koowarta, at pp. 645- 649; and Social Welfare Union, at pp. 14-15. The precise limits of the prohibition have not been formulated, as was noted by Walsh J., at p. 410, in the Pay-roll Tax Case, and by the Full Court in Social Welfare Union, at p. 15, and there is no need here to essay a more precise formulation, for the discussion of the principle as it applies in this case can be left until later. What is important for present purposes is that the implied prohibition reflects in point of expressed principle as much as can legitimately be extracted from the miscellany of considerations on which Tasmania relies. So much and no more can be distilled from the federal nature of the Constitution and ritual invocations of "the federal balance". As Social Welfare Union demonstrates, a head of power under s. 51 should be given its natural meaning; the exercise of the power is then subject to the express and implied prohibitions in the Constitution, including the implied prohibition enunciated in Melbourne Corporation. That the power conferred by s. 51(xxix) is subject to implied Constitutional prohibitions was generally recognized in Koowarta, esp. at pp. 645, 649. (at p488)

21. No doubt the first of the three tests suggested by Tasmania is relevant in examining the question whether a particular law is a valid exercise of the power, but it cannot be right to say that only a law which implements an obligation imposed on Australia by a convention or treaty is such a valid exercise. Certainly, in the cases there are many statements to be found in which it is asserted that the power authorizes the implementation of an obligation imposed on Australia by a convention or treaty. However, speaking generally, these statements were made with reference to a treaty or convention that imposed obligations and they cannot reasonably be construed as expressing the negative, namely, that the exercise of the power is confined to the implementation of obligations. See, for example, the judgments of members of the Court in Burgess and Koowarta. (at p488)

22. If the carrying out of, or the giving effect to, a treaty or convention to which Australia is a party is a matter of external affairs, and so much is now accepted, it is very difficult to see why a law made under s. 51(xxix), that is, a law with respect to the matter of external affairs, should be limited to the implementation of an obligation. To say this is to import an arbitrary limitation into the exercise of the power, one which might deprive Australia of the benefits which a treaty or convention seeks to secure. Take, for example, a treaty by which another country undertakes to provide technological and other benefits in connexion with a joint enterprise to be undertaken in this country between Australia and the other party to the treaty. Why would the power not extend to Commonwealth legislation facilitating the enjoyment by Australia of the benefits promised by the treaty and to facilitating the carrying on of the activities for which it makes provision? In Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965), 113 C.L.R. 54, Barwick C.J. said, at p. 86, that:

" . . . where a law is to be justified under the external affairs power by reference to the existence of a treaty or convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the legislative authority, it is for this Court to determine whether particular provisions, when challenged, are appropriate and adapted to that end." (at p488)

23. The same view was expressed by Starke J. and Evatt and McTiernan JJ. in Burgess, at pp. 658, 688, and Menzies J. in Airlines of N.S.W. (No. 2) at p. 141. In my opinion it is correct; see also Koowarta, at pp. 652, 664. (at p488)

24. It is significant that this view of Parliament's power to legislate so as to give effect to a treaty conforms to the approach which this Court has adopted in deciding whether legislative controls designed to achieve an end within power are themselves within power. In Herald and Weekly Times Ltd. v. The Commonwealth [1966] HCA 78; (1966), 115 C.L.R. 418 it was argued that the legislative controls went beyond what was necessary to ensure freedom of competition between television services. The Court's response to the argument was delivered by Kitto J., at p. 437, in these terms:

"It may be conceded that in some of the cases to which they apply, the described situations will often, or even generally, afford no foothold at all for an exertion of influence. Yet it is impossible, in my opinion, to avoid the conclusion, even upon consideration of the most extreme illustrations of the working of the provisions, that together they form a means, and are enacted as a means, for effectuating a desired end which is within power, namely that of ensuring freedom of competition between television services. How far they should go was a question of degree for the Parliament to decide, and the fact that the Parliament has chosen to go to great lengths - even the fact, if it be so, that for many persons difficulties are created which are out of all proportion to the advantage gained - affords no ground of constitutional attack." (at p488)

25. Whether failure on the part of Australia to enact domestic legislation incorporating the rules in the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf as part of our domestic law would have amounted to a contravention of those Conventions is not altogether clear. The Conventions did not impose an obligation in specific terms to enact domestic legislation of a particular kind. Nonetheless the validity of the Seas and Submerged Lands Act 1973 (Cth) which gave effect to these Conventions was upheld in New South Wales v. The Commonwealth (the Seas and Submerged Lands Case) [1975] HCA 58; (1975) 135, C.L.R. 337. It may be said that the legislation was valid because it gave effect to the principles of customary international law as declared by the Conventions. But if Australia became a party to a convention which enacted a new set of rules in relation to the territorial sea and the contiguous zone, but that convention did not attract sufficient support to constitute its provisions as principles of customary international law, domestic legislation giving effect to it would none the less still constitute a valid exercise of the power. (at p489)

26. The extent of the Parliament's power to legislate so as to carry into effect a treaty will, of course, depend on the nature of the particular treaty, whether its provisions are declaratory of international law, whether they impose obligations or provide benefits and, if so, what the nature of these obligations or benefits are, and whether they are specific or general or involve significant elements of discretion and value judgment on the part of the contracting parties. I reject the notion that once Australia enters into a treaty Parliament may legislate with respect to the subject matter of the treaty as if that subject matter were a new and independent head of Commonwealth legislative power. The law must conform to the treaty and carry its provisions into effect. The fact that the power may extend to the subject matter of the treaty before it is made or adopted by Australia, because the subject matter has become a matter of international concern to Australia, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it.

The Convention for the Protection of the World Cultural and Natural Heritage (at p489)

27. Do the provisions of Pt. II of the Convention, which is headed "National Protection and International Protection of the Cultural and Natural Heritage", impose an obligation on Australia to protect the area which has been entered on the World Heritage List and, if so, what kind of obligation? It is by no means an easy question to answer and the difficulties are not diminished by the continuous debate and discussion as to the concept of obligation in International Law and as

to the nature of obligations created by treaties - see, for example, Fawcett, "The Legal Character of International Fawcett, "The Legal Character of International Agreements" (1953), 30 British Year Book of International Law 381; Widdows, "What is an Agreement in International Law?" (1979), 50 British Year Book of International Law 117. (at p489)

28. Much emphasis has been given to features in the form of expression of Arts. 4-6 which are said to support the view that the Convention stopped short of imposing an actual obligation on a party to protect its heritage. The word "undertakes" which is apt to create such an obligation is conspicuous by its absence from Arts. 4 and 5. Its absence in these articles is to be contrasted with its presence in Arts. 6.2 and 6.3. By Art. 6.2, each party undertakes to give its help in identification, protection, conservation and preservation of a property on the World Heritage List or on the World Heritage in Danger List at the request of the State in which it is situated. By Art. 6.3, each party undertakes not to take any deliberate measures which might damage the cultural and natural heritage of another State. (at p489)

29. On the other hand, Art. 4, which speaks of the duty of each State to ensure "the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory", is expressed in more qualified terms. It then deals with the scope of this duty by saving of each State that "it will do all it can to this end", adding the qualification "to the utmost of its own resources". Then Art. 5, which is more specific in its subject matter, is expressed in terms of "endeavour", the scope and content of this requirement being alleviated and modified by the words "in so far as possible, and as appropriate for each country". In par. (d) of the same article, which refers to the taking of "appropriate legal" and other measures for the protection, conservation, etc. of the heritage, there may be an element of discretion and value judgment on the part of the State to decide what measures are necessary and appropriate. Article 6 acknowledges the sovereignty of the States in whose territory the heritage is situated and is expressed "without prejudice" to "property rights provided by national legislation". (at p489)

30. Despite these features it seems to me that Art. 5 itself imposes a series of obligations on parties to the Convention, one of which is the obligation dealt with in par. (d) which includes the taking of legal measures. The imposition of this obligation is an element in a general framework which has as its foundation (a) the responsibility of each State under Art. 3 to identify and delineate the different properties situated in its territory which answer the descriptions of "cultural heritage" in Art. 1 and "natural heritage" in Art. 2; and (b) the first sentence in Art. 4 which amounts to a recognition of the general or universal responsibility for the protection, preservation, etc. of the heritage and a declaration that it "belongs primarily to" the State in which the heritage is situated. The sentence which follows is a strong and positive declaration of what each State will do in the discharge of the responsibility affirmed by the first sentence. (at p489)

31. Article 5 then goes further. What it does is to impose obligations on each State with the object set out in the opening words of the article "to ensure that effective and active measures are taken for the protection, conservation" etc. of the heritage in the discharge of the responsibility acknowledged by Art. 4. Article 5 cannot be read as a mere statement of intention. It is expressed in the form of a command requiring each party to endeavour to bring about the matters dealt with in the lettered paragraphs. Indeed, there would be little point in adding the qualifications "in so far as possible" and "as appropriate for each country" unless the article imposed an obligation. The first qualification means "in so far as is practicable" and the second takes account of the difference in legal systems. Neither of these qualifications nor the existence of an element of discretion and value judgment in par. (d) is inconsistent with the existence of an obligation. There is a distinction between a discretion as to the manner of performance and a discretion as to performance or non-performance. The latter, but not the former, is inconsistent with a binding obligation to perform (see Thorby v. Goldberg [1964] HCA 41; (1964), 112 C.L.R. 597, at pp. 604-605, 613, 614- 615). And it is only natural that in framing a command to States to take measures of the kind described in par. (d) in relation to their heritage the command will be expressed in terms of endeavour, subject to the qualifications mentioned. (at p490)

32. Neither the recognition of the sovereignty of the States in whose territory the heritage is situated nor the reference to property rights in Art. 6.1 puts a different complexion on Art. 5. The expression "without prejudice to property rights provided by national legislation" is a reference to domestic laws - in the case of Australia, both Commonwealth and State. It provides some safeguard for such existing and future rights in property forming part of the world heritage as a nation state may choose to protect, acknowledge, or create. But the operative provision in Art. 6.1 emphasizes the existence of a duty. It recognizes that there is a "duty" on the part of "the international community as a whole to cooperate" in protecting the world heritage. The recognition of this duty is consistent only with the existence of an

obligation on the part of a State party to the Convention to protect the heritage in its territory and it is significant that Art. 34, the federal clause, proceeds on the footing that the Convention imposes obligation. It is not to be supposed that the obligations to which the clause refers are those mentioned in Arts. 6.2 and 6.3 to the exclusion of the provisions in Arts. 4 and 5. (at p490)

33. Another circumstance of significance is that on 16th November, 1972, UNESCO adopted a resolution as well as the Convention. The resolution was in the form of recommendations for the protection of the cultural and natural heritage of nations not forming part of the world heritage. It seems that UNESCO considered that, although recommendations were appropriate to this subject matter, the imposition of obligations resulting from adherence to a convention were appropriate to the world heritage. (at p490)

34. In arriving at the conclusion that Pt. II of the Convention, in particular Arts. 4 and 5, imposes binding obligations on Australia, I have not found the travaux preparatoires to be of assistance. They do not contain anything that is sufficiently definite to displace the natural construction of the language of the Convention. (at p490)

35. Part III of the Convention deals with the "Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage". It established the World Heritage Committee (Art. 8.1) whose function it is to establish, keep up-to-date and publish (a) the World Heritage List, a list of properties forming part of the cultural and natural heritage as defined in Arts. 1 and 2, which it considers as having outstanding universal value, and (b) the World Heritage in Danger List, a list of property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under the Convention. The World Heritage List is established from inventories submitted by each State a party to the Convention, each State being required by Art. 11, in so far as possible, to submit to the Committee an inventory of property forming part of the cultural and natural heritage situated in its territory and suitable for inclusion in the List. Inclusion of a property in the World Heritage List requires the consent of each State concerned (Art.11.3). This provision does not detract from the obligation imposed by Art.11.1 on a State to submit an inventory of property to the Committee. But it does prevent a State from placing a property in another State on the World Heritage List in cases of disputed sovereignty or jurisdiction. (at p490)

36. Another function of the Committee is to deal with requests for international assistance with respect to properties forming part of the cultural or natural heritage included, or potentially suitable for inclusion, in the lists. The purpose of such requests may be to secure the protection, conservation, presentation or rehabilitation of such property (Art.13.1). (at p490)

37. Part IV establishes the World Heritage Fund to which States, parties to the Convention, contribute, The Committee decides on the use of the resources of the Fund (Art.13.6). (at p490)

38. The effect of entry of a property in the World Heritage List is (1) that it qualifies the property for entry in the World Heritage in Danger List; and (2) it enhances the prospects of the State in which the property is situated of securing international assistance pursuant to the Convention (see Arts. 13,14,20 and 22). (at p490)

39. The Convention, to which seventy-four nations have acceded, reflects a vigorous endeavour on the part of the community of nations, under the auspices of the United Nations, to take common action in the pursuit of a common objective essential to the welfare of mankind - the preservation and conservation of the world heritage. That the attainment of this objective is of international interest and concern is evidenced by the formulation of the Convention under the auspices of the United Nations and its adoption by so many nations. That the subject matter is international in character and appropriate for international action is self-evident. By what other means, one might ask, could the objective be realistically achieved? No doubt, in the end, the success of the enterprise will largely depend on the extent to which each nation discharges its primary responsibility for preserving the heritage in its territory, but the formulation of the Convention, its adoption by so many nations resulting in cooperative international action and the assumption by the parties to it of obligations to preserve the heritage will enhance the likelihood of a party discharging its primary responsibility. The real benefit which Australia gains in common with other nations is the preservation of the world heritage. This benefit apart from any other obviously warrants participation by Australia in the Convention and entry by Australia of suitable properties situated in Australia in the World Heritage List. (at p491)

40. Article 34 of the Convention, the federal clause, does not relieve Australia from performance of its obligations under

the Convention. Paragraph (a) of the article makes it clear that in the case of a central legislative power possessing legal jurisdiction to implement the provisions of the Convention, the State party to the Convention has an obligation to implement the provisions of the Convention. It is otherwise where the central legislative power has no jurisdiction to implement the provisions. Then the obligation of the State party to the Convention is to inform the constituent organs in the federation and make recommendations for adoption of the provisions. The existence of the power conferred by s.51(xxix) has the consequence that par.(a) of Art.34 imposes an obligation on the Commonwealth of Australia to implement the provisions of the Convention by legislation enacted by the Commonwealth Parliament.

Validity of the National Parks and Wildlife Conservation Act 1975 (Cth) section 69 (at p491)

41. It follows from what has been said that s.51(xxix) confers legislative power on the Commonwealth Parliament to implement and give effect to the provisions of the Convention. Section 69, in authorizing the Governor-General to make regulations for and in relation to giving effect to the Convention, is a valid exercise of this power. The power conferred by the section is subject to prohibitions express and implied in the Constitution, with the result that Tasmania's argument based on the Melbourne Corporation principle and the acquisition power are relevant to the validity of the regulations and fall to be considered in that context.

Validity of the World Heritage (Western Tasmania Wilderness) Regulations 1983 made under the National Parks and Wildlife Conservation Act 1975 (at p491)

42. The first question, one of statutory construction, is whether s.69 of the Act merely authorizes the making of regulations which will bring a property placed on the World Heritage List within the regime of parks and reserves for which Pt.II of the Act makes provision. The object of the Act, as its short title announces, is "to make provision for and in relation to the Establishment of National Parks and other Parks and Reserves and the Protection and Conservation of Wildlife." The object of Pt.II of the Act, which deals with "Parks and Reserves", is to make provision for the establishment and management of parks and reserves in various areas and for a variety of purposes mentioned in s.6(1), one of which is stated in par.(e) of the subsection in this way:

"(e) for facilitating the carrying out by Australia of obligations under, or the exercise by Australia of rights under, agreements between Australia and other countries;. . ." (at p491)

43. The subsection concludes with the words "and this Act shall be administered accordingly". Apart from s. 6(1)(e) and s. 69, the Act contains no provisions dealing with the carrying into effect of international conventions. (at p491)

44. I do not agree that all this leads to the conclusion that s.69 merely authorizes regulations which make provision for matters within the scope of Pt.II of the Act. Section 69 is expressed as an independent regulation making power. It appears among the miscellaneous provisions of Pt. VII of the Act, provisions which have a general application, and it bears the heading "International agreements". It is separate from the general regulation making power which is contained in s.71 of the Act. That power enables the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. (at p491)

45. One objection to the narrow construction of s.69 is that it achieves nothing that is not achieved by s.71(1) in enabling regulations to be made prescribing "all matters . . . convenient to be prescribed for carrying out or giving effect to this Act". That subsection is wide enough to confer power to carry into effect all the agreements specified in the Schedule to the Act in relation to parks and reserves in Pt.II. Another objection is that the narrow construction simply

does not give effect to the broad and general words of s.69(1) and the indication provided by s.69(3) that the regulation making power conferred by s.69(1) is in addition to that conferred by s.71. Indeed, one of the conventions mentioned in the Schedule, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, could not be carried into effect by regulations relating to parks and reserves under Pt. II. (at p491)

46. The World Heritage (Western Tasmania Wilderness) Regulations apply to an area of 14,125 hectares. This area comprises the site of the dam and associated works and the major part of the water storage area behind the dam. The area of 14,125 hectares is but a small part of the total area of the property, 769,355 hectares, which has been entered in the World Heritage List. Regulation 5(1), in its amended form, prohibits the doing of various acts without the consent of the federal Minister. The acts prohibited range from (a) the construction of a dam and associated works and acts done for this purpose, and (b) excavation works, to (d) killing, cutting down, damaging or removing trees, and (g) carrying out any other works. Regulation 5(2) prohibits a person without the consent of the federal Minister from doing any act, not being an act referred to in Reg.5(1), that is likely to adversely affect the conservation or preservation of the area as part of the world cultural or natural heritage. (at p491)

47. The first question is whether these provisions do more than give effect to the Convention. If they do they exceed the regulation making power as authorized by s.69 of the Act and s.51(xxix) of the Constitution. The legislative prohibition of acts inimical to the preservation and conservation of the property as a property forming part of the world cultural and natural heritage is not only consistent with the provisions of the Convention but is also a discharge of Australia's obligation under Art.5 of the Convention. It is obvious that the prohibition in Reg.5(1) extends to many acts which in themselves may do no harm at all to the unique or exceptional qualities of the property which have led to its forming part of the world cultural and natural heritage, for example, cutting down, damaging or removing a tree. It is equally obvious that Regs.5(1) and (2) prohibit development within the area without the consent of the federal Minister and thereby deny to Tasmania effective control over development. In practice it will be the federal Minister who, by virtue of his power of veto, will decide what development is to be permitted within the area. Of course, Tasmania may legislate to prohibit any development, even development to which the federal Minister has consented, but this is of little practical significance if the Minister's power of veto is valid. (at p492)

48. Although the reach of the prohibitions contained in the regulations is wide and the impact on Tasmania's capacity to control development is severe, it does not follow that Regs. 5(1) and (2) go beyond implementation of the provisions of the Convention. Implementation of the Convention, and of the obligation which it imposes on Australia in relation to the property, calls for the establishment of a regime of control which will ensure protection and conservation of the property. No doubt there are a variety of methods of control which will achieve this result. But it is not for the Court to choose between them, or to prefer one to another. The only question is whether the legislative provisions are appropriate and adapted to the desired end, to take up the words of Barwick C.J. in Airlines of N.S.W. (No.2) at p.86. The answer to this question is that the prohibition, by forbidding the acts described without the consent of the federal Minister, is directed to the protection and conservation of the area. To repeat the words of Kitto J. in Herald and Weekly Times, at p.437,". . . it is impossible . . . to avoid the conclusion, even upon consideration of the most extreme illustrations of the working of the provisions, that together they form a means, and are enacted as a means, for effectuating a desired end which is within power . . ." - the protection and conservation of property which has been entered in the World Heritage List. That the effect of the regulations is to prevent any development is entirely consistent with the protection and conservation of a wilderness area. Indeed, it is not suggested that the regime of control imposed by the regulations has an ultimate object divorced from implementation of the Convention. (at p492)

49. The next question is whether the effect of the regulations is to infringe the implied prohibition forbidding the Commonwealth from imposing some special burden or disability upon a State or from inhibiting or impairing the continued existence of a State or its capacity to function, a prohibition which has been discussed earlier in this judgment. Mr. Ellicott, Q.C., submits, in my view correctly, that in order to come within the prohibition it is not necessary to show that the law discriminates against a State, though discrimination in itself will attract the principle. It is enough that the Commonwealth law inhibits or impairs the continued existence of a State or its capacity to function. It is then suggested that the prohibition strikes down a Commonwealth law which inhibits, impairs or curtails any governmental function of a State in a material way. But this is to rewrite the principle. What it does is to prohibit impairment of the capacity of the State to function as a government, rather than to prohibit interference with or impairment of any function which a State government undertakes. As Stephen J. pointed out in Koowarta, at p.645, the

implication is derived from the federal nature of the Constitution and it is designed "to protect the structural integrity of the State components of the federal framework, State legislatures and State executives". (at p492)

50. To fall foul of the prohibition, in so far as it relates to the capacity of a State to govern, it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system. The same idea was expressed by Gibbs J. in the Pay roll Tax Case at p.424, when he said: "A general law of the Commonwealth which would prevent a State from continuing to exist and function as such would in my opinion be invalid." (at p492)

51. It has been affirmatively established by the course of decisions in this Court that the prerogatives of the Crown in right of the State can be adversely affected by Commonwealth laws enacted under ss.51 and 52 of the Constitution. In the Commonwealth v. New South Wales (the Royal Metals Case) [1923] HCA 34; (1923) 33 C.L.R. 1, the Court held that a Commonwealth law under s.51(xxxi) could terminate the prerogative rights in respect of royal metals possessed by the States, provided that the law complied with the requirements of s.51(xxxi). See Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd. [1940] HCA 13; (1940), 63 C.L.R. 278, at pp. 322-323, where Evatt J. pointed out that the prerogative of preference enjoyed by the Crown in right of the State could be destroyed by the valid Commonwealth legislation on the subject of "bankruptcy and insolvency". Dixon J. expressed a similar view, at pp. 313-314, though distinguishing an exercise of the taxation power, at pp. 316-317. In In re Foreman & Sons Pty. Ltd.; Uther v. Federal Commissioner of Taxation [1947] HCA 45; (1947), 74 C.L.R. 508, at p.529, Dixon J. expressed the same view in his dissenting judgment, a judgment which was later vindicated in The Commonwealth v. Cigamatic Pty. Ltd. (In Liquidation) [1962] HCA 40; (1962), 108 C.L.R. 372; see now Bank of New South Wales v. Federal Commissioner of Taxation [1979] HCA 64; (1979), 145 C.L.R. 438. In the meantime, The State of Victoria v. The Commonwealth [1957] HCA 54; (1957), 99 C.L.R. 575 had decided that s. 221(1)(b)(i) and (ii) of the Income Tax and Social Services Contribution Assessment Act 1936-1956 (Cth) was a valid exercise of the "bankruptcy and insolvency" power. The relevant provision gave priority to the Commonwealth in payment of income tax by a trustee in bankruptcy and the liquidator of a company; see pp. 611-612, 624, 658. (at p493)

52. All this supports the view which I expressed in State of Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982), 41 A.L.R. 71, at p. 117, when I said:

"Although the grant of legislative powers to the Commonwealth Parliament in s. 51 is prefaced by the words 'subject to this Constitution', there is nothing elsewhere in the Constitution which subordinates the exercise of these powers to the prerogatives of the Crown in right of the States. Elsewhere the emphasis, as in s. 109, is on the supremacy throughout the Commonwealth of all laws validly made under the Constitution. There is no secure foundation for an implication that the exercise of the Parliament's legislative powers cannot affect the prerogative in right of the States and the weight of judicial opinion, based on the thrust of the reasoning in the Engineers' Case, is against it." (at p493)

53. The State prerogative in relation to wastelands of the Crown is a matter of considerable importance. Its history in Australia was discussed by Stephen J. in the Seas & Submerged Lands Case, at pp. 438-441. There is, as the Royal Metals Case shows, no reason for thinking that it stands immune from the operation of Commonwealth laws enacted under s. 51. Nor is there any solid ground for distinguishing s. 51(xxix) from the other legislative powers in their application to State prerogatives. The special problem which Dixon J. thought arose in the case of the taxation power - whether the power extended to defeating the equal priority of the State claim for payment of its debt - has no relevance to the external affairs power. (at p493)

54. It is perhaps possible that in some exceptional situations if the area of land affected by Commonwealth prohibitions similar to those imposed by Reg. 5 forms a very large proportion of the State, the imposition of the prohibitions would attract the Melbourne Corporation principle. But this is certainly not the case here, where the regulations affect 14,125 hectares only. (at p493)

55. The questions asked in relation to the regulations do not include the question whether the regulations bring about an acquisition of property, a question which arises in connexion with the provisions of the World Heritage Properties Conservation Act 1983. But it is appropriate to say here that for reasons to be given in connexion with the operation of that Act, the regulations do not bring about an acquisition of property. (at p493)

56. In the result, in my view, the regulations are valid and their validity does not depend upon a determination of any of the disputed allegations of fact.

Validity of section 9 of the World Heritage Properties Conservation Act 1983 (Cth) and associated provisions (at p493)

57. By virtue of five proclamations made under s. 6(3) gazetted on 26th May, 1983, s. 9 applies to the Franklin-Lower Gordon Wild Rivers National Park, an area of 14,905 hectares, Kutikina Cave and Deena Reena Cave and an open archaeological site. Section 6(3) provides that where the Governor-General is satisfied that any property in respect of which a proclamation may be made under the subsection is being or is likely to be damaged or destroyed, he may, by proclamation, declare that property to be property to which s. 9 applies. A proclamation made under s. 6(3) in relation to property in a State must relate to "identified property" and to property to which one or more of the paragraphs in s. 6(2) apply. Section 3(2) provides that a reference to "identified property" shall be read as a reference to (a) property forming part of the cultural or natural heritage being property that (i) the Commonwealth has submitted to the World Heritage Committee as suitable for inclusion in the World Heritage List; or (ii) has been declared by the regulations to form part of the cultural heritage or natural heritage; or (b) any part of property referred to in par. (a). Whether par. (a)(ii) and the corresponding part of par. (b) of s. 3(2) is valid is open to question. (at p493)

58. Section 9(1) is substantially similar to Reg. 5(1) of the World Heritage (Western Tasmania Wilderness) Regulations. The principal difference is that the subsection does not specifically refer to the construction of a dam and associated works. However, s. 9(1)(h) prohibits without the written consent of the federal Minister the doing of a prescribed act in relation to particular property to which the section applies. Regulation 4(2) of the World Heritage Properties Conservation Regulations 1983, as amended, prescribes the construction of the dam and preparatory and associated works. Regulation 4(1) defines the relevant property as the part of the cultural area within the excised area, Kutikina Cave and Deena Reena Cave and the open archaeological site. Section 9(2) is a counterpart to Reg. 5(2), except that, instead of prohibiting without written consent any other act that is likely to adversely affect the protection or conservation of the area as part of the world heritage, it prohibits without the written consent of the federal Minister any other act that damages or destroys any property to which the section applies. (at p493)

59. Section 3(2) creates a problem by including a reference to any part of property referred to in par. (a) of the description of "identified property". It raises in an acute form the question whether damage to a part of an entire property threatens or endangers the unique or exceptional characteristics of the entire property which qualify it as part of the world cultural and natural heritage. As I have noted in relation to Reg. 5, damage to part of the property does not necessarily threaten the characteristics of the entire property which qualify it as part of the world heritage. The issue is whether a regime of control which entails prohibition, subject to written consent, against damage to any part of the property is appropriate and adapted to the desired end. (at p494)

60. In this respect s.13(1) is important. The reference to "property" at the end of the subsection is a reference to the particular property which constitutes part of the world heritage, as the mention of the Convention makes plain. Consequently, in deciding whether consent is to be given, the Minister shall have regard only to the protection, conservation and presentation of that property. This may mean that the Minister is bound to refuse consent when (a) the applicant fails to satisfy the Minister that a proposed activity or development is consistent with the "protection, conservation and presentation" of the property: or (b) the Minister's mind is evenly balanced on that issue. (at p494)

61. The scope of the Minister's discretion in s.13(1) is therefore narrower than the discretion to grant or refuse consent in Regs. 5(1) and (2) of the World Heritage (Western Tasmania Wilderness) Regulations which enables the Minister to take into account and balance considerations which compete against the protection and conservation of the property.

The difference, Tasmania submits, is critical because it means that s. 13(1) does not give effect to the concept of what is "appropriate" within the meaning of Art. 5(d) of the Convention because the subsection unduly confines the ambit of the Minister's discretion. (at p494)

62. However, the matters which I have mentioned, in particular those affecting ss. 3(2) and 13(1), do not lead me to the conclusion that the regime of control for which ss.9 and 13(1) provide is less than appropriate and adapted to the protection, conservation and presentation of the property to which the prohibitions relate. As I have already noted, the reference to "appropriate . . . measures" in Art. 5(d) leaves some element of judgment to the State party to the Convention in respect of the particular measures that are appropriate. Section 13(1) is an expression of the judgment made by Parliament in respect of the regime of control which it regards as "appropriate". The discretion which it confers on the Minister gives emphasis to the protection, conservation and presentation of the property. As such, it is the central element in a regime of control which is reasonable and falls well within the area of judgment left to Australia by Art. 5(d) of the Convention. (at p494)

63. Although the area affected by the prohibitions is much larger than that affected by Reg. 5, this is not enough to bring the section within the Melbourne Corporation principle. (at p494)

64. In expressing this conclusion I proceed on the footing that s. 6(2)(b) is valid. I do not find it necessary to explore the validity of the other paragraphs in s. 6(2). Paragraph (b) is plainly severable and would be unaffected by the invalidity of the other paragraphs, should they be invalid. (at p494)

65. At this point it is convenient to deal with the argument that ss.9, 10, 11 and 17 effect an acquisition of property otherwise than on just terms. Tasmania's submission is that, although the Act does not attempt to divest title from the State to the Commonwealth, it so restricts the rights of the State with respect to its waste lands and confers such rights on the federal Minister with respect to those lands that there has been an acquisition of property. Mr Ellicott, Q.C., points to the distinction between "taking" property and "regulation" of property which has been developed in the United States, a distinction which was discussed by Stephen J. in Trade Practices Commission v. Tooth & Co. Ltd. [1979] HCA 47; (1979), 142 C.L.R. 397, at pp. 413-415. (at p494)

66. The proposition, supported by the judgments of Holmes J. and Brandeis J., in Pennsylvania Coal Co. v. Mahon [1922] USSC 193; (1922), 260 U.S. 393, at pp. 415, 417 (67 Law Ed. 322, at pp. 326-327), is that a restriction on the use of property deprives the owner of some right previously enjoyed and is therefore an abridgment of rights in property without making compensation. The consequence is that if the regulation of property goes too far it is a "taking". Corpus Juris Secundum (1965), vol. 29A, "Eminent Domain" c 6 states:

"There is no set formula to determine where regulation ends and taking begins; so, the question depends on the particular facts and the necessities of each case, and the court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest." (at p494)

67. The decisions of the United States Supreme Court have no direct relevance to s.51(xxxi) of the Constitution. Many of them turn on the Fifth Amendment which is made applicable to the states by the Fourteenth Amendment; see, for example, Penn Central Transportation Co. v. New York City [1978] USSC 180; (1978), 438 U.S. 104 (57 Law Ed. 2d 631), in which Pennsylvania Coal was explained on the footing that a state statute that substantially furthers important public policies may so frustrate distinct investmentbacked expectations as to amount to a "taking". The relevant provision in the Fifth Amendment is ". . . nor shall private property be taken for public use, without just compensation". It seems that the Supreme Court has proceeded according to the view that the object of the clause is to prevent government from forcing some people alone to bear public burdens which should be undertaken by the entire public. (Armstrong v. United States [1960] USSC 113; (1960), 364 U.S. 40 (4 Law Ed. 2d 1554); National Board of Young Mens Christian Assns. v. United States [1969] USSC 114; (1969), 395 U.S. 85 (23 Law Ed. 2d 117);Penn Central). (at p494)

68. The emphasis in s. 51(xxxi) is not on a "taking" of private property but on the acquisition of property for purposes of

the Commonwealth. To bring the Constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be. The effect of s.51(xxxi) was correctly stated by Dixon J. in Bank of N.S.W. v. The Commonwealth (the Banks Case)(1948), 76 C.L.R.1, at p.349:

"I take Minister of State for the Army v. Dalziel ((1944), 68 C.L.R.261) to mean that s.51(xxxi.) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51(xxxi.) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect." (at p495)

69. See also Minister of State fotr the Army v. Dalziel [1944] HCA 4; ((1944), 68 C.L.R. 261, at pp. 276-277, 284-286, 290-291,299-300). (at p495)

70. The effect of s.9, and perhaps to a lesser extent, of ss. 10 and 11, is to prevent any development of the property in question, subject to the Minister's consent, so as to preserve its character as a wilderness area. Section 13(1), which compels the Minister to have regard only to the protection, conservation and presentation of the property, applies only to consents under s.9. In terms of its potential for use, the property is sterilized, in much the same way as a park which is dedicated to public purposes or vested in trustees for public purposes, subject, of course, to such use or development as may attract the consent of the Minister. In this sense, the property is "dedicated" or devoted to uses, that is, protection and conservation which, by virtue of Australia's adoption of the Convention and the legislation, have become purposes of the Commonwealth. However, what is important in the present context is that neither the Commonwealth nor anyone else acquires by virtue of the legislation a proprietary interest of any kind in the property. The power of the Minister to refuse consent under the section is merely a power of veto. He cannot positively authorize the doing of acts on the property. As the State remains in all respects the owner the consent of the Minister does not overcome or override an absence of consent by the State in its capacity as owner. The fact that the Minister has a power of veto of any development of or activity on the property does not amount to a vesting of possession in the Commonwealth. Significantly, the Act contains no provision dealing with possession. (at p495)

71. There being to my mind no acquisition of property, I have no need to consider whether s. 17 provides for just terms. However, it is necessary to consider whether the Act infringes s. 100 of the Constitution. Examination of this can be deferred for the moment.

Validity of sections 7 and 10 of the World Heritage Properties Conservation Act 1983 (at p495)

72. Section 10 relies on the corporations power (s. 51(xx)) in its application to fireign corporations and trading corporations and on the territories power (s. 122) in its application to corporations incorporated in a territory. By virtue of the three proclamations made under s. 7 gazetted on 26th May, 1983, s. 10 applies to that part of the Franklin area that is within the natural area, that part of the cultural area that is within the excised area and Kutikina Cave and Deena Reena Cave. Section 7 contains no counterpart to s. 6(2). (at p495)

73. The acts prohibited without the consent of the Minister by s. 10(2) and (3) are those prohibited by s. 9(1) and (2). The question then is whether the corporations power extends to the regulation of the activities of trading corporations,

not being trading activities. The Hydro-Electric Commission contends that it does not, relying principally on statements culled from the judgments in Huddart, Parker & Co. Proprietary Ltd. v. Moorehead [1909] HCA 36; (1908), 8 C.L.R. 330, a decision which was overruled in Strickland v. Rocla Concrete Pipes Ltd. (1971), 124 C.L.R. 468. On the other hand, the Commonwealth contends that the power extends to authorize laws about the activities of trading corporations which are not restricted to their trading activities and that the power includes power to make laws with respect to conduct undertaken for the purpose of a trading corporation's trading activities. (at p495)

74. It is an unrewarding exercise to review all that was said in Huddart, Parker about the scope of the power. The judgment of Barwick C.J. in Rocla Pipes is a complete refutation of the decision in Huddart, Parker and of the reasoning on which it was based. With the exception of Isaacs J. the members of the Court conceded a very restricted operation to the power. This was because they subscribed to grave constitutional heresies, notably the doctrine of reserve powers, which have long since been denounced; see, for example, the judgment of Griffith C.J., at pp. 348 et seq. The doctrine supported the erroneous view that s. 51(xx) could not subtract from a State's power over its own internal trade. Although Higgins J. did not subscribe to the doctrine, he thought that the heads of Commonwealth legislative power were mutually exclusive - another deviation from the true faith - and this seems to have led him to the notion that the internal trade of a State is "forbidden to the Federal Parliament" unless the other heads of power clearly authorize an intrusion into that forbidden area; pp. 415-416. Even so, his Honour considered that s. 51(xx) authorized a law regulation corporactions as corporations; p. 412. And Isaacs J. said, at p. 395, that the power "entrusts to the Commonwealth Parliament a regulation of the conduct of the corporations in their transactions with or affecting the public", although he thought that it did not extend to internal management. So much for Huddart, Parker. (at p496)

75. Discussion of the topic in the Banks Case was just as inconclusive. Rich and Williams JJ., at pp. 255-256 treated the power as one which authorized laws with respect to the conditions, subject to performance of which, the corporations mentioned should be entitled to carry on business in Australia. Starke J., after noting the views of Isaacs and Higgins JJ. in Huddart, Parker, said, at p. 304, that the power "is an independent power complete in itself" which:

". . . authorizes the Commonwealth to govern and regulate the operation of these companies but would not authorize the suppression of all such corporations or the nationalization of their activities. Thus, the carrying on (of) business in Australia by these corporations might be prohibited absolutely or except upon certain conditions and the exercise of their powers in Australia might be regulated and so forth." (at p496)

76. Latham C.J. did not commit himself to an interpretation of the power, though he quoted the extreme examples given by Higgins J. in Huddart, Parker, at pp. 409-410, of the consequences which would follow if the power extended to a prohibition or regulation of anything a corporation might do. (at p496)

77. Since then it has been affirmatively established that the power extends to the regulation and the protection of the trading activities of trading corporations; Rocla Pipes, esp. at pp. 489-491, 511, 525; Actors & Announcers Equity Association v. Fontana Films Pty. Ltd. [1982] HCA 23; (1982), 40 A.L.R. 609, at pp. 617, 624-627, 634-635, 640, 645; Fencott v. Muller (judgment delivered 28th April, 1983 - official pamphlet p. 24). Whether the power goes further remains to be decided. Barwick C.J., Murphy, Brennan JJ. and I have indicated that it does; Rocla Pipes, at p. 490; Fontana, at pp. 636-637, 640, 645- 646. It would be unduly restrictive to confine the power to the regulation and protection of the trading activities of trading corporations. After all, the subject matter of the power is persons, not activities. The suggested restriction might possibly deny to Parliament power to regulate borrowing by trading corporations, notwithstanding that there is much to be said for the view that one of the objects of s. 51(xx) was to enable Parliament to regulate transactions between the categories of corporation mentioned and the public, indeed to enable Parliament to protect the public, should the need arise, in relation to the operations of such corporations. (at p496)

78. There is, certainly, no sound reason for denying that the power should extend to the regulation of acts undertaken by trading corporations for the purpose of engaging in their trading activities. I do not understand Mr. Merralls, Q.C., to deny that in some instances at least the power extends that far. (at p496)

79. There is more to be said for the view that the scope of the power is to be ascertained by reference to those matters,

whatever they may be, as are relevant to the trading character of a trading corporation. Thus, it might be said that the power extends to, but does not travel beyond, such aspects of a trading corporation's structure, business and affairs, as have relevance to its character as a trading corporation. This view of the power would, if accepted, enable Parliament to enact legislation regulating (and prohibiting) acts and activities engaged in by a trading corporation for the purpose of engaging in its trading activities. (at p496)

80. However, it seems to me that there are three powerful objections to the adoption of this limited construction. The first is that this approach to the scope of the power in its application to the classes of corporations mentioned, though it has some plausibility in the case of trading corporations, has none at all in the case of financial and foreign corporations. It can scarcely have been intended that the scope of the power was to be limited by reference to the foreign aspects of foreign corporations and the financial aspects of financial corporations. And it would be irrational to conclude that the power is plenary in the case of those corporations, but limited in the case of trading corporations. (at p496)

81. The second objection is that the interpretation fails to give effect to the principle that a legislative power conferred by the Constitution should be liberally construed. And the final objection is that a power to make laws with respect to corporations (of designated categories), as in the case of a power with respect to natural persons, would seem naturally to extend to their acts and activities. In Koowarta Stephen J., when referring to the power conferred by s. 51(xxvi) with respect to the people of any race, said, at p. 642, that "the content of the laws which may be made under it are left very much at large" and that "they may be directed to any aspect of human activity". (at p496)

82. There is nothing in the context of s. 51(xx) which compels the conclusion that the language in which the power is expressed should be given a restricted interpretation. In this respect I mention, without repeating, what I said in Fontana, at pp. 636-637. In the result we should recognize that the power confers a plenary power with respect to the categories of corporation mentioned. (at p496)

83. It is of some interest to note that Griffiths C.J. in Huddart, Parker made it clear that, but for the doctrine of reserved powers, this is the interpretation of s. 51(xx) to which he would have been compelled. He said, at p. 348:

"The Commonwealth Parliament can make any laws it thinks fit with regard to the operation of the corporation, for example, (it) may prescribe what officers and servants it shall employ, what shall be the hours and conditions of labour, what remuneration shall be paid to them, and may thus, in the case of such corporations, exercise complete control of the domestic trade carried on by them. In short, any law in the form 'No trading or financial corporation formed within the Commonwealth shall,' or 'Every trading or financial corporation formed, etc., shall,' must necessarily be valid, unless forbidden by some other provision of the Constitution." (at p497)

84. He then went on to say:

"It is not seriously disputed that the words of pl. xx., if they stood alone, might be capable of such a construction, but the appellants contend that it is not the true one." (at p497)

85. It was the doctrine of reserved powers that led him to depart from this, the natural and literal construction of the words. (at p497)

86. Barwick C.J. in Rocla Pipes, at pp. 489-490, when referring to Griffiths C.J.'s comments, said:

". . . that it does not follow either as a logical proposition, or, if in this instance there be a difference, as a legal proposition, from the validity of those sections, that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations . . . is necessarily a law with respect to the subject matter of s. 51(xx.)." (at p497)

87. In substance these remarks amount to a counsel of caution. However, when analysed in the light of Barwick C.J.'s view of characterization of a law as expressed in the Pay-roll Tax Case, which I do not accept and which I shall discuss shortly, they suggest that his Honour was accepting that the potential reach of a law under s. 51(xx) would extend to the non-trading acts and activities of a trading corporation, subject only to its being characterized as a law with respect to the subject matter. Although it may be that his Honour entertained some doubt as to the universality of the illustrations given by Griffith C.J., the doubt appears to have stemmed from Barwick C.J.'s view of characterization. (at p497)

88. The argument presented in the present case tends to obscure the difference between two distinct and separate questions: (1) what is the scope of the power; and (2) is the law in truth a law with respect to the subject matter of the power, once its scope has been ascertained. Characterization, the name given to the process of arriving at an answer to the second question, cannot begin until the first question is answered. (at p497)

89. Tasmania then argues that s. 10 is not a law about trading and foreign corporations; rather it is a law about the activities which are prohibited by the section or, alternatively, about the Western Tasmania Wilderness area. There is no need to recall all that has been said on the topic of characterization of a law. It is sufficient to mention the discussion in Fontana by Stephen J., at pp. 622-625, Brennan J., at pp. 648- 649, and myself, at pp. 632-635. But it is necessary to reject the invitation proffered by Mr Merralls, Q.C., to accept what Barwick C.J. expressed in Pay-roll Tax Case, at pp. 372-373, as constituting a correct approach to characterization. There his Honour said:

". . . a law may be at the same time thought to be a law with respect to either of two of the topics enumerated in s. 51 and it may be satisfactory in such a case not to trouble to say with respect to which of the two subject matters the law should preferably be referred. But when a law may possibly be regarded as having either of two subjects as its substance, one of which is within Commonwealth power and the other is not, a decision must be made as to that which is in truth the subject matter of the law." (at p497)

90. His Honour then likened the manner in which the choice is to be made to the manner in which the validity of a law claimed to be within one of the two mutually exclusive lists in the Canadian Constitution is determined. He went on to say, at p. 373: "The law must be upon one or other of the subjects. It cannot be on both." (at p497)

91. His Honour's statement reflects an approach similar to that which had been adopted by Latham C.J. in West, at pp. 668-669, and in Melbourne Corporation, at pp. 50-51. But it does not accord with the approach that has been consistently taken by the Court in modern times. It is now well settled (a) that a law upon a subject matter within Commonwealth power does not cease to be valid because it touches or affects a topic outside Commonwealth power or because it can be characterized as a law upon a topic outside power; and (b) that it is not necessary to characterize a law upon one topic to the exclusion of the other - see Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan [1931] HCA 34; (1931), 46 C.L.R. 73, at pp. 103-104; Attorney-General (Vict.) v. The Commonwealth (1962), 107 C.L.R. 529, at p. 601; the Pay-roll Tax Case at pp. 400, 403-404; Fairfax v. Federal Commissioner of Taxation [1965] HCA 64; (1965), 114 C.L.R. 1, at p. 13; Herald and Weekly Times at pp. 433-434; Worthing v. Rowell and Muston Pty. Ltd. (1970), 123 C.L.R. 89, at p. 137; Rocla Pipes, at p. 510; Murphyores Incorporated Pty. Ltd. v. The Commonwealth [1976] HCA 20; (1976), 136 C.L.R. 1, at pp. 19-23, esp. at p. 22; Seamen's Union of Australia v. Utah Development Co. [1978] HCA 46; (1978), 144 C.L.R. 120, at p. 154; Re Linehan; Ex parte Northwest Exports Pty. Ltd. [1981] HCA 22; (1981), 55 A.L.J.R. 402, at pp. 405, 406, 409; Fontana Films at pp. 624-626. No doubt, as Stephen J. suggested in Fontana, at p.625, the statement was made with reference to the argument that the character of the law in that case was with respect to the functions of a State. Be this as it may, his Honour's remarks cannot be accepted as a correct approach to characterization in general. (at p497)

92. The true principle is that the character of the law is to be ascertained from its legal operation, that is by reference to the rights, duties, obligations, powers and privileges which it creates. This is not to deny the validity of a law which exhibits in its practical operation a "substantial connexion" with a relevant head of power. Taking the practical effect of the relevant law into account led the Court to uphold its validity in Herald and Weekly Times. So much appears from the judgments of Kitto and Menzies JJ. Kitto J. said, at p. 436:

"Undoubtedly it is right to scrutinize minutely the effect of a challenged law in all the variety of cases to which it applies according to its terms; but when that has been done the broader inquiry remains: what, then, is the law really doing by the operation which the scrutiny reveals that it has?" (at p498)

93. And Menzies J. said, at p. 440:

"A law governing a particular relationship may, however, be supported by a legislative power with respect to a subject matter notwithstanding that the connexion between the legal relationship and the subject matter of legislative power is of practical rather than of legal significance." (at p498)

94. The requirement that there should be a substantial connexion between the exercise of the power and its subject matter does not mean that the connexion must be "close". It means only that the connexion must not be "so insubstantial, tenuous, or distant" that it cannot be regarded as a law with respect to the head of power; Melbourne Corporation, at p. 79. (at p498)

95. In this respect Tasmania submits that s. 7 is invalid because it selects damage to or destruction of property as the basis of the power to make a proclamation and not an act or prohibited act of a foreign or trading corporation. An event having no necessary connexion with trading or foreign corporations is made the occasion for prohibiting them from damaging property. This demonstrates something that is evident from other provisions of the Act, namely that the object of s. 10 is to protect the Western Tasmania Wilderness area. The Parliament has exercised the corporations power to achieve this end, not for some overriding purpose having a connexion with trading and foreign corporations. But the point is that the legislative power with respect to trading and foreign corporations is not, on the view which I have expressed, in any sense purposive. It is enough that the law has a real relationship with the subjects of the power; it matters not, when the power is not purposive, that the object of the exercise is to attain some goal in a field that lies outside the scope of the Commonwealth power. A law which prohibits trading and foreign corporations from doing an act is a law about trading and foreign corporations, notwithstanding that it is also a law about the act which is prohibited. It is a law which imposes obligations on such corporations enforceable by injunctions. Consequently, it is simply impossible to say that the law has no substantial connexion with trading and foreign corporations. (at p498)

96. In the result then, subject to consideration of the argument based on s. 100 of the Constitution, ss. 7 and 10 are valid. The validity of s. 10(4) is a necessary consequence of the validity of s. 10(2) and (3).

Does the Act infringe section 100 of the Constitution? (at p498)

97. Section 100 provides:

"The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation." (at p498)

98. The prohibitions in ss. 99 and 100 of the Constitution are plainly directed to the Commonwealth, not to the States. It is unnecessary to decide whether s. 100 guarantees to riparian States and their residents access to the use of the waters for the purposes mentioned or whether it merely imposes a restriction on the power of the Commonwealth when legislating under ss. 51(i) and 98. It is, however, appropriate to point out that in the form in which it is expressed s. 100 does impose a restriction on the exercise of Commonwealth legislative power, one which prevents the Commonwealth by a law or regulation of the kind described from abridging the rights of a State and its residents. (at p498)

99. The words "of trade or commerce" relate back to "law" as well as "regulation". This view is supported by similar expressions in the neighbouring sections, ss. 98, 99, 101 and 102 which make it plain that the group of sections is dealing with laws with respect to trade and commerce. In this context the concept of laws and respect to trade and commerce signifies laws made, or perhaps capable of being made, under ss. 51(i) and 98 for that is the relevant power conferred on the Parliament to make laws with respect to trade and commerce. The prohibitions are naturally directed to laws which may be made in the exercise of that power, with the addition in the case of s. 99 of revenue laws because the exercise of the taxation power might otherwise result in the giving of a preference to a State or to part of a State. Section 98 is of special significance because (1) it provides that Parliament's power with respect to trade and commerce extends to navigation and shipping; (2) it demonstrates that the references in other sections to a law or regulation of trade and commerce are references to laws which are made, or perhaps can be made, under s. 51(i) as explained by s. 98; and (3) it thereby suggests that the primary purpose of s. 100 was to safequard the rights of a State and its residents to the use of waters in rivers used for interstate trade and commerce including navigation and shipping, viz., the Murray River. (at p498)

100. What I have said accords with what was decided in Morgan v. The Commonwealth [1947] HCA 6; (1947), 74 C.L.R. 421, where the Court held that the National Security (Rationing) Regulations and certain orders made under the regulations, though they had an effect in relation to trade and commerce, were not laws or regulations of trade and commerce within the meaning of s. 99 because they could not have been made under s. 51(i) of the Constitution. Latham C.J., Dixon, McTiernan and Williams JJ. left open the question whether a law which might be supported under s. 51(i) and independently under some other power might fall within the prohibition contained in s. 99 (p. 455). On the other hand, Starke J. was disposed to answer the question in the affirmative; p. 458. For the purposes of the present case it is unnecessary to answer this question. (at p499)

101. At first glance it may seem somewhat artificial to confine the restriction on legislative power to laws made, or capable of being made, in exercise of one power when a somewhat similar effect in relation to the use of waters of rivers by a State and its residents for conservation or irrigation might be achieved by the Commonwealth in the exercise of other legislative powers. Why, one might ask, would the framers of the Constitution confine the pursuit of the objective - the protection of the State and its residents in relation to the use of the waters - to some Commonwealth laws but not others? (at p499)

102. The answer to this question probably lies in the importance of the Murray River to New South Wales, Victoria and South Australia and the residents of those States and the apprehensions entertained by them as to the impact of the Commonwealth's legislative powers under ss. 51(i) and 98. Time does not permit an examination of this aspect of our history. And in any event the legal answer to the question is that we must give preponderant weight to the significance of the expression "law or regulation of trade and commerce" used in ss. 99 and 100 which, as we have seen, confines the prohibition to laws made, or capable of being made, under ss. 51(i) and 98. (at p499)

103. In my opinion neither s. 10 nor any other section of the Act infringes s. 100.

Is the Commission a trading corporation within the meaning of section 10? (at p499)

104. This question must be answered in the affirmative for reasons which may be shortly stated in this way:

1. The decision in Reg. v. Trade Practices Tribunal; Ex parte St. George County Council [1974] HCA 7; (1973), 130 C.L.R. 533, is no longer to be regarded as correct. A majority of the Court in Reg. v. Federal Court of Australia; Ex parte W.A. National Football League [1979] HCA 6; (1979), 143 C.L.R. 190 considered it to have been wrongly decided. See also State Superannuation Board v. Trade Practices Commission [1982] HCA 72; (1982), 57 A.L.J.R. 89, at p. 96.

2. As Barwick C.J. observed in his dissenting judgment in St. George County Council, at p. 541, the connexion of the corporation with the government of a State will not take it outside s. 51(xx). In making this statement, his Honour referred to certain features of the County Council in that case and stated that they did not take the Council outside the category of "trading corporations". The features were (1) that it was incorporated under the Local Government Act 1919 (N.S.W.); (2) that it had power to levy a loan rate; (3) that there was a limitation on profitmaking to ensure that the council performed a public service for the county district; and (4) that in reticulating electricity to the district it was performing a public service.

3. The Commission's connexion with the government of Tasmania is certainly closer than the connexion of St. George County Council with the government of New South Wales. And the Commission's position in the structure of government is certainly more important than that of the County Council. The Commission is the State authority responsible for generating and distributing electrical power in the State. It constructs and manages the relevant dams, generating plants and other works and makes the policy decisions and recommendations to the Minister in connexion with its functions. But in Launceston Corporation v. The Hydro-Electric Commission [1959] HCA 12; (1959), 100 C.L.R. 654, it was decided that the Commission was an independent statutory corporation and it was not a servant or agent of the Crown. Since then the Commission's Act has been amended, notably by the inclusion of ss. 15A and 15B. Section 15A enables the Minister to notify the Commission of the policy objectives of the government with respect to any matter relating to generation, distribution, etc. of electrical energy. Section 15B enables the Minister to give a direction to the Commission with respect to the performance of its functions, subject to certain limitations and qualifications. The Commission may object to the direction. If the Minister does not withdraw the direction or qualify it in a manner acceptable to the Commission, the matter is then submitted to the Governor for decision (s.15B(4) and (5)). The Commission is bound to comply with the direction, subject to any withdrawal or modification and subject to a decision of the Governor. However, it is specifically provided that the Minister's power to give a direction does not make the Commission a servant or agent of the Crown or confer on the Commission any status, privilege or immunity of the Crown (s. 15B(9)). Accordingly it is not suggested that the decision in Launceston Corporation has been eroded by legislative developments.

4. The trading activities of the Commission therefore form a much less prominent feature of its overall activities than was the case with St. George County Council. The Commission has an important policy-making role. It is the generator of electrical power for Tasmania for distribution to the public and for this purpose it engages on a large scale in the construction of dams and generating plants. In this respect its operations are largely conducted in the public interest.

5. However, W.A. National Football League demonstrates that these considerations do not exclude the Commission from the category of "trading corporations". The majority judgement in State Superannuation Board pointed out, at p.96, that the case decided that a trading corporation whose trading activities take place so that it may carry on some other primary or dominant undertaking (which is not trading) may nevertheless be a trading corporation.

6. The agreed facts show that the Commission sells electrical power in bulk and by retail on a very large scale. This activity in itself designates the Commission as a trading corporation.

7. The final question, one raised on behalf of the Commission, is whether it is possible to treat for the purposes of s.51(xx) a corporation as a trading corporation in relation to its trading activities and as a non-trading corporation in

relation to its non-trading activities. My earlier conclusion that the legislative power is not confined to the trading activities of trading corporations is in one sense an answer to this submission. The other answer is that s. 51(xx) designates as the subject of the power the corporate persona itself, that is the artificial person created by incorporation. There is no suggestion in the paragraph that it is looking to some hypothetical or notional incorporation which covers only the trading activities of a trading corporation. (at p500)

105. I therefore conclude that the Commission is a trading corporation within the meaning of s.10 of the Commonwealth Act. And in my opinion the Commission is constructing the dam and associated works for the purposes of its trading activities. The dam will provide additional electrical energy for supply and sale by the Commission.

Validity of sections 8 and 11 of the World Heritage Properties Conservation Act 1983 (at p500)

106. By virtue of two proclamations gazetted on 26th May, 1983, it was declared pursuant to s. 8(3) that s.11 of the Act applies to Kutikina Cave and Deena Reena Cave and to the open archaeological site. Likewise, Reg. 5(1) defines the "relevant site" for the purposes of s.11(1)(i) as meaning the two caves and the open archaeological site. (at p500)

107. Regulation 5(2) then prescribes for the purposes of s. 11(1)(i) the following acts - the carrying out of works in the course of constructing a dam which will be capable of causing the inundation of a relevant site or part of a relevant site, the carrying out of works preparatory to such construction and the carrying out of works associated with the construction. (at p500)

108. The prohibitions in s. 11(1) are identical to those contained in s. 9(1), except for the inclusion of a new prohibition, that contained in par. (d) of s. 11(1). Paragraph (d) prohibits damage to or destruction of any artefacts or relics sited on any site to which the section applies. Section 11(2) then prohibits, without the consent in writing of the Minister, the doing of any act, not being an act prohibited by sub-s. (1) that damages or destroys or is likely to result in damage to or destruction of any site, artefact or relic on any site to which the section applies. Subsection (3) prohibits without the written consent of the Minister the doing of any act preparatory to the doing of an act that is prohibited by sub-s. (2). (at p500)

109. Section 8(2) provides that a reference to an aboriginal site is a reference to a site (a) situated within identified property and (b) the protection or conservation of which is, whether by reason of the presence on the site of artefacts or relics or otherwise, of particular significance to the people of the aboriginal race. (at p500)

110. The question is whether the relevant provisions are supported by the power conferred by s. 51(xxvi), that is, the power to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". (at p500)

111. In Koowarta, Stephen J., after saying that laws made under par. (xxvi) "must be special laws, in the sense of having some special connexion with people of any race", stated, at p.642:

". . . I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises." (at p500)

112. Later he said:

"To be within power under par.(26) a law must be special in the sense that it is the particular race, or races, for whom it legislates that gives rise to the occasion for its enactment." (at p500)

113. See also p.665, per Brennan J. (at p500)

114. Tasmania contends that ss.8 and 11 lie outside this conception of a special law for the people of the aboriginal race for two reasons: (1) they are not special laws for the people of that race; and (2) their character is not that of a law with respect to the people of that race. The two reasons, though different, are by no means distinct. They share in common the notion that a law made under par. (xxvi) must, if it operates upon people generally, be confined to their dealings with people of the aboriginal race. (at p500)

115. To my mind this is too narrow a view of the power. It seems to require of the law that it must regulate the rights of people of the particular race inter se or vis-avis others or, to put it another way, that the law must regulate the conduct and transactions of people of that race inter se or vis-a-vis others. Why the power should be so limited is not immediately apparent. Its terms are wide enough to enable the Parliament (a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community; and (b) to protect the people of a race in the event that there is a need to protect them. Indeed, it is not denied that the power extends to a law protecting them, for example, a law protecting the people of that race from racial discrimination. Of course, a distinction can be drawn between (a) the protection from injury to, and discrimination against, the individual members of a particular race and (b) the protection from damage or injury to elements of the cultural heritage - and I use this term to include the historical and spiritual or religious heritage - of the people of a particular race, for example, a church, a shrine or an archaeological site. But there is no persuasive reason for drawing such a distinction in the context of a legislative power in the Constitution so broadly expressed as to apply to "the people of any race". (at p500)

116. In essence the argument is that, as a subject matter of the legislative power, the cultural heritage of the people of a race is distinct and divorced from the people of that race, so that a power with respect to the latter does not include power with respect to the former. The answer is that the cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage. (at p501)

117. A law which protects the cultural heritage of the people of the aboriginal race constitutes a special law for the purpose of par. (xxvi) because the protection of that cultural heritage meets a special need of that people. However, it is argued that ss.8 and 11 do not answer the description of such a law because the law only protects a site which is of significance to the whole of mankind and to the people of the aboriginal race. This argument fails to acknowledge that something which is of significance to mankind may have a special and deeper significance to a particular people because it forms part of their cultural heritage. Thus an aboriginal archaeological site which is part of the cultural heritage of people of the aboriginal race has a special and deeper significance for aboriginal people than it has for mankind generally. If it be found on the facts that the sites do have a particular significance for them because the sites are part of their cultural heritage, there is a special need to protect the sites for them, a need which differs from, and in one sense transcends, the need to protect it for mankind. (at p501)

118. Other points which are made are said to go to the character of the law, viz. the law does not attempt to deal with sites of aboriginal significance in their generality, the actual protection which a proclaimed site receives may be unrelated to features which make it significant to aboriginal people and the true object of the law is to protect the property which forms part of the world heritage. These matters may be acknowledged, subject only to saying that the protection given to the sites will result in the protection of the features which make them significant to aboriginal people. But they do not detract from the validity of the law if, on the facts, it does what it purports to do on its face, namely protects sites which are part of the heritage of the aboriginal people. It is then a law upon the legitimate subject of legislative power. (at p501)

119. In the result ss. 8 and 11 are valid, subject to the sites being of "particular significance" to the people of the aboriginal race, using that expression in the sense which I have ascribed to it, namely that the sites are significant because they are elements in the cultural heritage (including the historical and spiritual or religious heritage) of that people. (at p501)

120. I answer the questions asked as follows:

Actions No. C6 and No. C8 of 1983

Question 1.(a)"Yes".

Question 1.(b)"Yes".

Question 2."No".

Question 3."No".

Question 4. Does not arise.

Question 5."It is not invalid but it is ineffective unless the federal Minister consents."

Question 6. Not necessary to answer.

Action No.C12 of 1983

Question 1.(a) "Yes; ss. 6 and 9 in their entirety except pars.(a),(c),(d) and (e) of s.6(2), the validity of which it is not necessary to determine".

Question 1.(b)"Yes;ss. 7 and 10 in their entirety".

Question 1.(c)"Yes;ss. 8 and 11 in their entirety".

Question 1.(d) Does not arise.

Question 2. "No, save as to Reg. 5 and the two proclamations made under s.8(3), the validity of which depends on whether Kutikina Cave, Deena Reena Cave and the open archaeological site are sites of particular significance to people of the aboriginal race".

Question 3.(a)Does not arise.

Question 3.(b) Does not arise.

Question 4.See answer to Question 2.

Question 5.(a)"Yes".

Question 6."It is not invalid but it is ineffective unless the federal

Minister consents".

Question 7.Not necessary to answer.

Question 8."Yes". (at p501)

MURPHY J. The Gordon River Hydro-Electric Power Development Act 1982 (Tas.) authorized the construction of a dam by the Hydro-Electric Commission in the wilderness area of South West Tasmania. Unless that State Act is inconsistent with federal law there is no reason to doubt its validity. However, the effect of both the National Parks and Wildlife Conservation Act 1975 (Cth)s. 69 and the World Heritage Properties Conservation Act 1983 (Cth) (together with the instruments made under each) is to prevent the building of the dam and other conduct without the consent of a federal Minister. If either of these Acts is valid, there is clear inconsistency between the State Act and federal law. If there is such an inconsistency it is resolved by supremacy clauses,s. 5 of the covering clauses and s. 109 of the Constitution, in the Commonwealth of Australia Constitution Act. Section 5 of the covering clauses states:

"This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; . . ." (at p501)

2. Section 109 of the Constitution states:

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." (at p501)

3. The question is whether either of the Acts, to the extent that it, or the instruments (regulations or proclamations) made under it, prohibits the construction of the dam or other conduct within the area without the consent of a federal Minister, is within the legislative powers of the Federal Parliament. If so, to that extent it is valid, and by force of the Constitution, prevails over the State Act. (at p502)

4. The suggested bases of legislative power for the two Acts are: the external affairs power (s. 51(29)); the corporation's power (s. 51(20)); the power to make special laws for the people of any race (s. 51(26)); and the inherent nationhood power. Tasmania disputes that any of these authorize the Acts and contends that even if these powers were otherwise available they are subject to s. 100 of the Constitution, which renders them invalid because they abridge the right of the State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. It also claims that the Acts amount to acquisitions of property from the State without just terms contrary to s. 51(31) of the Constitution. (at p502)

5. Before dealing with those powers and prohibitions, I will refer to the presumptions of validity and of facts essential to validity, and to the doctrines of reserved State powers, and "the federal balance".

Presumption of validity (at p502)

6. An Act of Parliament is the authentic expression of the will of the people through their elected representatives. There is a strong presumption of the constitutionality or validity of every Act. However as Tasmania asserted that there was no presumption of validity, an examination of the status of the presumption is desirable. (at p502)

7. The presumption of validity has been referred to by many judges of this Court.Isaacs J. stated:

"Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will." Federal Commissioner of Taxation v. Munro [1926] HCA 58; (1926), 38 C.L.R. 153, at p. 180. (at p502)

8. On appeal, this passage was specifically approved by the Privy Council; Shell Company of Australia Ltd v. The Federal Commissioner of Taxation (1930), 44 C.L.R. 530, at p. 545. (at p502)

9. Starke J. said: "Every legislative Act, regulation or order must find some warrant in the Constitution, though the presumption is in favour of validity." Stenhouse v. Coleman [1944] HCA 36; (1944), 69 C.L.R. 457, at p. 466; see also Dixon J., at p. 470. Dixon, McTiernan and Fullagar JJ. observed that parties to issues of constitutional validity, even those interested to support the legislation, "usually prefer to submit such an issue in the abstract without providing any background of information in aid of the presumption of validity and to confine their cases to dialectical arguments and considerations appearing on the face of the legislation." Wilcox Moffin Ltd v. State of N.S.W. [1952] HCA 17; (1952), 85 C.L.R. 488, AT P. 507; (my emphasis). (at p502)

10. The presumption was recognised by Latham C.J. in South Australia v. Commonwealth [1942] HCA 14; (1941), 65 C.L.R. 373, at 432; by Fullagar J. in Australian Communist Party v. The Commonwealth (1951), 83 C.L.R. J, at p. 255 and by Kitto J. in Breen v. Sneddon [1961] HCA 67; (1961), 106 C.L.R. 406, at p. 414. Mr Justice Dixon said: "In discharging our duty of passing upon the validity of an enactment, we should make every reasonable intendment in its favour", Attorney-General (Vic.); Ex rel. Dale v. The Commonwealth [1945] HCA 30; (1945), 71 C.L.R. 237, at p. 267. I have referred to the presumption in a series of cases from Attorney-General (W.A.) v. Australian National Airlines Commission [1976] HCA 66; (1976), 138 C.L.R. 492, at p. 528-529 to Gazzo v. Comptroller of Stamps (Vic); Ex parte Attorney-General (Vic.) [1981] HCA 73; (1981), 56 A.L.J.R. 143, at p. 153, but have taken the view that it does not apply where the challenge to an Act is based on a constitutional prohibition or guarantee. (at p502)

11. Many Australian commentators have referred to it. Inglis Clark stated:

"The Federal Judiciary will at all times be guided by the fundamental rule the constant observance of which is the foundation of public confidence in its decisions affecting its own position under the Constitution, and which requires that the validity of any apparent exercise of legislative authority which has been promulgated in proper form is always to be presumed until the alleged law is clearly demonstrated to be in excess of the contents of the legislative power conferred by the Constitution, and if at any time the question is a doubtful one, the decision must be in favour of the validity of the impugned law", Studies in Australian Constitutional Law (1901) p. 33. (at p502)

12. Moore referred to it as "the ordinary presumption in favour of the validity of a legislative Act", The Constitution of the Commonwealth of Australia (2d ed.), (1910) p. 383. Sawer has written that the presumption of validity "meant little to the High Court from 1903-13, a good deal from 1920-42 and has again meant very little since about 1950, but could become a real factor once again" (Australian Federalism in the Courts (1967) p. 119; see also Burmester "The Presumption of Constitutionality", (1983) 13 Federal Law Review) Wynes states: "in construing an enactment the constitutional validity of which is in issue, the Court will not hold it to be ultra vires unless the invalidity is clear beyond all doubt; the presumption is always in favour of validity"; Legislative Executive and Judicial Powers in Australia (5th ed. (1976) p. 35.). (at p502)

13. The presumption of validity or constitutionality is a fundamental rule of constitutional law in countries which have written constitutions which limit the powers of legislatures. "The presumption of the validity of the statue is employed in most countries with written constitutions containing supremacy provisions"; Groves Comparative Constitutional Law

(1963)p. 5.

United States. (at p502)

14. The presumption was "thoroughly established" by 1811; see Thayer "The Origin and Scope of the American Doctrine of Constitutional Law", (1893-94) 7 Harvard Law Review, 129, at p.150. It is also known as the doctrine of "reasonable doubt" after the classic statement by Washington J. in Ogden v. Saunders 12 Wheat (25 U.S.)(1827)213, at p.270:

"It is but a decent respect due to the . . . legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." (at p503)

15. See also Fletcher v. Peck 6 Cranch 10 U.S.(1810) 87, at p.128, Marshall J. Pure Oil Co. v. State of Minnesota 248 U.S.(1918), 158, at p. 162-163; Chicago Board of Trade v. Olsen 262 U.S.(1923),1, at pp. 37-38; Gitlow v. New York 268 U.S.(1925), 652, at p.668; Davies Warehouse Co v. Bowles 321 U.S.(1944),144, at p.153; United States v. Five Gambling Devices 346 U.S.(1953),441, at p.449; Hodel v. Virginia Surface Mining and Reclamation Association 452 U.S.(1981),264, at p.276. (at p503)

16. The United States Supreme Court referred to "the rule that every reasonable intendment must be indulged in favor of the constitutionality of a legislative power exercised" (First National Bank of Bay City v. Union Trust Co. 244 U.S. (1917),416, at p.422). (at p503)

17. It has been described as a well established rule that the judges will always "lean in favour of the validity of a legislative Act; that if there be a reasonable doubt as to the constitutionality of a statute, they will solve that doubt in favour of the statute; that where the legislature has been left a discretion they will assume the discretion to have been wisely exercised; that where the construction of a statute is doubtful, they will adopt such construction as will harmonize with the Constitution, and enable it to take effect"; Bryce, The American Commonwealth, (1912)vol.1 p.447. The unanimity with which the doctrine of reasonable doubt has come to be accepted "as the only correct and orthodox rule of judicial construction "is attested by "subsequent judicial utterances numbering into the thousands as well as by the statements of practically every commentator in the field of constitutional law"; (Cushman in Selected Essays on Constitutional Law (ed. Association of American Law Schools,(1938), at PP.527,532). The presumption is, however, given a narrower scope of operation, or not applied, when the legislation appears on its face to violate a specific constitutional prohibition or guarantee of freedom. There are now very few challenges to federal legislation on the ground that a law is not one with regard to a constitutional head of power.

Canada. (at p503)

18. The practice of the Supreme Court of Canada has been consistent with a presumption of constitutionality for both provincial and federal laws; see Weiler "The Supreme Court and the Law of Canadian Federation" (1973), University of Toronto Law Journal at p.307. Strong J. stated that the Court's duty in determining the validity of provincial statutes is "to make every possible presumption in favour of such Legislative Acts" (Severn v. The Queen (1878)2 S.C.R.70, at p.103); see also Valin v. Langlois (1879) 3S.C.R.1,at p.28; In re Railway Act Amendment (1904)36SCR136, at p143; Hewson v Ontario Power Co. (1905)36S.C.R.596, at p.603; Reference re Farm Products Marketing Act (1957)7D.L.R. (2d) 257, at p.311. (at p503)

19. In the Constitutional Law of Canada (1977) Hogg writes at p.47:

"The legislative decision should always receive the benefit of a reasonable doubt, and should be overridden only where its invalidity is clear. There sould be, in other words, a presumption of constitutionality. In this way a proper respect is

paid to the legislators, and the danger of covert (albeit unconcious) imposition of judicial policy preferences is minimized." See also Lefroy Legislative Power in Canada (1898)pp.260-269; Driedger The Construction of Statutes (1974)p.167;Magnet "The Presumption of Constitutionality", Osgoode Hall Law Journal, vol.18(1980)p.87.

Malaysia. (at p503)

20. There is a presumption - "perhaps even a strong presumption - of the constitutional validity of the impugned section" (Public Prosecutor v. Datuk Harun bin Haji Idris,(1976)2M.L.J.116, at p.117; Datuk Haji Harun bin Haji Idris v. Public Prosecutor, (1977)2MLJ155, at p166)

Phillipines. (at p503)

21. Fernando J., for the Supreme Court, stated that the presumption of validity is one of the "constitutional doctrines of a fundamental character" (Ermita-Malate Hotel and Motel Operators Association Inc. v. City Mayor of Manilla (1967), 20S.C.R.A. 849, at p.856- 857. See also Fernando, The Power of Judicial Review (1968),pp.110-116).

India. (at p503)

22. The presumption is always in favour of the constitutionality of an enactment and "the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles" (see Chiranjit Lal Chowdhuri v. Union of India, (1950)1SCR 869, at p879; State of Bombay v Balsara, (1951)38A.I.R.(S.C.)318, at p.326; V.M. Syed Mohammad & Co v. State of Andhra, (1954) S.C.R.1117, at p.1120; Shri Ram Krishna Dalmia v. Shri Justice Tendolkar(1959) S.C.R. 279, at p.297; Madhubhai Amathalal Gandhi v. Union of India, (1961) 1 SCR 191, at p209; GK Krishnan v The State of Tamil Nadu, (1975) 2 S.C.R. 715, at p.729; Seervai Constitutional Law of India (1967), p. 54; Jain Indian Constitutional Law (1978), p.411).

Ireland. (at p503)

23. When the Court has to consider the constitutionality of a law "it must be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established" (Pigs Marketing Board v. Donnelly (Dublin) Ltd. (1939),I.R.413, at p.417). An interpretation favouring the validity of an Act "should be given in cases of doubt" (East Donegal Co-operative Livestock Mart Ltd v. Attorney-General, (1970)I.R.317, at p.341). (at p504)

24. The presumption of constitutionality "springs from, and is necessitated by, that respect which one great organ of the State owes to another", Buckley v. Attorney-General,(1950)I.R.67, at p.80; see also In re Article 26 and the Offences against the State (Amendment) Bill, (1940),(1940)I.R.470, at p.478; In re Article 26 and the School Attendance Bill, (1942),(1943)I.R.334, at p. 344; Foley v. The Land Commission, (1952) I.R. 118, at p. 129; National Union of Railwaymen v. Sullivan, (1947)I.R.77, at p.100; McDonald v. Bord na gCon (1965)I.R.217, at p.239; In re Padraic Haughey, (1971)I.R.217, at p.227; Boland v. An Taoiseach, (1974)I.R.338, at p.362.

Pakistan. (at p504)

25. The Court "should lean in favour of upholding the constitutionality of . . . legislation", Province of East Pakistan v. Sirajul Hug Patwari, (1966) 1 P.L.D. (S.C.)854, at p.954; Mahmood The Constitution of Pakistan (1965)p.16.

Bangladesh. (at p504)

26. Whenever legislation is challenged as unconstitutional "the presumption is in favour of its constitutionality", Munim J. Rights of the Citizen under the Constitution and Law (1975)p.24.

Japan. (at p504)

27. The Supreme Court has accorded a "strong presumption of constitutionality to both challenged legislation and administrative decrees", Murphy and Tanenhaus Comparative Constitutional Law Cases and Commentaries (1977)p.44; see also the "Sunakawa Case" in Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality (No.4)(1960)pp.6-7; David and Brierley Major Legal Systems in the World Today (2d ed. (1978),p.499; Tanaka "Democracy and Judicial Administration in Japan",(1959-60) Journal of the International Commission of Jurists.2 at pp7.10).

Federal Republic of Germany. (at p504)

28. The Federal Constitutional court takes the view that "there is always a presumption that a statute is consonant with the Constitution" (Rupp "Judicial Review in the Federal Republic of Germany",(1960) American Journal of Comparative Law, 9 at pp.29, 38; Hahn "Trends in the Jurisprudence of the German Federal Constitutional Court", (1968-69) American Journal of Comparative Law, 16, at pp.570,572). (at p504)

29. It is therefore apparent that in other countries where laws may be challenged as beyond the powers of a limited legislature, the presumption is regularly applied by the courts. To ignore the presumption of validity is to deal cavalierly with the representatives of the people and the legislative power entrusted to them by the Constitution. The fact that in Australia the presumption has often been overlooked may help to explain the considerable number of laws, extraordinary by the standards of other national courts, which have been held by this Court to be beyond the powers of the Parliament.

Presumption of facts essential to validity (at p504)

30. A corollary of the presumption of validity is that the existence of all facts and circumstances essential to the validity is presumed. The U.S. Supreme Court has stated: "If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did"(Munn v. People of Illinois(1877),24 Law Ed.77,at p.86)and "when the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts", Borden's Farm Products v. Baldwin 293 U.S.(1934),194, at p.209. Those challenging the legislative judgment "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker", Vance v. Bradley 440U.S.(1979),93, at p.111).(See also Lindsley v. Natural Carbonic 220U.S. (1911),61, at p.78; Clarke v. Deckebach 274U.S. (1927),392, at p.397; Lawrence v. State Tax Commissioner 286 U.S.(1932),276,at p.283; U.S. v. Carolene Products Co. 304U.S. (1938),144, at p.152; McGowan v. Maryland 366U.S.(1961),420, at p.426; U.S. v. Maryland Savings-Share Ins. Corp. 400U.S. (1970),4, at p.6:Schilb v. Kuebel 404U.S.(1971),357, at p.364;McGinnis v. Royster 410U.S.(1973),263, at p.274;U.S. Railroad Retirement Board v. Fritz 449 U.S.(1980),368,at p.376. (at p504)

31. The Supreme Court of India also presumes the existence of facts essential to validity (see Dalmia's Case, at p.297),

as does the Supreme Court of the Philippines; United States v. Salaveria (1918), 39 Phil 102, at p.111.(See also Bikle "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action",(1924-25), Harvard Law Review,38,at p.6;"The Consideration of Facts in 'Due Process'Cases",(1930) Columbia Law Review, 30,at p.360.)

The fallacy of reserved state powers (at p504)

32. The grants of legislative power in the Constitution, s.51, are plenary. There is no reservation from any such grant unless the reservation is explicitly stated in the grant; Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (the Engineers'Case) (1920),28 C.L.R.129, at p.154. Despite the fact that the doctrine of implied reserved State powers was discredited in the Engineer's Case, it is advanced, not openly but indirectly, in almost every case in which an Act is challenged as having no head of legislative power. Dixon J. explained that it is a fundamental error to regard a State Act as if it were an exercise of an express grant, contained in the Constitution, to the States of a power to make laws with respect to the specific subject of the State Act: it is an exercise of a general residuary legislative power. He said:

"The content and strength of this power are diminished and controlled by the Commonwealth Constitution. It is of course a fallacy, in considering what a State may or may not do under this undefined residuary power, to reason from some general conception of the subjects which fall within it as if they were granted or reserved to the States as specific heads of power. But no fallacy in constitutional reasoning is so persistent or recurs in so many and such varied applications"; In Re Foreman & Sons Pty Ltd; Uther v. Federal Commissioner of Taxation and Another (1947)74C.L.R.508,530. (at p505)

33. It follows that the question under s.51 "is always whether a particular enactment is within Commonwealth power. It is never whether it invades a State's domain"; Windeyer J. Victoria v. The Commonwealth (1971)122CLR353,400 However Tasmania, while claiming to disavow the doctrine, also claimed that the power to develop and to control the environment and "wastelands" of Tasmania belonged to the State Parliament to the exclusion of the Commonwealth Parliament.

The federal balance (at p505)

34. Closely allied to the fallacy of reserved State powers is the doctrine of federal balance. Novel uses of federal legislative power challenged by the States are said to upset "the federal balance". According to this proposition, when a challenged law is supported as an exercise of the power to make laws with respect to any subject enumerated in s.51, the Court should disregard the federal power sought to be relied upon, and conceive a federal balance between the other enumerated federal powers and State powers. Then it is claimed that the exercise of the federal power sought to be relied upon would upset the federal balance. This has occurred in relation to external affairs (see The King v. Burgess;Ex parte Henry (1936),55C.L.R.608; Koowarta v. Bjelke Petersen (1982),56A.L.J.R.625 and this case) and corporations (see Actors and Announcers Equity v. Fontana Films Pty.Ltd.(1982),56A.L.J.R.366)and marriage (see Russell v. Russell (1976),134C.L.R.495 and Gazzo v. Comptroller of Stamps (Vic); Ex parte Attorney-General (Vic.) (1981)56A.L.J.R.143)and even bankruptcy; see Storey v. Lane (1981), 55 A.L.J.R.608. (at p505)

35. In this case,it was contended that the use of the external affairs or the corporations power to support the Acts would upset "the federal balance". There are two serious objections to this doctrine. One is that the State powers brought into the balance can only mean "reserved State powers". The other is that no rational argument is advanced for disregarding the particular federal power relied upon when achieving the balance. It builds upon the doctrine of reserved State powers by a fallacious method of "balancing" those notional State powers with some only of the undoubted federal

powers. As advanced in this and recent constitutional cases the doctrine of federal balance presents only a balance between fallacies. (at p505)

36. Counsel for Tasmania, relied on Melbourne Corporation v. The Commonwealth(1947),74C.L.R.31; Victoria v. The Commonwealth (1971),122C.L.R. 353 and Koowarta, to argue that the Acts would prevent the continued existence of the State or its capacity to function. The Acts manifestly do not have such an operation; the argument is frivolous. The mere fact that the Acts impair, undermine, make ineffective or supersede various State functions or State laws is an ordinary consequence of the operation of federal Acts and does not affect their validity. (at p505)

37. Any "extravagant" use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituency and not by the Courts; Engineers'Case, p.151.

External affairs power

(Constitution(s.51(29)) (at p505)

38. The power to make laws for the peace, order and good government of the Commonwealth with respect to external affairs authorises the Parliament to make laws with respect to external affairs which govern conduct, in as well as outside, Australia. The core of Tasmania's case was that the construction of the dam and the regulation of the South West area of Tasmania were purely domestic or internal affairs of the State. However it is elementary that Australia's external affairs may be also internal affairs (see Burgess; New South Wales v. The Commonwealth (1975),135C.L.R.337(the Sea and Submerged Lands Case) and Koowarta); examples are control of traffic in drugs of dependence, diplomatic immunity, preservation of endangered species and preservation of human rights. (at p505)

39. The circumstances which bring a law within the power have not been stated exhaustively. It was recognized in Burgess, and is even clearer now, that along with other countries, Australia's domestic affairs are becoming more and more involved with those of humanity generally in its various political entities and groups. Increasingly, use of the external affairs power will not be exceptional or extraordinary but a regular way in which Australia will harmonize its internal order with the world order. The Constitution in its references to external affairs (s.51(29)) and to matters arising under treaties or affecting consuls or representatives of other countries (s.75) recognizes that while most Australians are residents of States as well as of the Commonwealth, they are also part of humanity. Under the Constitution Parliament has the authority to take Australia into the "one world", sharing its responsibilities as well as its cultural and natural heritage. (at p505)

40. The power extends to the execution of treaties by discharging obligations or obtaining benefits, but it is not restricted to treaty implementation. The power would be available for example where, without any treaty, Australia wished to assist in an overseas famine. No doubt the Parliament could authorize acquisition of food in Australia (albeit on just terms, in accordance with s.51(31)) for relief of the famine and could legislate to prevent hoarding and profiteering in regard to the food remaining in Australia. Again, suppose that in the next few decades, because of the continuing rapid depletion of the world's forests and its effect on the rest of the biosphere, the survival of all living creatures becomes endangered. This is not a fanciful supposition; see The Global 2000 Report to the President of the United States, (1980). Suppose the United Nations were to request all nations to do whatever they could to preserve the existing forests. Let us assume that no obligation was created (because firewood was essential for the immediate survival of people of some nations). I would have no doubt that the Australian Parliament could, under the external affairs power, comply with that request by legislating to prevent the destruction of any forest, including any State forest. Again, without any treaty but in order to avert threatened military or economic sanctions by another nation, the Parliament could legislate on a subject which was otherwise outside power. (at p506)

41. Although external affairs are mostly concerned with our relationships with other nation States, they are not exclusively so concerned. There may be circumstances where Australia's relationship with persons or groups who are not nation States, is part of external affairs. The existence of powerful transnational corporations, international trade

unions and other groups who can affect Australia, means that Australia's external affairs, as a matter of practicality, are not confined to relations with other nation States. (at p506)

42. In Koowarta, the majority considered that if the subject was one of international concern this brought it within the external affairs power. For the reasons I have given it is not necessary that the subject be one of concern demonstrated by the other nation States generally. For example concern expressed by the world's scientific community or a significant part of it over action or inaction in Australia might be enough to bring a matter within Australian external affairs. However even if international concern is not always necessary, it is sufficient. External concern over human rights violations often extends internal affairs into external affairs. (at p506)

43. It is preferable that the circumstances in which a law is authorized by the external affairs power be stated in terms of what is sufficient, even if the categories overlap, rather than in exhaustive terms. To be a law with respect to external affairs it is sufficient that it:

(a) implements any international law; or

(b) implements any treaty or convention whether general (multilateral) or

particular; or

(c) implements any recommendation or request of the United Nations Organization or subsidiary organizations such as the World Health Organization, The United Nations Education, Scientific and Cultural Organization, The Food and Agriculture Organization or the International Labour Organization; or

(d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia; or

(e) deals with circumstances or things outside Australia; or

(f) deals with circumstances or things inside Australia of international

concern. (at p506)

44. The fact that a subject becomes part of external affairs does not mean that the subject becomes, as it were, a separate, plenary head of legislative power. If the only basis upon which a subject becomes part of external affairs is a treaty, then the legislative power is confined to what may reasonably be regarded as appropriate for implementation of provisions of the treaty. This does not mean that either all of the provisions must be implemented or else none can be implemented. It does not mean that there must be any rigid adherence to the terms of the treaty. Again, if the subject of external affairs is some other circumstance, the legislative power will extend to laws which could reasonably be regarded as appropriate for dealing with that circumstance. (at p506)

45. The world's cultural and natural heritage is, of its own nature, part of Australia's external affairs. It is the heritage of Australians, as part of humanity, as well as the heritage of those where the various items happen to be. As soon as it is accepted that the Tasmanian wilderness area is part of world heritage, it follows that its preservation as well as being an internal affair, is part of Australia's external affairs. (at p506)

46. As at December 1982, there were some 64 items on the World Heritage List maintained by the World Heritage Commission under the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (the Convention), Art. 11(2); see Schedule to the World Heritage Properties Conservation Act 1983 (Cth). These included cultural items of world renown such as the Pyramid fields of Egypt; Aksum and the Rock-hewn churches of Lalibela in Ethiopia; the decorated caves of the Vezere Valley in France; the Mesa Verde in the United States, the ruins of Antigua in Guatemala and the sacred city of Anuradhapura in Sri Lanka. (at p506)

47. The natural heritage on the World Heritage List includes:

Algeria: The M'Zab Valley.

Argentina: Los Glaciares National Park.

Australia: Kakadu National Park; Great Barrier Reef; Willandra Lakes Region;

Wesrtern Tasmania Wilderness National Parks; Lord Howe Island Group. Canada: Nahanni National Park; Dinosaur Provincial Park; Anthony Island; Head-Smashed-In Bison Jump Complex.

Ecuador: The Galapagos Islands.

Ethiopia: Simien National Park; Lower Valley of the Awash; Lower Valley of

the Omo.

Guatemala: Tikal National Park.

Guinea & Ivory Coast: Mount Nimba Strict Nature Reserve.

Honduras: Rio Platano Biosphere Reserve.

Ivory Coast: Tai National Park.

Nepal: Sagarmatha National Park; Kathmandu Valley.

Poland: Bialowieza National Park.

Panama: Darien National Park.

Senegal: Island of Goree; Niokolo-Koba and Djoudj National Parks.

Seychelles: Aldabra Atoll.

Tanzania: Ngorongoro Conservation Area; Serengeti National Park; Selous Game

Reserve.

U.S.A.: Yellowstone; Grand Canyon, Everglades, Redwood, Mammoth Cave and Olympic National Parks.

Yugoslavia: Durmitor National Park; Plitvice Lakes National Park.

Zaire: Virunga, Garamba and Kahuzi-Biega National Parks. (at p507)

48. Wilderness regions such as that of South West Tasmania are thus common on the World Heritage List. (at p507)

49. The Preamble to the World Heritage Convention states:

"Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world. . . .

"Considering that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong. . . .

"Considering that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an effective complement thereto." (at p507)

50. The concern of nations which lead to the Convention is understandable. In the ancient mediterranean civilization there were seven "wonders of the world": the Pyramids of Egypt, the Hanging Gardens of Babylon, the Statue of Zeus at Olympia, the Temple of Artemis at Ephesus, the Mausoleum of Halicarnassus, the Colossus of Rhodes and the Pharos of Alexandria. Of these only the Pyramids remain. It is significant that the Convention provides for a List of World Heritage in Danger (Art. 11(4)). It is notorious that much of the world's natural and cultural heritage is endangered from periodic wars and natural decay and man-made pollution; see Cousteau The Cousteau Almanac - An Inventory of Life on Our Water Planet (1981); The Global 2000 Report. Dangers such as those of acid rain, radioactive fallout, destruction of the forests and extinction of many plant and animal species indicate that the preservation of the world's cultural and natural environment is dependent upon international cooperation and international concern; see Barros and Johnson The International Law of Pollution (1974). (at p507)

51. The cooperation of Australia with other nation States to preserve the world cultural and natural heritage falls easily within the external affairs power. It is part of Australia's external affairs to participate with other nations bodies and persons in this process of declaring that world renowned monuments, scenic and architectural sites belong to the world, and not merely the nation or the province where they are situated. It is also part of Australia's external affairs to cooperate with others, each nation doing what it can to preserve the sites within its area, as part of a web of international regulation and supervision of such sites. Even if there were no treaty the preservation of world heritage is part of Australia's external affairs and federal laws directed to preservation of any part of that heritage in Australia, would be within the legislative powers of the Parliament. (at p507)

52. International concern about preservation of the world's heritage was amply demonstrated. The Commonwealth put in evidence a list of international agreements dating from the early part of this century dealing with the preservation of the world's cultural and natural heritage; examples are Convention Relative to the Preservation of Fauna and Flora in their Natural State Nov. 8, 1933 (1933) L.N.T.S. 172, at p. 242; Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere Oct. 12, 1940 (1953) U.N.T.S. 161, at p. 193; Convention for the Protection of Cultural Property in the Event of Armed Conflict May 14, 1954 (1956) U.N.T.S. 249, at p. 240. The principal agreement is the World Heritage Convention 1972. (at p507)

53. International concern about the preservation of the world's natural heritage is a particular aspect of the intense international concern about conservation of the world's natural resources. This led in 1980 to a new global programme known as World Conservation Strategy, compiled by the International Union for the Conservation of Nature and Natural Resources, the United Nations Environment Program and the World Wildlife Fund, in collaboration with the Food and Agricultural Organization of the United Nations and UNESCO. Aimed at protection of vital habitats, it has identified regional ecosystems in need of immediate and special attention. (at p507)

54. Australia, sharing in the international concern, on the initiative of former Prime Minister Fraser, has developed a National Conservation Strategy which adopts the three main objectives of living resource conservation identified in the World Conservation Strategy. These are:

"(a) to maintain essential ecological processes and life support systems (such as soil regeneration and protection, the recycling of nutrients, and the cleansing of waters), on which human survival and development depend;

(b) to preserve genetic diversity (the range of genetic material found in the world's organisms), on which depend the breeding programs necessary for the protection and improvement of cultivated plants and domesticated animals, as well as much scientific advance, technical innovation, and the security of the many industries that use living resources;

(c) to ensure the sustainable utilisation of species and ecosystems (notably fish and other wildlife, forests and grazing land), which support millions of rural communities as well as major industries."

See "The National Conservation Strategy", George Wilson Director, National Conservation Strategy Task Force, UNESCO Review, No. 8, May 1983. (at p508)

55. Other agreements reflect international concern about the environment and its resources and support the concept of the "Common Heritage of Mankind"; see Antarctica Treaty (1961), 402 U.N.T.S. at p. 71 (reprinted: (1960), American Journal of International Law, 54, at p.476); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies Art.1 (1967) U.N.T.S., 610, at p.205 (reprinted: (1967), American Journal of International Law, 61, at p.644); 1971 Declaration of the Principles Governing the Seabed and Ocean Floor and The Subsoil Thereof Beyond the Limits of National Jurisdiction, G.A. res. 2749 (XXV) (reprinted: (1971), International Legal Materials, 10, at p.220); 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies Art. 11, U.N. Doc. A/34/664 (reprinted: (1979), International Legal Materials, 18, at p. 1434); Convention on the Law of the Sea, Art. 136, U.N. Doc. A/Conf.62/122 (reprinted: (1982), International Legal Materials, 21, at p. 1261); Arnold "The Common Heritage of Mankind as a Legal Concept", (1975), International Lawyer, 9, at p. 156; Christol "The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies", (1980), International Lawyer, 14, at p. 429. (at p508)

56. The preservation of the world's heritage must not be looked at in isolation but as part of the cooperation between nations which is calculated to achieve intellectual and moral solidarity of mankind and so reinforce the bonds between people which promote peace and displace those of narrow nationalism and alienation which promote war. The United Nations came into being because of the Second World War. In its constitutive documents, proceedings and evolution over forty years, there has been a continuing emphasis on removing the causes of war - the denial of human rights and intense nationalism. Thus the preamble to the United Nations Charter (1945) states:

"We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . and for these ends to practice tolerance and live together in peace with one another as good neighbours . . . have resolved to combine our efforts to accomplish these aims". (at p508)

57. Through bodies such as the United Nations Educational, Scientific and Cultural Organization, under whose auspices the convention was created, the United Nations has attempted to educate the people of the world to think of themselves as one, to break down the intense nationalistic attitudes which lead to war. The encouragement of people to think internationally, to regard the culture of their own country as part of world culture, to conceive a physical, spiritual and intellectual world heritage, is important in the endeavour to avoid the destruction of humanity. (at p508)

58. The Constitution of UNESCO (1945) declares:

"'That since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed . . .

"That ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war . . .

"That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind'." (at p508)

59. Protecting the world's cultural and natural heritage and thus fostering the intellectual and moral solidarity of mankind, in promoting the elimination of war, advances the foremost object of international relations. (at p508)

60. Obligation. Although it is not necessary for validity that the federal law implement some treaty obligation, the Acts do so. There has been a continuing dispute about the nature of obligation in international law; see Holder and Brennan, The International Legal System (1972) p. 41; Brierly, The Basis of Obligation in International Law (1958); Schachter, "Towards a Theory of International Obligation" in The Effectiveness of International Decisions (Schwebel ed., 1971) p. 9. This has increased with the recent widesread use of the consensus procedure in international organizations in the production of treaties and resolutions; see Falk "On the Quasi-Legislative Competence of the General Assembly", (1966), American Journal of International Law, 60, at p. 782; Vignes "Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?", (1975), American Journal of International Law, 69, at p. 119; Buzan "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea" (1981), American Journal of International Law, 75, at p. 324. (at p508)

61. The Convention should be interpreted giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose (Art. 31(1) Vienna Convention on the Law of Treaties, A.T.S. (1974) No. 2 (reprinted: (1969), American Journal of International Law, 63, at p.875), which endorsed existing principles). So interpreted, it contains obligations which the Acts tend to carry out. The preamble speaks of the necessity for creating "an effective system of collective protection". Australia has accepted the "primary" duty for "protection, conservation, presentation and transmission to future generations" of the world cultural and natural heritage situated on its territory (Art. 4). It is obliged to "do all it can to this end, to the utmost of its own resources" (Art. 4). Article 5, states: "To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this convention shall endeavour, in so far as possible, and as appropriate for each country . . . to take the appropriate legal . . . measures necessary . . . " (at p509)

62. In considering treaty obligations for the purposes of the external affairs power, it is an error to assume that they must have the same characteristics and should be interpreted in the same way as contractual obligations in municipal law. However, even in our domestic law, obligations are often framed similarly. For example, in occupational safety laws a command to take a precaution is often qualified by the words "so far as is reasonably practicable". Nevertheless such provisions have repeatedly been held to impose a direct obligation, a duty to take the precaution if it is practicable, and if it is not, to do it as far as it is; see Butler (or Black) v. Fife Coal Co. Ltd., (1912) A.C. 149; Duff v. Lake George Mines Ltd. (1960), S.R.(N.S.W.) 83; Wellington v. Lake George Mines Ltd (1962), S.R.(N.S.W.) 326; Australian Oil Refining Pty. Ltd. v. Bourne (1980), 54 A.L.J.R. 192, 194-195. Taking into account the imprecise standards of obligation under international law, for the purposes of the external affairs power, the Convention, in particular Art. 5, imposes a real obligation. (at p509)

63. Federal Clause. The federal clause (Art. 34) in the Convention is not material. It seemed to be common ground that Art. 34 does not determine which organ in a federal State should discharge its obligation; this requires examination of its own Constitution. If the provisions of a treaty are within the competence of the Federal legislature then the Article has no relevant operation; see Bernier, International Legal Aspects of Federalism (1973), p. 172; Looper "'Federal State' Clauses in Multilateral Instruments", (1955-56), British Yearbook of International Law, 32, at p.162; Liang, "Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments", (1951), American Journal of International Law, 45, at p. 108). (at p509)

64. Section 69 of the National Parks and Wildlife Conservation Act 1975 authorises the making of regulations for giving effect to a number of agreements between Australia and other countries (The Convention on Wetlands of International Importance, especially as Waterfowl Habitat 1971; the Convention for the Conservation of Antarctic Seals 1972;Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973; the Australia-Japan

agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment 1974 and the World Heritage Convention 1972). Section 69 is a regulation - making power independent of the general regulation making power in the Act (s. 71). It is authorised by the external affairs power at least so far as it applies to the World Heritage Convention. The World Heritage (Western Tasmania Wilderness) Regulations are valid. The parts of the World Heritage Properties Conservation Act 1983 (Cth) which rely upon the external affairs power are also valid. Apart from any wider basis of validity, all the provisions of the challenged laws are reasonably appropriate for implementation of the World Heritage Convention.

Corporations power

(Constitution (s. 51(20)) (at p509)

65. The corporations power is relied upon for those parts of the World Heritage Properties Conservation Act 1983 (Cth), particularly ss. 7 and 10, which are directed specifically to foreign or trading corporations, and which in detail make it unlawful for such a corporation to do anything, without the consent of the Minister, which might injure the South West Tasmanian site. The corporations power is plenary. It must be read with all the generality which the words of s. 51(20) admit. That power authorizes the Parliament to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. It enables Parliament to make laws covering all internal and external relations of all or any foreign corporations and trading or financial corporations; to enact a civil and criminal code dealing with the property and affairs of such corporations, or a law dealing with any aspect of the affairs of any such corporation or corporations (see Fontana's Case). The power under s. 51(20) extends to any command affecting the behaviour of a foreign corporation or a trading or financial corporation and is not restricted to commands about the trading activities of trading corporations or about the financial activities of financial corporations. The Act in so far as it regulates the conduct of such corporations is valid. (at p509)

66. The constitutional description of trading corporations includes those bodies incorporated for the purpose of trading and also those corporations which trade; see Ex parte National Football League Western Australia; re Adamson [1979] HCA 6; (1979), 23 A.L.R. 439, at p.477; State Superannuation Board v. Trade Practices Commission [1982] HCA 72; (1982), 44 A.L.R. 1; (1981), 41 A.L.R. 279; Fencott v. Muller (1983 Federal Court Reporter, 150). The Hydro-Electric Commission incorporated by and under the Hydro-Electric Commission Act 1944 (Tas.) is a trading corporation both by virtue of its constitution and its activities which make it a major trader. Once it is established that the Commission is a trading or financial corporation it is immaterial that it has other functions. (at p510)

67. It is a fallacy to suggest that a law with respect to a subject within s. 51 is invalid because it is also a law on a subject not within s. 51. It is beside the point to endeavour to characterize the second subject as being more dominant than the first. It is necessary but also sufficient for the law to be with respect to a subject within power. (at p510)

68. Sections 7 and 10 of the World Heritage Properties Conservation Act 1983 (Cth) are valid.

Special laws for people of any race power

(Constitution (s. 51(26)) (at p510)

69. Certain parts of the World Heritage Properties Conservation Act 1983 (Cth) (ss. 8, 11, 13(7), 14(5)) are claimed by the Commonwealth to be authorized by s.51(26) which empowers the Parliament to make laws with respect to the people of any race, for whom it is deemed necessary to make special laws. (at p510)

70. A broad reading of this power is that it authorizes any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass special laws. Whatever technical meaning "race" might be given in other contexts, in the Australian Constitution it includes the aborigines and Torres Strait Islanders and every subdivision of those peoples. To hold otherwise would be to make a mockery of the decision by the people to delete from s. 51(26) the words "other than the aboriginal race in any State" (Constitution Alteration (Aboriginals) Act 1967 (Cth)) which was manifestly done so that Parliament could legislate for the maintenance, protection and advancement of the aboriginal people. (at p510)

71. The history of the Aboriginal people of Australia since European settlement, is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalization, attempted genocide and systematic and unsystematic destruction of their culture. According to recent studies, at the time of the first European settlement in 1803 there were approximately 4,000 Aborigines (or Parlevars) in Tasmania. They were divided into sixty or more bands of nomadic hunter-gatherers who ranged over a fifty mile radius inside about ten major tribal areas. In 1829, 250 aboriginals, believed to be possibly the last of their race, were transported to various Islands in the Furneaux Group. However, the Tasmanian aboriginal peoples did not become extinct, even though some of the tribes may be. The Report of the Aboriginal Affairs Study Group of Tasmania (No. 94 of 1978) states, at p. 16:

"any claim that 'there are no aborigines in Tasmania' is false . . . the prevalence of such claims in Tasmania is regrettable . . . There are, according to the 1976 census 1,564 males and 1,378 females who, by reason of mixed descent justifiably have the right to be proud to defend their aboriginality"; see also Ryan The Aboriginal Tasmanians (1981). (at p510)

72. Parliament was entitled to act on the view that a law to preserve the material evidence of the history and culture of the Tasmanian aboriginals is a law with respect to the people of the Tasmanian aboriginal race, or with respect to the people of the aboriginal race of Australia. Information from archaeological sites such as Kutikina and Deena-Reena (see for example, Flood, The Moth Hunters - Aboriginal Prehistory of the Australian Alps (1980); Mulvaney, The Prehistory of Australia (1969) may not only strengthen the common understandings that make the Aboriginal people conscious of their identity as a race but may promote tolerance of their position amongst the general community. Because of the attempted genocide of the Aboriginal Race in Tasmania, which extended to their customs, tribal structures and culture, a law aimed at the preservation, or the uncovering, of evidence about their history is a special law with respect to the people of this race. The law in question which provides for the protection and conservation of aboriginal sites that are, or are within, world heritage sites, "the protection or conservation of which is of particular significance to the people of the Aboriginal race" is a law within s.51(29). I agree with the interpretation of "particular significance" given by Mr Justice Brennan. The presumption of validity applies in favour of the proclamation made under these provisions, but the presumption not being conclusive, evidence is admissible on the issue of whether the protection or conservation is of particular significance. The World Heritage Properties Conservation Act 1983 (Cth), ss. 8, 11, 13(7) and 14(5) which are supported on s.51(29) are valid.

Acquisition of property

(Constitution (s. 51(31)) (at p510)

73. Tasmania contended that the Acts were invalid because they constituted an acquisition of property on other than just terms contrary to s. 51(31) of the Constitution. The "acquisition" was said to result from the fact that the Acts so restrict the use of lands to which they apply and the rights over them that Tasmania is no longer the owner of the land. Property is a concept of very wide scope; see Dorman v. Rodgers [1982] HCA 25; (1982), 41 A.L.R. 683. But the extinction or limitation of property rights does not amount to acquisition. The transfer of property from one person to another, not the Commonwealth, does not amount to an acquisition within par. 31. Unless the Commonwealth gains some property from the State or person, there is no acquisition within the paragraph. The Commonwealth of course includes its agents and

this concept should be applied liberally. Here, the law gives the Commonwealth control over certain activities which might otherwise occur on the land. I am not satisfied that it has acquired any property. Section 51(31) thus does not apply; see Trade Practices Commission and Another v. Tooth & Co Limited and Another [1979] HCA 47; (1979), 142 C.L.R. 397, at p. 434; Attorney-General (Cth) v. Schmidt [1961] HCA 21; (1961), 105 C.L.R. 361, at pp. 372-373 and Andrews v. Howell [1941] HCA 20; (1941), 65 C.L.R. 255).

Constitution - Section 100. (at p510)

74. This section states: "The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation". (at p511)

75. In Morgan v. The Commonwealth [1947] HCA 6; (1947), 74 C.L.R. 421, at p.455, it was held that s.100 should be read as applying only to laws which are made under the trade and commerce power in s. 51(1) of the Constitution, which is extended by s.98. The two federal Acts are not laws made under that power. Morgan's Case was not challenged, and when it is applied, s.100 has no operation in relation to the two Acts.

Nationhood power. (at p511)

76. I have held that the other parts of the World Heritage Properties Conservation Act 1983 (Cth) are valid in prohibiting the dam construction and other conduct without the consent of a federal Minister. This disposes of the real issue between the parties, and it is unnecessary to consider whether s.6(2)(e)(i) which relies on the nationhood power, is valid.

Subsidiary issues. (at p511)

77. Some questions were raised about whether even if the Acts were valid, the proclamations were validly made. I am not satisfied that any of the proclamations have been shown to be beyond power. (at p511)

78. It was also claimed that it was inappropriate to extend the protection of the Act to an area well beyond the site of the dam and the construction area. But assuming the law to be with respect to external affairs or corporations or the people of any race, such questions are within the discretion of Parliament and the presumption of validity applies. I am not satisfied that it has been displaced. (at p511)

79. It follows from what I have said, that the validity of the Acts or Regulations does not depend on the determination of facts in dispute. Further, validity of the Proclamations does not depend on facts in dispute, unless any question arises whether a site is of particular significance to the people of the Aboriginal race.

Conclusion (at p511)

80. The two Acts prohibit the construction of the proposed dam, and other work, except with the consent of a federal Minister. The State Act authorizing the dam is invalid unless the federal Minister consents. In other words with no practical difference, the State Act is valid but ineffective unless the federal Minister consents. (I would therefore answer

the questions asked as follows.)

Actions No. C6 and No. C8 of 1983

Question 1.(a)"Yes".

Question 1.(b)"Yes".

Question 2."No".

Question 3."No".

Question 4.Does not arise.

Question 5."Valid but ineffective unless the Federal Minister consents".

Question 6.Not necessary to answer.

Action No. C12 of 1983

Question 1."Yes, apart from (e) of s. 6(2) the validity of which it is not necessary to determine".

Question 2."No, save as to Reg. 5 of the World Heritage Properties Conservation Regulations and the two Proclamations made under s. 8(3) on 26th May, 1983, the validity of which depends on whether Kutikina Cave, Deena-Reena Cave and the open archaeological site are sites of particular significance to people of the Aboriginal race".

Question 3.Does not now arise.

Question 4.See answer to Question 2.

Question 5."(a)Compel".

Question 6."Valid, but ineffective unless the federal Minister consents".

Question 7.Not necessary to answer.

Question 8."Yes". (at p511)

WILSON J. Introduction (at p511)

2. The facts and issues involved in these cases are set out in the reasons for judgment of the Chief Justice. It is unnecessary for me to repeat them. In these reasons I shall refer to the opposing parties as the Commonwealth and Tasmania respectively. In order to answer the questions which are directed to the Court, four basic problems involving the interpretation of the Constitution must be addressed. Those four problems focus on the four heads of constitutional

power by which the Commonwealth seeks to support the legislative and executive action it has taken with a view to stopping the construction of the dam. The four heads of power are with respect to external affairs (s. 51(xxix)), corporations (s. 51(xx)), special race laws (s. 51(xxvi)) and the implied nationhood power. Whether or not some of the more particular questions will require to be answered will depend on the result of the consideration of the adequacy of Commonwealth power in these areas to sustain the action that has been taken.

The external affairs power

Koowarta (at p511)

3. The nature and scope of this power was recently examined at length in Koowarta v. Bjelke-Peterson [1982] HCA 27; (1982), 56 A.L.J.R. 625. In that case, the Court by majority (Stephen, Mason, Murphy and Brennan JJ.; Gibbs C.J., Aickin and Wilson JJ. dissenting) decided that ss. 9 and 12 of the Racial Discrimination Act 1975 (Cth) were valid, being laws with respect to external affairs. Collectively, the reasons for judgment of the members of the Court provide an extensive discussion of the earlier decisions of the Court which bear on the question. It is therefore sufficient for me in considering the relevant authority of past decisions to confine my attention to a consideration of that case. The central question was whether a law to implement within Australia the International Convention on the Elimination of all Forms of Racial Discrimination fell within Commonwealth legislative power as a law with respect to external affairs. Gibbs C.J., with whom Aickin J. agreed, answered that question in the negative. Gibbs C.J. expressed the view at p.640, that "the external affairs power does not enable the Parliament to enact a law whose purpose is to give effect within Australia to an international obligation, unless the subject-matter of that obligation is an external affair". He held, at p.639, that a law which is designed to forbid racial discrimination by Australians against Australians within the territory of Australia is not an external affair simply because other nations are interested in Australia's policies and practices with regard to racial discrimination. In concurring with the Chief Justice, I observed, at p.660, that Australia's obligation to eliminate racial discrimination within Australia will only assume the character of an external affair for the purposes of s. 51(xxix) if its implementation necessarily exhibits an international character. (at p512)

4. Stephen, Mason, Murphy and Brennan JJ. answered the central question in the affirmative. In the course of referring to the authorities, Stephen J. remarked, at p.644:

"What however remains unclear is the extent to which the federal nature of the Constitution requires that limits be imposed upon the broad power to implement international obligations seemingly conferred by par.(29), thus ensuring that exercise of that power will not destroy the federal character of the polity." (at p512)

5. When he came to express his conclusion, his Honour, at p.645 said:

"But where the grant of power is with respect to 'external affairs' an examination of subject-matter, circumstance and parties will be relevant whenever a purported exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny." (at p512)

6. After noting that areas of purely domestic concern are steadily contracting and those of international concern are ever expanding, his Honour concluded:

"Nevertheless the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation's 'external affairs'. A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'." (at p512)

7. Mason J., at pp.648-653 and Murphy J., at pp.655-656, each took a broad view of the legislative power. In effect, their Honours held that the implementation within Australia of any treaty genuinely entered into by Australia necessarily constituted an external affair within the meaning of s. 51(xxix) subject only to express or implied prohibitions in the Constitution. With respect to the latter, Mason J. said, at p.649:

"Likewise the exercise of the power is subject to the implied general limitation affecting all the legislative powers conferred by s. 51 that the Commonwealth cannot legislate so as to discriminate against the States or inhibit or impair their continued existence or their capacity to function": Victoria v. The Commonwealth [1971] HCA 16; (1971),122 C.L.R. 353, AT PP.372,374-375, 388-391,403,411-412,424. (at p512)

8. Murphy J. (at p.655) saw the implied limitations on the legislative power arising from the Constitution as including those relating to the continued existence of the States and those associated with freedom of expression and other attributes of a free society to which he had referred in earlier cases. (at p512)

9. Brennan J., at p.663, expressed the view that "when a particular subject affects or is likely to affect Australia's relations with other international persons, a law with respect to that subject is a law with respect to external affairs" notwithstanding that the subject is "an aspect of the internal legal order". While recognizing that there may be questions of degree which require evaluation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them, his Honour considered that to subject an aspect of the internal legal order to treaty obligation stamps the subject of the obligation with the character of an external affair. (at p512)

10. It will be seen from this brief review of the reasons for judgment of the members of the Court in Koowarta that there is some difference of emphasis in the views expressed by those Justices who formed the majority. Mason and Murphy JJ., without purporting to identify the limits of the power, were both of the opinion that the mere ratification of an international treaty or convention rendered the implementation of that treaty within Australia an "external affair". Brennan J. would appear to have held that a law comes within s. 51(xxix) when it is a law with respect to a subject matter which affects or is likely to affect Australia's relations with other international persons, notwithstanding that the subject matter is an aspect of the internal legal order of Australia. The subjection of an aspect of the internal legal order to a treaty obligation is "a powerful indication" that the subject does affect the parties to the treaty and their relations one with another and stamps the subject of the obligation with the character of an external affair. (at p512)

11. Stephen J. sought to articulate the limits that must be imposed upon the broad power to implement international obligations in order to ensure that the exercise of the external affairs power would not destroy the federal character of the polity. It is not enough that the challenged law gives effect to treaty obligations. Something more is needed. An examination of subject matter, circumstance and parties is relevant, in order to determine the quality of the subject matter. It must possess the quality of international concern, the capacity to affect a country's relations with other nations. (at p513)

12. It is easy to see how the members of the Court who constituted the majority, notwithstanding their different conceptions of the scope of the external affairs power, found the impugned sections of the Racial Discrimination Act to be valid. For that law, notwithstanding its regulation of conduct within Australia by Australians towards Australians in circumstances which lacked any external aspect in themselves, clearly sought to implement a treaty obligation of undeniable international importance. Mason J., at p.653 described it in these terms:

"All the materials indicate that the United Nations consider racial discrimination to be abhorrent conduct which, posing a threat to international peace and security, should be eliminated. At the level of international law the means chosen to attain this end was the formulation of the Convention. It imposes on each of the many parties to it an obligation to eliminate racial discrimination in its territory. The failure of a party to fulfil its obligations becomes a matter of international discussion, disapproval, and perhaps action by way of enforcement. Viewed in this light, the subject-matter of the Convention is international in character." (at p513)

13. In the light of these considerations, I take the ratio decidendi of Koowarta to be that s.51(xxix) empowers the Parliament to enact a law of purely domestic operation on a topic with respect to which it would not otherwise have power provided that the law is directed to the implementation of a treaty obligation on a topic of international concern having the capacity to affect Australia's relations with other countries. It is against this background that the issues in the present case referable to the scope of the external affairs power fall to be considered. I should add that, in my opinion, Koowarta is the only decision of this Court which affords relevant authority in relation to the questions which now fall to be considered. All the earlier cases concerned matters which in themselves bore an international character.

World Heritage (Western Tasmania Wilderness) Regulations (S.R. 1983,No.31) (at p513)

14. These Regulations purport to be made under s.69 of the National Parks and Wildlife Act 1975 (Cth) (the National Parks Act). Tasmania raises at the threshold an issue of construction of the scope of the power contained in s.69. It is submitted that on its proper construction s.69 is confined in its operation to those national parks which are established by the Commonwealth pursuant to Pt.II of the National Parks Act. I reject the submission. Notwithstanding its isolation from the remainder of the Act, its extraordinary brevity and wide-ranging implications, the section must be read as an independent power accorded to the Governor-General to make regulations for and in relation to giving effect to the Convention for the Protection of the World Cultural and Natural Heritage (the Convention). With respect, I agree with the reasons advanced by the Chief Justice for reaching this conclusion and do not wish to add to them. The central question which then remains in the consolidated action (C6 and C8 of 1983) is whether s.69 exceeds the legislative power of the Commonwealth in so far as it authorizes the implementation of the Convention. The corresponding question in action C12 of 1983 is whether s.6 (except sub-s.(2)(e)) and s.9 of the World Heritage Properties Conservation Act 1983 (Cth)(the Act) are a valid exercise of the external affairs power. In each case the answer depends on the view one takes of the Convention and to that subject matter I now turn.

The Convention (at p513)

15. The Commonwealth argues that the implementation of the Convention within Australia falls within the external affairs power. Several alternative propositions are advanced in support of the submission, reflecting the different conditions precedent to the making of a Proclamation in relation to identified property that is in a State and which are set out in s.6(2)(a) to (d) of the Act. In each case, they are said to bring into being an external affair within s.51(xxix). They may be summarised under three heads:

(i) the Convention imposes obligations upon and offers benefits to Australia;

(ii) the mere entry bona fide into a treaty is sufficient;

(iii) in any event, the subject matter of the treaty is a matter of

international concern and a failure to honour the treaty is likely to affect Australia's relations with other countries. (at p513)

16. On the other hand, Tasmania, with the support of Queensland, denies the sufficiency of any of the grounds advanced by the Commonwealth to attract the exercise of the external affairs power. It joins issue with the Commonwealth's characterisation of the Convention as relevantly imposing any obligation upon or offering any benefit to Australia or as identifying a matter of international concern capable of affecting Australia's relations with other countries. Tasmania also relies upon Art.34 of the Convention (the federal clause) to confirm the absence of any relevant obligation resting upon the Commonwealth. (at p513)

17. The material parts of the Convention are set out in the reasons for judgment of the Chief Justice. Broadly speaking, the Convention evinces two main objectives, both of which affirm the importance to mankind of preserving those cultural and natural features which are of outstanding universal value. One objective is to encourage each party to the Convention to identify and preserve those features within its own country which form part of the world heritage and take appropriate action to strengthen the appreciation of and respect for that heritage by its people (Preamble, Arts. 3,4,5,11 and 27). The other is to establish a system of international co-operation and assistance designed to support parties to the Convention in their efforts to identify and conserve that heritage (Preamble, Arts.6,7,13,15,16, and 18-26). In relation to this latter objective, it may be said that the Convention imposes some obligations upon the parties to it. They are clearly identified by the use of the word "undertake", for example, in Arts.6(2), 6(3) and 16. Again in relation to the scheme of international assistance a party is offered a benefit in the form of a right to request international assistance in relation to property forming part of the cultural or natural heritage, being property which the World Heritage Committee has decided, or may decide, to list pursuant to Art.11 (Arts. 13, 19, 20). But, in my opinion, these provisions of the Convention, while in themselves constituting external affairs which the Commonwealth may be competent to pursue, do not bear any relevant relation to the competence of the Commonwealth to enact the legislation which is under challenge in this case. That legislation is in no way directed to those provisions. (at p514)

18. It is necessary now to decide whether the earlier articles in the Convention oblige Australia to take action to protect those items of the world heritage situated within Australia. I make this inquiry on the assumption that the existence of an international obligation may bring into being an external affair with consequent power in the Parliament under s.51(xxix) to pass a law in fulfilment of that obligation. Article 4 provides that each party recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory belongs primarily to that party. Each party "will do all it can to this end, to the utmost of its own resources" and, where appropriate, with any international assistance and cooperation it may be able to obtain. The first sentence of this Article involves the recognition of the sovereign responsibility of each party for the property within its territory, a principle which is asserted again in the opening phrases of Art.6(1). The Convention goes to some pains to emphasise its respect for that principle. The second sentence may amount to a promise but it is not expressed in a form which imports a binding commitment. At most it is a promise by each party to do what it can to advance the objectives of the Convention. There is no resort to the language of obligation. It is to be contrasted with the later articles to which I have referred where the word "undertake" is used. (at p514)

19. Article 5 provides that each party, in relation to the cultural and natural heritage situated on its territory, "shall endeavour, in so far as possible, and as appropriate for each country" to do various things to ensure that effective and active measures are taken for the protection, conservation and presentation of the heritage. These things are set out in five paragraphs. Briefly, the substance of these paragraphs includes matters such as -

the adoption of a general policy which aims to give the cultural and natural heritage a function in the life of the community;

the integration of the protection of that heritage into comprehensive planning programmes;

the setting up of services, where they do not already exist, for the protection, conservation and presentation of the

heritage with appropriate staff, possessing the means to discharge their functions;

the development of scientific and technical studies and research directed to counteracting the dangers that threaten the heritage;

the taking of appropriate legal, scientific, technical administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of the heritage;and

the fostering of the establishment or development of national or regional training centres and the encouragement of scientific research. (at p514)

20. As with Art.4, this Article is not expressed to impose a binding commitment on parties to discharge each of these responsibilities. Indeed, the range and detail of the Article strongly suggest that its purpose and function are to set goals in order to encourage and guide the parties, first, in the task of kindling and developing the appreciation of their peoples for the cultural and natural heritage of universal significance that lies close at hand and, secondly, in the taking of effective and active measures toward those ends. I do not understand the Commonwealth to acknowledge an international obligation that is coextensive with all the aspirations contained in this Article and it would, in my opinion, be quite unreasonable to expect it to do so. Nevertheless, the Commonwealth argues that a binding obligation, allowing for some latitude in performance, is to be spelt out of the prefatory words "each State Party . . . shall endeavour, in so far as possible, and as appropriate for each country". These words are of critical importance to the argument. No doubt the word "endeavour" reflects a mutual willingness to strive toward the goals that are set out in the Article but, in my opinion, it falls far short of creating an obligation. The clarity and precision of language in which a particular objective is expressed will often be material in determining whether there is a binding commitment to pursue it. Here the objectives are of such general and wide-ranging content that they are properly described as aspirations. In that context, the word "endeavour" is well chosen to reflect the notion of one who is an aspirant, one who tries, who strives, who does one's utmost (c.f. the Oxford English Dictionary). It is argued that the words "in so far as possible" are words of absolute obligation, an obligation to do everything save that which is impossible. I find such a rendering of the phrase unacceptable. Given the political context of the Convention, the word "possible" carries the same meaning as that conveyed by Bismarck's aphorism that "politics is the art of the possible". An alternative rendering would be "so far as practicable", meaning that which is suitable to the circumstances of the case. It clearly imports a necessity for judgment between competing interests or with a view to their reconciliation. Whatever its precise meaning, its presence militates against any interpretation that would yield a legal obligation. The same may be said of the phrase "and as appropriate for each country". The Commonwealth argues that the phrase does no more than allow some latitude in the method of compliance having regard to the different approaches to treaty implementation in some legal systems. However, the phrase is more likely to reflect an awareness of the problems confronting the parties when they set out to reconcile the wholly admirable goals set by the Convention with the pressing demands of their peoples for that enhanced quality of life which depends in part on social and economic development. (at p515)

21. In support of its submission, Tasmania argues that the Convention can be understood only in the context of this balancing process between development and the environment. The Convention recognises that each party is fully sovereign with respect to the exploitation of the resources within its territory and that the basic needs of its people for food and shelter and the other amenities of life will often weigh heavily in favour of the development of those resources even at the expense of environmental features of great value. It is against the background of that recognition that the Convention nevertheless declares boldly the importance that the cultural and natural heritage holds for mankind. Understandably its operative provisions are expressed with caution. The language, deliberately chosen, is designed to express a common aspiration, an international accord, in order to encourage and stimulate appropriate action but stopping short of words of obligation. The words stand in stark contrast with the emphatic words of obligation contained in the Convention on the Elimination of all Forms of Racial Discrimination which was under consideration in Koowarta. If there were any ambiguity on the question, reference to the travaux preparatoires serves amply to confirm the view which I have taken. The propriety of reference to the travaux preparatoires in these circumstances has been affirmed recently by Lord Wilberforce in Fothergill v. Monarch Airlines, [1980] UKHL 6; (1981) A.C. 251, at p.278. The discussions, in the course of which the Convention was prepared, trace clearly the determination of the participating States to exclude any notion of accountability to the international community for the decisions they take with respect to the preservation of items of the world heritage within their own territories. For this reason the word "undertake" was

removed from the draft Arts. 4 and 5 and the present wording substituted, yielding the result that while the parties would do their best to pursue the objectives laid down in the Convention they were not prepared to be held to account or subjected to any coercion at the hands of the international community. (at p515)

22. The learned Solicitor-General of the Commonwealth places some reliance on the fact that on the same day as the General Conference of the United Nations Educational, Scientific and Cultural Organization adopted the Convention it adopted a recommendation concerning the protection, at national level, of the cultural and natural heritage of special value. He argues that the inclusion in the Convention of some articles touching the protection of the world heritage at the national level should therefore be taken as an indication of an intention to introduce obligations in that area; the Conference was not prepared for matters of outstanding universal value to be dealt with solely as a matter of recommendation. The point is not without substance but, in my opinion, is not strong enough to bear the weight of argument it is asked to carry. When the recommendation and the Convention are read together the conclusion which emerges is that the latter is primarily concerned with international protection, that is to say, the establishment of a system of international cooperation and assistance designed to support parties to the Convention in their efforts to conserve and identify the world heritage (Art.7). The earlier articles dealing with the national protection of that heritage are designed to stress the important role which parties could play in that regard. But as I have said, they stop short of imposing a relevant obligation. It may be noticed in passing that cl. 17 of the recommendation appears to recognise explicitly the necessity of balance which Tasmania sought to extract from the Convention itself. It provides:

"17. Considering the fact that the problems involved in the protection, conservation and presentation of the cultural and natural heritage are difficult to deal with, calling for special knowledge and sometimes entailing hard choices, and that there are not enough specialized staff available in this field, responsibilities in all matters concerning the devising and execution of protective measures in general should be divided among central or federal and regional or local authorities on the basis of a judicious balance adapted to the situation that exists in each State" (My emphasis). (at p515)

23. It seems to me that this recognition is implicit also in the Convention. (at p515)

24. The right and responsibility of each sovereign State to pursue the defence and improvement of the human environment together with the goal of economic and social development was affirmed by the United Nations Conference on the Human Environment adopted at Stockholm on 16th June, 1972. The declaration made by that Conference includes a number of statements directed to that end. I do not rely upon the declaration as a supplementary means of interpreting the Convention but it provides a further recognition of the compelling considerations in this field. Principle 21 of the declaration reads:

"Principle 21. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (at p516)

25. One finds a similar affirmation (a) of the right and responsibility of each State to promote the economic, social and cultural development of its people and to that end, inter alia, to mobilize and use its resources, and (b) of the responsibility of all States to protect, preserve and enhance the environment for the benefit of present and future generations in the Charter of Economic Rights and Duties of States adopted in the General Assembly of the United Nations on 12th December, 1974(Arts. 7,30). (at p516)

26. Finally, on the question whether Arts. 4 and 5 give rise to any obligation, it will be observed that the Convention makes no provision for handling any complaints or resolving any disputes. This is yet another consideration suggesting a negative answer to the question. (at p516)

27. As I have said, the Commonwealth also argues that, even if the Convention does not impose any relevant obligation

or confer any relevant benefit on the parties to it, the mere fact of Australia's entry into it brings into being an external affair which arms the Commonwealth with legislative authority to implement it within Australia. Associated with this argument is the further submission that quite apart from the Convention the protection of the world's cultural and natural heritage is sufficiently a matter of international concern carrying with it a capacity to affect Australia's relations with other nations to attract to the Commonwealth a power pursuant to s.51(xxix) to legislate generally on the topic. These far-reaching submissions derive no support from the earlier decisions of this Court. I am unable to accept them. In my opinion, such an unbridled interpretation of the scope of the legislative power conferred on the Commonwealth by s.51(xxix) is quite inconsistent with a proper regard for its place in the Constitution when viewed as a whole. I shall have occasion later in these reasons to discuss more generally these submissions on the scope of the legislative power with respect to external affairs. It is convenient to deal first with some other matters which may have some bearing on the argument. (at p516)

28. When it is said that the subject matter of the Convention is a matter of international concern it may be relevant in judging the strength of that concern to observe that to date seventy-four nations have become parties to it; that is to say, a little less than half the total membership of the United Nations. Furthermore, there are some notable absentees from the list of parties, including the United Kingdom, the Soviet Union, China, Belgium, Holland, Norway, Sweden, Japan, New Zealand, Singapore, Malaysia, Thailand and the Phillipines. The significance of this observation depends upon the understanding that is to be given to the term "international concern" as used by Stephen J. in Koowarta and the capacity of a matter to affect Australia's relations with other nations (cf. both Stephen and Brennan JJ. in Koowarta). Be that as it may, the extent and intensity of international concern that is reflected in the present Convention is in no way comparable to that which was evidenced by the Convention on the Elimination of Racial Discrimination which was under consideration in Koowarta. (at p516)

29. The World Heritage Convention is distinguished from many other conventions of recent times by the fact that it contains a federal clause. Article 34 deals with two situations relating to parties which have a federal constitutional system. In the case of those parties where the implementation of the Convention comes under "the legal jurisdiction of the federal or central legislative power", the obligations of the federal government shall be the same as for those parties which are not federal States. In cases where the implementation comes under the legal jurisdiction of individual constituent units that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such units of the relevant provisions of the Convention, with its recommendation for adoption. The construction of the Article presents difficulties. It may be accorded varying significance depending on its construction. The Commonwealth says that it contributes nothing to a solution of the present case. Either there is an external affair which confers legislative power on the Commonwealth to implement the Convention or there is not. The Article cannot change that situation. That no doubt is true. Nevertheless it must be acknowledged that the clause forms part of the Convention which is to be construed in its entirety in determining the existence of a relevant external affair. In this regard, two observations may be made. Firstly, its presence tends to confirm the clear indications which are to be drawn from the wording of the substantive provisions that the Convention seeks to achieve its purposes, so far as national protection of the heritage is concerned, by a conciliatory and informal engagement of international relationships which would fall short of conferring any power on the Commonwealth. The tone is one of help and encouragement, not of coercion. There is, on this view, no reason to discern an intention to override existing constitutional arrangements within a party to the Convention and the Article is included to negate any such intention. (at p516)

30. Secondly, the "legal jurisdiction" of the Commonwealth is to be determined having regard to the provisions of the Convention itself and the respect for national sovereignty that it exhibits. The Commonwealth is not equipped with legislative or executive power to make the political decisions which the Convention demands. As I have shown, Arts. 4 and 5 recognize that the sovereignty of parties over their territory attracts to them and denies to the international community the responsibility for determining what is practicable in the pursuit of the objectives laid down in the Convention. This may require in some circumstances the strong claims of the world heritage to protection to be weighed against the demands of development in order to maintain or improve the quality of life of the people. Even when the provisions of the Convention are taken into account, the fact remains that the Commonwealth is not empowered to make the judgment which those circumstances may require. Its implementation at the national level is therefore not within the "legal jurisdiction" of the Commonwealth. This line of reasoning leads again to the conclusion that it is not for the Commonwealth but for Tasmania, after receiving the recommendation of the Commonwealth, to make the decisions that

are appropriate in the present case to give effect to the Convention. (at p517)

31. It will be apparent from what I have written earlier that I have come to a conclusion in favour of Tasmania on the external affairs issue, based on the construction of the Convention independently of the federal clause. Nevertheless, I find its presence in the Convention to be wholly consistent with and generally supportive of that conclusion. (at p517)

32. Before moving on, I should mention a submission advanced by counsel for Queensland based on Art. 6 of the Convention. I have not hitherto based any conclusions upon this Article because its subject matter is concerned with the duty of the international community to cooperate in the protection of the heritage. That cooperation is achieved by the parties undertaking to give their help in that regard to any party asking for it (Art.6(2)). Article 6(3) is perhaps no more than declaratory of the rule of customary international law that a country must not take any deliberate measures which might damage the world heritage situated on the property of another State. However, Queensland draws attention to the phrases which appear at the commencement of Art.6(1), namely, "whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation . . .", and argues that consistently with the latter of these phrases the Convention cannot be construed so as to authorize or require a party to act in a manner which prejudices property rights. The submission was made in support of an argument that the legislation, assuming that entry into the Convention brought into being an external affair, was nevertheless invalid because it failed faithfully to implement its provisions. Having regard to the conclusion that I have reached on the substantive issue, it is unnecessary for me to determine this aspect of the matter.

The scope of the power (at p517)

33. In R. v. Burgess;Ex parte Henry [1936] HCA 52; (1936),55 C.L.R. 608, AT P.669, Dixon J. remarked that the limit of the external affairs power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example. I believe there is much wisdom in that observation and would prefer to avoid abstract discussion. However, there are already so many obiter dicta in the cases and the learned Solicitor-General for the Commonwealth has argued in this case for such a broad view of the power that I feel constrained to make some brief general observations on the proper interpretation of s.51(xxix). I acknowledge, as I must, that my earlier view of that paragraph was not sustained in Koowarta and that Ishould therefore reconsider the matter in order to accomodate that decision. I do not find this an easy task. I remain convinced, with all respect to those who think differently, that an expansive reading of s.51(xxix) so as to bring the implementation of any treaty within Commonwealth legislative power poses a serious threat to the basic federal polity of the Constitution. Such an interpretation, if adopted, would result in the Commonwealth Parliament acquiring power over practically the whole range of domestic concerns within Australia. This is not speculation. Many treaties and conventions of the United Nations Economic Social and Cultural Organization, the International Labour Organization and the United Nations itself are already in existence. It is not a satisfactory answer to observe that State laws will be ousted only if the Commonwealth chooses to legislate. Ultimately absolute political power must come to reside with the paramount authority. The natural incentive of governments in the pursuit of their policies to resort to the legislative powers available to them would afford little assurance to the States of a stable framework in which to pursue the residual responsibilities and opportunities left to them. In Koowarta, every member of the Court acknowledged that the content of the legislative powers conferred on the Commonwealth is to be determined having regard to the implications of federalism. It seems to me that if a whole range of legislative and executive authority which formerly resided in the States is capable of being subsumed under paramount Commonwealth laws then the very constitutional structure of the States is undermined. Of what significance is the continued formal existence of the States if a great many of their traditional functions are liable to become the responsibility of the Commonwealth? This is not an application of the reserved powers doctrine as it operated before the Engineers' Case (Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920), 28 C.L.R. 129). It is a question of the survival of the indissoluble federal Commonwealth as the Constitution conceived it to be; cf. Latham C.J. in Bank of New South Wales v. The Commonwealth [1948] HCA 7; (1948), 76 C.L.R. 1, at pp. 184-185 (the Bank Case). In the context of the decision in Koowarta, I welcome the attempt by Stephen J. to discern the limits which must be imposed on a broad interpretation of the power in order to preserve Australia's federal character. The concept, as

enunciated by him, of international concern as a necessary consideration additional to that of obligation may be somewhat elusive but it is clear that, in his Honour's contemplation, it must mean something more than the mere existence of that interest or concern among nations which finds expression in a Convention. If it meant no more than that, then his Honour's reference would be meaningless. I take it to be a matter of degree requiring an evaluation in each case of subject matter, circumstance and parties in order to determine the importance of the particular obligation in terms of international relationships. Only those obligations resting on the Commonwealth of such a quality that a failure to implement threatens serious disruption to its international relationships will attract the external affairs power in cases where the subject matter would otherwise be of purely domestic concern within the province of the States. I do not regard this as a satisfactory interpretation of the power, but consistently with existing authority it would appear to be the best that can be done.

Summary (at p518)

34. With respect to the question of the validity of the World Heritage (Western Tasmania Wilderness) Regulations (action C6 and C8 of 1983), it is my opinion that s. 69 of the National Parks and Wildlife Act cannot validly authorize the making of those regulations. (at p518)

35. Although question 1 in action C12 of 1983 asks the Court, inter alia, whether any of the provisions of ss. 6 and 9 of the Act are valid, it seems to me that it may be more helpful for the Court to consider, in relation to the external affairs power, whether the matters set out in pars. (a) to (d) of s. 6(2) or any of them validly authorize the Governor-General to make the Proclamations which he has made in purported pursuance of s. 6(3). It is unnecessary, and, in the case of some paragraphs, inappropriate to express a final opinion on the sufficiency of the matters contained in those paragraphs in all or any circumstances to attract the power of the Parliament with respect to external affairs. (at p518)

36. In my opinion, the Parliament could not validly authorize the making of the Proclamations in question. (at p518)

37. As to par. (a), the submission of the identified property to the World Heritage Committee under Art. 11 of the Convention cannot of itself constitute an external affair such as would support the application of s. 9 to the property. (at p518)

38. As to par. (b), as I have shown, the Convention does not give rise to any relevant obligation. The paragraph speaks of an obligation arising by reason of the Convention "or otherwise". Whether or not such an obligation which may arise in the future otherwise than under the Convention will call for consideration remains to be seen. In this case, it is only the Convention that is advanced by the Commonwealth as the source of an obligation. In any event, I am of the opinion that an international obligation, howsoever arising, is not of itself sufficient to support a proclamation which attracts the operation of s. 9 to identified property within a State. (at p518)

39. As to par. (c), the fact that the protection or conservation of the property by Australia is necessary or desirable for the purpose of giving effect to a treaty (including the Convention) or for the purpose of obtaining for Australia any advantage or benefit under a treaty (including the Convention) is insufficient to support a proclamation under s. 6(3). The mere fact of entry bona fide into a treaty in relation to a matter otherwise beyond Commonwealth power cannot, in my opinion, empower the Parliament to pass laws directed to its implementation or generally upon its subject matter. With regard to benefit, I do not perceive any relevant benefit accruing to Australia under the Convention which would support the proclamations in the present case and no other relevant benefit is relied upon. (at p518)

40. As to par. (d), the asserted fact on which legislative power is said to depend is that the protection or conservation of the property by Australia is a matter of international concern (whether or not it is also a matter of domestic concern), whether by reason that a failure by Australia to take proper measures for the protection or conservation of the property would, or would be likely to, prejudice Australia's relations with other countries, or for any other reason; cf. par. (d). There is no suggestion in the present case that, independently of the Convention, any matter of international concern touching the protection or conservation of the world heritage has arisen. Given the absence of obligation on a party to

the Convention in respect of the protection of property within its own territory, the inclusion of the federal clause and the general spirit of the Convention, in my opinion, it cannot be said that the facts asserted are capable of supporting a legislative power with respect to external affairs. In any event, as Stephen J. asserted in Koowarta, the element of international concern is cumulative upon, and not alternative to, the presence of a relevant international obligation. It follows that the Proclamations cannot be supported by reference to this paragraph. Whether in the future circumstances may materially change the intensity of international concern in relation to the world heritage remains to be seen.

The corporations power (at p518)

41. The question here is whether ss. 7 and 10 of the Act are laws with respect to the foreign or trading corporations mentioned in s. 51(xx). Section 7 empowers the Governor-General, if satisfied that any identified property is being or is likely to be damaged or destroyed, to declare that property to be property to which s. 10 applies. Identified property, for the purposes of the Act, includes the three national parks in south-western Tasmania, these areas having been submitted for listing on the World Heritage List pursuant to Art. 11 of the Convention and having also been declared by the regulations to form part of the heritage pursuant to s. 3(2)(a)(ii). The Governor-General has declared part of that area to be property to which s. 10 applies, with the consequence that the section purports to make it unlawful except with the consent in writing of the Minister for either a foreign corporation or a trading corporation to do any one of a range of specified acts on the property (s 10(2)(d) to (m)) including any act which may be prescribed, or to do any other act that damages or destroys any property to which the section applies (s. 10(3)). Acts which have been prescribed pursuant to s. 10(2)(m) include carrying out works in the course of constructing a dam that, when constructed, will be capable of causing the inundation of a specified portion of the property. Section 10(4) makes it unlawful for the corporation, except with the consent in writing of the Minister, to do any of the acts referred to in the preceding subsections "for the purposes of its trading activities". (at p519)

42. The question is whether the law is "in its real substance" a law with respect to the specified corporations: Fairfax v. Federal Commissioner of Taxation [1965] HCA 64; (1965), 114 C.L.R. 1, at p. 7. It is possible for a law to bear a dual character. It will be of no consequence that a law may properly be characterized as a law with respect to a subject outside Commonwealth power if it is nevertheless at the same time properly characterized as a law with respect to a subject within Commonwealth power. The agreed facts make it plain that the provisions to which I have referred are directed to making it unlawful for the Hydro-Electric Commission (the Commission), a body corporate created by the Hydro-Electric Commission Act 1944 (Tas.), to proceed with the construction of the dam. However, the motives which may have led the Parliament to enact the law are irrelevant to the task of characterization. As Mason J. observed in Murphyores Incorporated Pty. Ltd. v. The Commonwealth [1976] HCA 20; (1976), 136 C.L.R. 1 at p. 20:

"It is now far too late in the day to say that a law should be characterized by reference to the motives which inspire it or the consequences which flow from it." (at p519)

43. In speaking of consequences, I do not think his Honour intended to exclude from consideration the practical operation of the law; see also the Bank Case, at p. 186. Although the question whether the Commission is a trading corporation within the meaning of s. 51(xx) is in issue, that question may be put to one side. The striking feature of this law is that the activities to which it is directed bear such a special character. This is no general law with respect to trading corporations. It is expressed to operate only in narrowly confined areas of the Commonwealth, namely, proclaimed portions of areas identified not by any characteristic of trade but by their significance to the cultural or natural heritage as defined in the Act. The portions are proclaimed, for the purposes of s. 10, upon the Governor-General's apprehension of damage to or destruction of those areas. The prohibited acts are directly related to damage or destruction to the land and not to any effect upon trade. Indeed, the acts are identical to those which are proscribed by s. 9 of the Act which applies to any person. Section 10(4) introduces the phrase "for the purposes of its trading activities" as an additional element in the proscription but I do not think that this addition changes the character of the law. Let it be assumed that the Commission is a trading corporation in relation to that part of its functions which involves the sale

of electricity. The construction of the dam is at best only indirectly and remotely related to that part of its functions. It is a major public work directed to the provision of sources of electrical energy to meet the needs of the State. In reality, the law is not concerned with regulating or controlling the Commission's trade in electricity. It is concerned with the protection of identified property from damage and destruction whether by a trading or foreign corporation or by anyone else. It is well to recall the cautionary note sounded by Barwick C.J. in Strickland v. Rocla Concrete Pipes Ltd. (1971), 124 C.L.R. 468, at pp. 489-490, after expressing the view that s. 5(1) and s. 8(1) of the Australian Industries Preservation Act were valid laws with respect to trading corporations because they were clearly laws regulating and controlling their trading activities. His Honour said:

". . . it does not follow either as a logical proposition, or, if in this instance there be a difference, as a legal proposition, from the validity of those sections, that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject matter of s. 51(xx). Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law"; cf., also, the Bank Case, at p. 187. (at p519)

44. To be a law with respect to trading corporations, the substance of the law must bear a sufficient relation to those characteristics of such corporations which distinguish them from corporations which cannot be so described: Huddart, Parker & Co. Proprietary Ltd. v. Moorehead [1909] HCA 36; (1909), 8 C.L.R. 330, per Isaacs J. at p. 397; Actors and Announcers Equity Association of Australia v. Fontana Films Pty. Ltd. [1982] HCA 23; (1982), 56 A.L.J.R. 366, per Gibbs C.J. at p. 370. In other words, the law must be about trading corporations. I do not find it necessary to consider whether the nature of the power precludes its exercise in a manner which confines its operation to a strictly localized situation and perhaps to one corporation. As at present advised, it seems to me that there is a necessary generality attending a law with respect to any of the corporations mentioned in s. 51(xx). (at p519)

45. In the result, I am unable to ascribe to ss. 7 and 10 the character necessary to their validity. In my opinion, the law is in truth what the long title of the Act describes it as being, namely, an Act relating to the protection and conservation of certain property, and for related purposes. Sections 7 and 10 are not laws with respect to trading corporations.

The race power (at p520)

46. The question here is whether ss. 8 and 11 of the Act are valid. The answer to that question depends on whether they can properly be characterized as special laws for the people of the Aboriginal race. I readily accept the Commonwealth's contention that it is for the Parliament alone to deem it necessary to make the law. But the question whether the law answers the description of a special law for the people of the particular race must remain a question to be answered by the Court. (at p520)

47. The difficulty in the way of an affirmative answer to that question in the present case is comparable to that which confronted the Commonwealth's submission based on the corporations power. The sections which are said to bear a special character for the Aboriginal people are embedded in a statute which exhibits in all its parts the indelible imprint of a general law. This comes about because an Aboriginal site must be identified property within the meaning of the Act. That is to say, it must form part of the cultural heritage of the whole of mankind. The sites that have been proclaimed pursuant to s. 8 have been entered on the World Heritage List and therefore must be taken to be of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view: Convention, Art. 1. The preamble to the Convention emphasizes "the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong". A law which in substance does no more than protect sites which are of outstanding value to the whole of mankind, even though it may be declared to be a law for the people of the Aboriginal race, cannot be described as a special law for such people. This is so, notwithstanding that the sites may be of particular significance or interest to them, because the benefit of the law accrues to all mankind. Thus, the law serves the interest of the Aboriginal people in the sites in question and any artefacts or relics on them by

protecting them against damage or destruction. But in so doing it is serving, at the same time and by the same law, the interest of a much wider constituency, the whole of mankind. That latter interest is of no mean kind, because in effect the Act declares the sites to be of outstanding universal value. In any event, as I observed in Koowarta, at p. 657, a law within s. 51(xxvi) must of its very nature be discriminatory. It must be a special law for the reason that it addresses a problem that is peculiar to the people of a particular race. Views may differ on the proper interpretation of the words "for the people" in the phrase "for the people of any race". It was submitted by Tasmania that a special law for the people of a particular race is a law which operates only upon the people of that race or which operates upon people generally but only in respect of their dealings with the people of that race. It is unnecessary for the purposes of this case to determine that question and I express no opinion upon it.

Power inherent in nationhood (at p520)

48. The Commonwealth argues that, independently of any express legislative power conferred by the Constitution, the existence of the circumstances described in s. 6(2)(e) of the Act brings into being an inherent power to legislate. The circumstances are the following: a heritage distinctive of the Australian nation, an absence or inadequacy of any other available means for its protection, and a conclusion that it is peculiarly appropriate that the Parliament and Government of the Commonwealth should protect it. I am unable to accept the argument. I know of no occasion when a coercive law declaring certain conduct to be unlawful and imposing penalties has been enacted by the Parliament otherwise than pursuant to a given head of power. Such an approach to federal legislative power would in my opinion be wholly subversive of the Constitution and cannot be permitted. I accept, so far as coercive laws are concerned, the emphatic statement of Latham C.J. in the Bank Case, at p. 184:

"The Constitution assigns only specific legislative powers to the Commonwealth Parliament. It is a Federal Constitution, not a unitary Constitution. This has been emphasised again and again in the judgments of this Court, and in no case more clearly than in the Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (at p. 150) where reference is made to the conclusion 'as to which this court has never faltered, that the Commonwealth is a government of enumerated or selected legislative powers': see also at p. 154: 'It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority'." (at p520)

49. It is unnecessary, for the purposes of this case, to consider the existence and scope of a non-coercive legislative power inherent in the fact of Australia's nationhood; cf. Victoria v. The Commonwealth and Hayden [1975] HCA 52; (1975), 134 C.L.R. 338.

Conclusions (at p520)

50. It cannot be emphasized too strongly that, although the subject matter of the actions before the Court provides the occasion for much political controversy, the role of the Court is wholly divorced from that controversy. The questions which have been referred to it are strictly legal questions involving important issues of constitutional interpretation. The Court is neither equipped, empowered, nor permitted to enter upon the merits of that controversy. In other words, it is not for the Court to decide whether or not Tasmania should proceed with the construction of the dam. (at p520)

51. For the reasons which I have attempted to expound, I would resolve the four basic issues to which I alluded at the outset against the Commonwealth. Tasmania advanced several other arguments in support of its case that the Commonwealth legislation was invalid but in the light of the conclusions to which I have come on the matters which I have discussed it is unnecessary to consider them. I would answer the questions as follows:

Actions No. C6 of 1983 and No. C8 of 1983

Question 1. (a) Unnecessary to answer.

Question 1. (b) "No".

Question 2. "No".

Question 3. "Yes. The Regulations are wholly invalid".

Question 4. Does not arise.

Question 5. Does not arise.

Question 6. Does not arise.

Action No. C12 of 1983

Question 1. (a) "In present circumstances, no".

Question 1. (b) "No".

Question 1. (c) "No".

Question 1. (d) Unnecessary to answer.

Question 2. "No".

Question 3. "Yes. The whole".

Question 4. Does not arise.

Question 5. Unnecessary to answer.

Question 6. Does not arise.

Question 7. Does not arise.

Question 8. Unnecessary to answer. (at p521)

BRENNAN J. Three separate areas of land known respectively as the Cradle Mountain Lake St. Clair National Park, the Franklin Lower Gordon Wild Rivers National Park and the Southwest National Park in the south western part of Tasmania were proclaimed or were deemed to be proclaimed to be State reserves pursuant to the National Parks and Wildlife Act 1970 (Tas.) (the Tasmanian National Parks Act). The three parks are known collectively as the Western Tasmania Wilderness National Parks (the Parks). Except for the northern section of the Cradle Mountain Lake St. Clair National Park, the Parks lie within the Southwest Conservation Area. The Tasmanian National Parks Act makes provision for management plans that may indicate the purposes for which, or the manner in which, "reserved land" (that

is, land within a conservation area) or any part of such land may be used, developed or managed (ss. 19,21). However, no management plan having been approved by the Governor, the managing authority of the Parks, namely, the Director of the National Parks and Wildlife Service (s. 22(1)), is charged with the management and maintenance of the Parks in a manner designed to promote the purpose of conservation (ss. 23(1)(b), 14(1)). Some regulations have been made under s. 29 with respect to various aspects of the care, control and management of the Parks, but none of them is of present relevance. Within the boundaries of the Franklin Lower Gordon Wild Rivers National Park (hereafter the Wild Rivers Park) lies the junction of the Franklin River with the Gordon River. A short distance below the confluence of the two rivers there is a site on the Gordon River suitable for the construction of a dam. (at p521)

2. After extensive studies the Hydro-Electric Commission of Tasmania (the HEC) has proposed that a dam and power station should be constructed and a hydro-electric generating plant installed at that site. The proposal is to impound the waters of the Gordon River to a height of 76 metres above sea level. At that height, the reservoir would have a surface area of about 12,000 hectares. The impounded waters would raise the level of the Franklin River for a considerable distance upstream from its junction with the Gordon River. That will inundate Kutikina Cave and Deena-Reena Cave - two caves, recently discovered, that are of archaeological significance. (at p521)

3. The construction and operation of the dam and hydro-electric works are of importance to the Tasmanian economy and the HEC proposal found favour with the Parliament and Government of the State. To give effect to the proposal, legislative and executive action was taken. To permit the construction of the new power development upon the chosen site it was deemed necessary to vest certain parcels of land in the HEC, which is a corporation created by s. 4 of the Hydro-Electric Commission Act 1944 (Tas.) (the HEC Act). Some of the required land was part of the Wild Rivers Park and it was necessary to excise two parcels of land from that park under s. 16(1) of the Tasmanian National Parks Act and thereby terminate their status as part of a conservation area and State reserve (s. 15(4)). The two parcels of land contained in all 14,125 hectares or thereabouts. The excision of these parcels (the HEC land) took effect on 2nd September, 1982. A third parcel containing 780 hectares or thereabouts (the future HEC land) - a parcel which includes the caves - is to be excised with effect on 1st July, 1990. In the meantime it remains part of the Wild Rivers Park. By a proclamation made in pursuance of s. 35 of the HEC Act, the HEC land was vested in the HEC for the purposes of the HEC Act on 16th September, 1982, and the future HEC land is to vest in the HEC for the purposes of the HEC Act on 2nd July, 1990. Certain other tracts of land were also vested in the HEC for the purposes of the HEC Act: a parcel comprising 14,200 hectares or thereabouts was excised from the Southwest Conservation Area outside the Parks and vested in the HEC and an adjoining parcel comprising 3,570 hectares or thereabouts of Crown land situated outside the Southwest Conservation Area was so vested. Neither of these two parcels of land is of present relevance. The land vested in the HEC is available for use in and in connection with the construction of the proposed dam. Section 44 of the HEC Act empowers the HEC to "construct . . . and use any works for the purpose of generating, transmitting, or distributing electrical energy, upon or in respect of any land vested in the Commission, or over which it has acquired any right or authority for that purpose", but the HEC requires further authorization from the Tasmanian Parliament before it undertakes or constructs a new power development (s. 16(1)). The Tasmanian Parliament gave its authority for the construction of the proposed new power development by enacting the Gordon River Hydro-Electric Power Development Act 1982 (Tas.) which was assented to on 28th June, 1982, and came into operation on 12th July, 1982. The proposed development is known as the Gordon below Franklin Scheme. (at p522)

4. On 14th July, 1982, the HEC put in hand the preparatory work for the construction of the new power development. The damage to the natural and cultural environment apprehended from the construction and operation of the Gordon below Franklin Scheme excited considerable opposition. Intervention by the Commonwealth was sought. In December 1982, the Government of the day decided not to intervene. After a change of Government, that decision was reversed. The Commonwealth then sought to stop the construction of the new power development by a complex of statutory provisions: s. 69 of the National Parks and Wildlife Conservation Act 1975 (Cth) (the Commonwealth National Parks Act); the World Heritage (Western Tasmania Wilderness) Regulations (S.R. No. 31 of 1983, made under s. 69 on 30th March, 1983 (as amended) (the Wilderness Regulations); the World Heritage Properties Conservation Act 1983 (Cth) (the Act); the World Heritage Properties Conservation Regulations (S.R. No. 65 of 1983, made under the Act on 25th May, 1983 and amended (S.R.No. 67 of 1983)on 26th May, 1983); and certain proclamations made under the Act. The present litigation has resulted. Some works have already been carried out on the HEC land for the purpose of constructing the proposed dam. They are set out in a statement of facts agreed by the parties. (at p522)

5. The basic issues in this litigation are whether the Commonwealth has power to take the measures which it has taken and whether those measures are effective in law to prohibit the further construction of the dam. Of course, those issues are not to be resolved by according preference to one policy over another; the basis of resolution is the Constitution. If the Commonwealth has power under the Constitution to make a law prohibiting the construction of the dam and it has exercised that power, that law of the Commonwealth prevails over any inconsistent law of Tasmania. Section 109 of the Constitution says so. That is the way in which the people who agreed to unite "in one indissoluble Federal Commonwealth" determined that inconsistency between the laws of their Commonwealth and the laws of their respective States should be resolved; see the preamble to and covering cl. 3 of the Commonwealth of Australia Constitution Act. And so the question for present consideration is whether the Constitution grants to the Commonwealth the power to make the laws which purport to stop construction of the dam. (at p522)

6. Three heads of Commonwealth power are invoked in support of the validity of the measures taken by the Commonwealth, namely, the powers respectively conferred by par. (xxix) (external affairs), par. (xx) (trading corporations) and par. (xxvi) (special laws for the people of any race) of s. 51 of the Constitution. Paragraph (xxix) is invoked in support of s. 69 of the Commonwealth National Parks Act and the regulations made thereunder and in support of two of the key provisions of the Act: ss. 6 and 9. Paragraph (xx) is invoked in support of another two key provisions of the Act: ss. 7 and 10; and par. (xxvi) is invoked in support of a third set of key provisions of the Act: ss. 8 and 11. The extent of each of these powers and the validity of each of these measures are in dispute, but the parties have confined the dispute so that it is neither necessary nor desirable to go beyond resolving whether or not the Commonwealth has, by any and which of these measures, validly prohibited the construction of the dam. (at p522)

7. Before turning to the particular powers invoked by the Commonwealth in support of the measures it has taken, it is necessary to consider Tasmania's argument that a law of the Commonwealth, irrespective of the power relied on to support it, cannot impair the exercise of Tasmania's legislative and executive powers over Tasmania's unalienated Crown lands, the waste lands of the State. The waste lands which the Commonwealth laws are said to affect are the whole area of the Parks as they stood before excision of the HEC land - 769,355 hectares being 11.2 per cent of the land mass of the State. The nature of the Tasmanian Government's interest in and its powers over the Parks should be identified. (at p522)

8. Upon the settlement of the Australian colonies, the Imperial Crown assumed title to all land therein and asserted a prerogative power to dispose of it. The title was recognized by the Imperial Parliament in passing the Australian Land Sales Act in 1842 (5 & 6 Vict. c. 36) (Imp.) and by the Supreme Court of New South Wales in 1847 (Attorney-General v. Brown (1847) Legge 312, at pp. 318-319). A policy was adopted by the Colonial Office of disposing of Crown land by sale to encourage settlement and to provide funds for the administration of the colonies. The sale of waste lands yeilded significant proceeds but those proceeds were dealt with as the Imperial Crown determined; they were not within the disposition of the local colonial administrators. The 1842 Act provided that the gross proceeds were to be applied to the public service of each colony as Her Majesty or the Commissioners of Her Majesty's Treasury or any three of them might direct, but so that at least half of those proceeds were to be applied to assist in the programme of emigration from the mother country to the Australian colonies (s. 19). The 1842 Act contained no devolution of legislative powers upon colonial authorities, as Isaacs J. pointed out in Williams v. Attorney-General for New South Wales [1913] HCA 33; (1913), 16 C.L.R. 404, at pp. 450-451:

"It is extremely material to bear in mind that the Act was a restriction on the power of the Home Government to dispose of the waste lands and apply the proceeds, but it did not in any manner profess to confer any such power on the Colonial legislature. . . .

"The Colony obtained fixed rights with regard to the proceeds, but the exclusiveness of the Home Government's powers of disposal was maintained." (at p523)

9. An essential element of the Imperial policy was the reservation from sale of appropriate lands required for public

purposes. This history of Crown reserves before and after the Australian Land Sales Act can be found in the judgment of Windeyer J. in Randwick Corporation v. Rutledge [1959] HCA 63; (1959), 102 C.L.R. 54, at pp.71 et seq.By s.3 of the 1842 Act, the Governor of the Colony, who was subject to instructions from the Imperial Government, was empowered to decide what land should be reserved from sale, and whether any land so reserved should be disposed of and dedicated to the particular public purpose which had led to its being reserved from sale; cf.per Windeyer J. Rutledge's Case, at p.83. The reservation of land did not fetter the use to which the Crown might thereafter put the land. Isaacs J. said in Williams v. Attorney-General for New South Wales, at p.451:

"It is to be remembered that there was no detraction in the Act from the power of the Crown to abandon the public purpose for which any waste lands were set apart - provided always no adverse rights had arisen. A tract of waste forest land marked out on a map, and formally set aside for a future township, or reservoir, or police station, was still waste land of the Crown in fact and in ordinary parlance, but it was reserved waste land. If, however, the reservations were formally revoked, and the purpose abandoned, the land naturally fell back into the general stock of Colonial waste lands. . . It was altogether in the discretion of the Crown to reserve, or to cancel a reserve, and thus throw the particular lands into the purchasable mass." (at p523)

10. In 1850, when s.14 of the Australian Constitutions Act (No.2)(13 & 14 Vict.c.59)(Imp.) granted power to the Governor and Legislative Council of Van Diemen's Land to make laws for the peace, welfare and good government of that Colony, the Imperial Parliament excepted from the grant any power to interfere with the sale or other appropriation of the lands belonging to the Crown within the Colony or with the proceeds arising therefrom. That exception put the Governor in a position of comparative independence from the Legislative Council; see Early Constitutional Development in Australia (1963), A.C.V. Melbourne (R.B. Joyce (ed.)), at p.273. The refusal by Imperial authorities to grant power to control waste lands and their proceeds to the Governor and the Legislative Council of New South Wales evoked a remonstrance from the Legislative Council that "the land revenue, which 'derived as it (was) mainly, from the value imparted . . . by the labour and capital of the people of (the) colony, (was) as much their property as the ordinary revenue',(and) should be appropriated by the Council"; W.G. McMinn, A Constitutional History of Australia (1979), at p.48. However, power over waste lands and their proceeds was not granted until responsible government was granted, a constitutional development that would have been impossible in the mid-nineteenth century if the colonial legislatures had not secured control of the revenues derived from sale or other appropriation of waste lands. Responsible government had not been granted to Van Diemen's Land with the grant of legislative powers to the Governor and the Legislative Council. Responsible government followed upon the creation of a bicameral legislature pursuant to "an Act to establish a Parliament in Van Diemen's Land and to grant a Civil List to Her Majesty" (18 Vict. No.17). The Bill for that Act had been passed by the Governor and Legislative Council in 1854 and had been reserved for the Royal Assent pursuant to s.32 of the Australian Constitutions Act (No.2). That Act did not provide that the powers of the Parliament of Van Diemen's Land under the new Constitution should extend beyond those granted to the Governor and Legislative Council in 1850. But then there was a change in Imperial policy as to the control of the waste lands and their proceeds, and the Waste Lands (Australia) Acts Repeal Act (18 & 19 Vict. c.56) (Imp.) was passed in 1855 to repeal the 1842 Act. Section 5 of the 1855 Act empowered the new bicameral Legislature of Van Diemen's Land by Act "to regulate the Sale and other Disposal of the Waste Lands of the Crown" in the Colony "and the Disposal of the Proceeds arising therefrom for the Public Service" of the Colony. (at p523)

11. When the first Ministry of a responsible government took office in Tasmania (as Van Diemen's Land had become) in December 1856, the waste lands of the Colony and their proceeds were in its control. It had not been necessary to convey title to those lands; what was important was the legislative power to affect the prerogative exercisable over the waste lands of the Colony and to determine the disposition of revenue derived from the exercise of the prerogative. With responsible government, the Tasmanian Ministers became the advisers of the Crown upon the exercise of the prerogative over the waste lands of the Colony. The colonists thus wrested control of the waste lands and their proceeds from the Colonial Office (see per Barwick C.J. in New South Wales v. The Commonwealth [1975] HCA 58; [1975] HCA 58; (1975), 135 C.L.R. 337, AT p.369) but that control was transferred to the Colony as a matter of governmental function, not as a matter of title; per Isaacs J. in Williams v. Attorney-General for New South Wales, at p.456. The consequences of the grant of legislative power over the waste lands was stated by O'Connor J. in The State of South Australia v. The State of Victoria (1911) 12 C.L.R.667, at pp.710-711:

"That grant necessarily involved a cession to the executive power of the Colony of all rights of possession in public lands for public purposes which therefore had been in the King as representing the supreme Executive of the Empire. If that were not so, the right of self-government in respect of public lands would have been an empty form. Within the limits of self-government conferred by its Constitution the executive power of each self-governing Colony, though subject to control by Imperial enactment, is as independent of the executive power of the Empire as it is of the executive power of any Colony of the Empire." (at p524)

12. The administration of Tasmanian waste lands thus became a function of the Colonial government; see per Stephen J. in New South Wales v. The Commonwealth, at p.439. The Crown's prerogative, that fund of powers that is held and administered in the interests of the public, was controlled by Ministers responsible to the Tasmanian Parliament and was amenable to modification or extinction by Act of that Parliament; see The Commonwealth v. New South Wales (1923), 33 C.L.R.1, at p.39. The first Tasmanian Acts to control the waste lands were not passed until 1858;21 Vict.No.33 & 21 Vict. No. 34. In that year, the lands which came to constitute the Parks were included in the "Unsettled Lands" in the western section of the Colony and almost the whole area remained unalienated until the HEC land was excised from the Parks and vested in the HEC for the purposes of its Act on 16th September, 1982. (at p524)

13. In general, Federation made no difference to the title to waste lands. The Constitution provided for the vesting of property in or the acquisition of property by the Commonwealth in certain cases that are of no present relevance (ss.85,125) and a power to make laws with respect to the acquisition of property from a State was conferred on the Commonwealth Parliament by s.51(xxxi). For the purpose of considering the present argument, however, I assume that the Commonwealth has not acquired the Parks or any part of the Parks (though that assumption will have to be considered later). I assume that the Commonwealth measures restrict the use to which the Parks might be put and thereby purportedly restrict the plenary legislative powers that the Tasmanian Legislature might otherwise exercise with respect to the Parks and the freedom with which, subject to Tasmanian legislation, the Executive Government of Tasmania might otherwise use the Parks. Are the State's legislative and executive powers with respect to waste lands immune from affection by Commonwealth laws? (at p524)

14. It is submitted that the Commonwealth measures would inhibit or impair the State's capacity to function as such and would thus produce consequences which the Constitution impliedly denies to Commonwealth laws; see Melbourne Corporation v. The Commonwealth (1947), 74 C.L.R.31; Victoria v. The Commonwealth (the Payroll Tax Case)(1971), 122 C.L.R.353, at pp. 383,385-386,392,403,411- 412 and 425; Koowarta v. Bjelke-Petersen (1982), 56 A.L.J.R.625, at pp. 634, 645, 649. Alternatively, a narrower ground is advanced, namely, that the Commonwealth measures cannot impair the exercise of the prerogative of the Crown in right of Tasmania in respect of waste lands of the State as the prerogative generally is said to be immune from impairment by Commonwealth laws. (at p524)

15. What do the Commonwealth measures purport to do? They do not diminish the territory subject to the laws of the State, nor the competence of the Tasmanian Legislature to make laws with respect to the Parks. The Parks do not become a Commonwealth place subject to the exclusive legislative powers of the Commonwealth; Constitution, s. 52(i). If a Tasmanian law authorizes a particular use of the Parks and a valid Commonwealth law prohibits that use, the authority conferred by the Tasmanian law is ineffective: that follows from the grant of legislative power to the Commonwealth and the operation of s. 109 of the Constitution. There is no implication in the Constitution that the residue of effective State legislative power should not be diminished. In the Melbourne Corporation Case, Dixon J. said, at p. 82:

"The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them." (at p524)

16. However, there was a time in the mid-nineteenth century when the legislative control of waste lands was essential to the working of responsible government in Tasmania. Does that legislative control now sustain responsible government in the State? Legislative control of waste lands was essential then to ensure the Legislature's control of supply to the Executive, but there is no reason to think that restrictions imposed by Commonwealth law upon the use to which waste lands may be put would impair the State Legislature's ability to control supply to the Executive of the State. (at p524)

17. To hold that the Commonwealth measures do not invalidly impair the legislative function of the State leaves unresolved the question whether, in the federal system, they invalidly impair the State's executive functions. I approach this question in the way stated by Dixon J. in the Melbourne Corporation Case, at p. 83:

"... to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in the very frame of the Constitution." (at p524)

18. The description of the limiting intention has taken various forms. As Walsh J. observed in the Payroll Tax Case, at pp. 410-411:

"Some of these descriptions have been in terms which, in my opinion, do not provide satisfactory tests for determining whether or not a law is valid. For example, a statement that a law is invalid if it subjects the governmental functions of a State to 'undue interference' provides no satisfactory means for determining what is 'undue'. Again there are difficulties in a test which makes the decision of a legal question depend upon a distinction made by the Court between functions of governments which are 'normal' or are 'essential' and those which are not. A recognition that there are difficulties in formulating a single test in precise and comprehensive terms does not provide, in my opinion, a reason for denying that there can be any limitation by implication upon the power to affect the States." (at p525)

19. It may be said in the present case that the Wilderness Regulations apply only to the HEC land and that the Act does not single out the State's waste lands but applies to any land which falls within the definition of "identified property" in s. 3(2) of the Act. No doubt those considerations suggest that the Commonwealth measures are not discriminatory against the State and therefore do not exhibit one of the indicia of a law "aimed at the restriction or control of a State in the exercise of its executive authority". But absence of discrimination against the State is not necessarily conclusive of the valid operation of a law in its application to the State or its agencies; cf. Bank of N.S.W. V. The Commonwealth [1948] HCA 7; (1948), 76 C.L.R. 1, at p. 338. The consideration which, in my view, determines whether the Commonwealth measures invalidly trespass upon the exercise of the executive authority of the State is to be found in the actual operation of those measures upon the functioning of the Executive Government of the State. There would be some substance in Tasmania's argument if the Commonwealth measures, assuming them to be otherwise valid, were applied to the buildings that house the principal organs of a State. But it is impossible to suppose that the functioning - as distinct from the powers - of any organ of Tasmanian government is affected by a restriction on the use of land which is not devoted to the functioning of an organ of government. This is not a case of a Commonwealth law purporting to restrict the use by the central departments of Government or by Parliament or by the Supreme Court of the buildings appointed for their use in performing their respective functions. The Commonwealth measures impose restrictions on the use of part of the Parks and expose the whole of the Parks to the possibility of restriction if the conditions specified in the Act were satisfied and the required declarations were made by proclamation under s. 6, s. 7 or s. 8. To affect that land in that way is not to impair the functioning of the Executive Government of the State, though the measures limit the areas within which the Executive Government may make its will effective. The Commonwealth measures diminish the powers of the Executive Government but they do not impede the processes by which its powers are exercised. There is no foundation for attributing to the control of the mass of waste lands of a State a special immunity from valid Commonwealth law. Waste lands of a State are to be administered by the Executive Government of the State according to the law which is binding upon it, including the laws of the Commonwealth that bind the State. A restriction upon the doing of specified acts in the exercise of an executive power to use and to control the use of waste lands is no invalid intrusion upon the exercise of that power. (at p525)

20. If a law imposing such a restriction is a law with respect to a subject matter specified in s. 51 of the Constitution, its effect upon State executive power does not deprive it of the character which flows from its connection with that subject matter; it does not lose its character by acquiring a different and exclusive character because of its effect upon the State executive; see the Payroll Tax Case per Windeyer J. at p. 400; Wragg v. State of New South Wales [1953] HCA 34; (1953), 88 C.L.R. 353, at pp. 385-386; Airlines of N.S.W. Pty. Ltd. v. New South Wales (No.2) (the Second Airlines Case) (1965), 113 C.L.R. 54,at p. 78. The contrary view of Barwick C.J. in the Payroll Tax Case, at pp. 372-373, has not been followed (cf. per Stephen J. in Actors & Announcers Equity v. Fontana Films Pty.Ltd. [1982] HCA 23; (1982), 56 A.L.J.R. 366,at p. 375) and must now be regarded as incorrect. (at p525)

21. The subsidiary argument fastens upon the Crown's prerogative over waste lands and upon the reservation expressed in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (the Engineers Case) [1920] HCA 54; (1920), 28 C.L.R. 129, at pp. 143-144 and by Dixon J. in the Melbourne Corporation Case, at p. 78 of the question whether the prerogative of the Crown in right of a State is beyond the reach of a law of the Commonwealth. In fact Tasmanian legislation has overtaken the prerogative in the control of the waste lands of the State, but in any event I would respectfully agree with what Mason J. said in Victoria v. B.L.F. [1982] HCA 31; (1982), 41 A.L.R. 71, at pp. 117-118:

"There is no secure foundation for an implication that the exercise of the Parliament's legislative powers cannot affect the prerogative in right of the States and the weight of judicial opinion, based on the thrust of the reasoning in the Engineers' Case, is against it.

"If for the protection of the States as constituent elements in the federation an implication needs to be made, then the implication that should be made is that the Commonwealth will not in the exercise of its powers discriminate against or 'single out' the States so as to impose some special burden or disability upon them, unless the nature of a specific power otherwise indicates, and will not inhibit or impair the continued existence of the States or their capacity to function." (at p525)

22. The prerogative argument is thus subsumed into the principal argument that the powers of the Executive Government are immune from impairment by Commonwealth laws. Both arguments fail. Two further submissions of general importance to the validity of each of the Commonwealth measures have been made by Tasmania: one based upon s. 51(xxxi), the other upon s. 100 of the Constitution. It is convenient, however, to defer consideration of those arguments until the scope of each of the relevant heads of power is ascertained and such support as they give to the respective measures is determined.

The external affairs power,section 69 of the Commonwealth National Parks Act and the Wilderness Regulations. (at p526)

23. The starting point is the Convention for the Protection of the World Cultural and Natural Heritage (the Convention) which was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting in Paris on 16th November, 1972. Australia deposited its instrument of ratification of the Convention on 22nd August, 1974. The Convention entered into force on 17th December, 1975. Seventy-four countries have become parties to the Convention. The relevant provisions are set out by the Chief Justice in his judgment and I need not repeat them, except to note that the monuments, groups of buildings and sites which are defined by Art. 1 to constitute "cultural heritage" and the natural features, formations, sites and areas which are defined by Art. 2 to constitute "natural heritage" are of "outstanding universal value" from one or more of the points of view specified in the definitions. The inclusion of a property in the World Heritage List pursuant to Art. 11 identifies it as "forming part of the cultural heritage and natural heritage" and as having "outstanding universal value" in the eyes of the World Heritage Committee. The effect of the Convention upon a State Party on whose territory a property forming part of the cultural heritage or natural heritage is situated is a matter of contention. The Commonwealth contends that the Convention imposes an obligation to ensure the "identification, protection, conservation, presentation and transmission to future

generations of the cultural and natural heritage" (Art. 4), and that it confers a benefit upon that Party in that the property becomes eligible under Pt.V of the Convention for the grant of international assistance which may include assistance in artistic, scientific and technical matters. Tasmania, on the other hand, contends that the Convention imposes no real obligation and confers no real benefit; the Convention is said to be no more than a statement of aspiration or political accord. (at p526)

24. The resolution of this conflict is of some importance in the light of the several reasons for judgment in Koowarta. In that case the question was whether certain provisions of the Racial Discrimination Act 1975 (Cth) were supported by the external affairs power as laws passed in execution of the International Convention on the Elimination of All Forms of Racial Discrimination to which Australia is a party. The validity of the challenged provisions was upheld by a majority of the Court, but differing reasons were expressed. It was the view common to Mason J., Murphy J. and me, in upholding the validity of the provisions, that the external affairs power extends to the fulfilling by Australia of treaty obligations (see pp. 651, 656 and 664) though entry into a treaty merely as a colourable attempt to convert a matter of internal concern into an external affair and therby attract Commonwealth legislative power would fail in its purpose; pp. 651, 664. Stephen J., who also upheld the validity of the provisions, expressed his view somewhat differntly, at p. 645:

"But where the grant of power is with respect to 'external affairs' an examination of subject-matter, circumstance and parties will be relevant whenever a purported exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny.

" . . . the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation's 'external affairs'. A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'. And this being so, any attack upon validity, either in what must be the very exceptional circumstances which could found an allegation of lack of bona fides or where there is said to be an absence of international subject-matter, will still afford an appropriate safeguard against improper exercise of the 'External affairs' power." (at p526)

25. The minority judgments confined the power more narrowly. The Chief Justice, with whose judgment Aickin and Wilson JJ. agreed, held the challenged provisions to be beyond the Parliament's powers. The Chief Justice said, at p. 638:

"I consider that a law which carries into effect the provisions of an international agreement will only have the character of a law with respect to external affairs if the provisions to which it gives effect answer that description. . . .Since the law whose validity is to be tested is one that gives legal effect within Australia to the provisions of the agreement, the test must be whether the provisions given effect have themselves the character of an external affair, for some reason other than that the executive has entered into an undertaking with some other country with regard to them. . . .

" . . . Any subject-matter may constitute an external affair, provided that the manner in which it is treated in some way involves a relationship with other countries or with persons or things outside Australia. A law which regulates transactions between Australia and other countries, or between residents of Australia and residents of other countries, would be a law with respect to external affairs, whatever its subject matter. However, for the reasons I have given I consider that a matter does not become an external affair simply because Australia has entered into an agreement with other nations with regard to it." (at p527)

26. The point of difference between Stephen J. and the minority lies in the differing perception of the quality of the subject matter of the law needed to affect Australia's external relations. For Stephen J., it was necessary and sufficient for the subject matter of the law to be of international concern; for the minority, the subject matter must itself involve a relationship with other countries or with persons or things outside Australia - thus a law regulating transactions between

Australia and other countries or between residents of Australia and residents of other countries is a law with respect to external affairs. As I understand what Stephen J. wrote, his Honour did not hold the view that the subject matter of a valid law must possess an international character apart from the character it acquires by reason of its being the subject of a treaty; the treaty is material to the character of subject matter to which it relates but it is not necessarily conclusive of the character of the subject matter. The point of departure between his Honour's judgment and that of the other majority judgments was his Honour's qualification that a treaty obligation did not necessarily make the subject matter a matter of international concern. (at p527)

27. For my part, I would adhere to the view that I expressed in Koowarta, at p. 664: a treaty obligation stamps the subject of the obligation with the character of an external affair unless there is some reason to think that the treaty had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament. Only in such a case is it necessary to look at the subject matter of the treaty, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes in order to ascertain whether there is an international obligation truly binding on Australia. Applying the test which I hold to be appropriate to the circumstances of the present case, the acceptance by Australia of an obligation under the Convention suffices to establish the power of the Commonwealth to make a law to fulfil the obligation. But even if one applies a stricter test - a test that satisfies the qualification expressed by Stephen J. - the subject of an obligation accepted by Australia under the Convention is a matter of international concern. The qualification expressed by Stephen J. is not difficult to satisfy. (at p527)

28. An obligation created by a treaty in force "is binding upon the parties to it and must be performed by them in good faith": Art. 26 of the Vienna Convention on the Law of Treaties, an Article giving expression to the rule pacta sunt servanda which, as the preamble to the Vienna Convention recites, is "universally recognized". It is difficult to imagine a case where a failure by Australia to fulfil an express obligation owed to other countries to deal with the subject matter of a treaty in accordance with the terms of the treaty would not be a matter of international concern, a matter capable of affecting Australia's external relations. In Koowarta, when Stephen J. rehearsed the events which showed the growth in and intensity of international concern for the elimination of racial discrimination, it was to show that the "quite precise treaty obligation" was "on a subject of major importance in international relationships", but his Honour did not suggest that the capacity to affect Australia's relationships with other countries was a question of degree to be assessed by the Court as a step in deciding the constitutional validity of legislation to implement the treaty obligation. Indeed, an enquiry into the extent to which a failure to fulfil a treaty obligation has the capacity to affect Australia's relations with other countries is an enquiry that could hardly be pursued by this Court without advice given by the Executive Government. At all events, the Court can hardly be at liberty to consider that the subject of an obligation binding Australia under a multilateral treaty relating to the world cultural and natural heritage is "necessarily of no concern to other countries", to adopt the phrase of Dixon J. in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936), 55 C.L.R. 608, at p. 670. Applying the test proposed by Stephen J., the subject of an obligation binding upon Australia under the Convention enlivens the Commonwealth power. (at p527)

29. The more fundamental question is whether the Convention imposes an obligation upon Australia. If the Convention does not impose an obligation, it would be necessary to consider whether the subject with which it deals is nevertheless a matter of international concern. In such a case (and I venture to recall what I said in Koowarta, at p. 663), it would be necessary to determine whether the subject affects or is likely to affect Australia's relations with other international persons, an enquiry of some difficulty. There would be "questions of degree which require evaluation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them"; at p. 664. That enquiry need not be pursued if the Convention imposes an obligation on Australia. (at p527)

30. Tasmania submitted that these principles effect an undue expansion of Commonwealth power and that the Court should confine the concept of external affairs more narrowly in order to perform what was said to be the great curial function of sustaining the "balance of our Constitution". I suspect that the "balance of our Constitution" in this submission is a balance which owes something to the respective areas of Commonwealth and State legislative activity that were familiar in the early years of Federation and to the notion that the growth in Australia's external affairs ought not to be suffered to expand federal legislative power and correspondingly to erode the legislative powers that might be effectively exercised by the States. Counsel cautiously abstained from founding the submission on the discarded doctrine of State reserved powers, arguing that effect might be given to the submission by confining the meaning of the

constitutional expression "external affairs". But it is equally erroneous to construe the several grants of legislative power narrowly. The true principle was recently reaffirmed by this Court in its unanimous judgment in Ex parte the Australian Social Welfare Union (9th June, 1983, unreported, official pamphlet at p. 15) citing what O'Connor J. had said in Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association (1908), 6 C.L.R. 309, at pp. 367- 368:

". . . it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

"For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose." (at p528)

31. That canon of construction ensures that the Parliament is enabled to fulfil the object for which the power was designed. The application of that canon of construction to the affirmative grants of paramount legislative powers gives the Constitution a dynamic force which is incompatible with a static constitutional balance. The complexity of modern commercial, economic, social and political activities increases the connections between particular aspects of those activities and the heads of Commonwealth power and carries an expanding range of those activities into the sphere of Commonwealth legislative competence. This phenomenon is nowhere more manifest than in the field of external affairs. (at p528)

32. Windeyer J. in the Payroll Tax Case spoke of the concordance throughout the history of the Federation between the growth of Commonwealth power and the growth of national sentiment and the need for national laws, at pp. 395-396:

"The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the Federal Government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the Engineers' Case [1920] HCA 54; ((1920), 28 C.L.R. 129), which diverted the flow of constitutional law into new channels. I have never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the Engineers' Case as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs." (at p528)

33. In the years since the second World War, Australia has been involved in expanding fields of international cooperation, and those fields of cooperation are of enhanced importance to Australians as they are to the people of other countries. If the movements of history are relevant to the striking of a federal balance, the development of Australia's international relations and the participation of the Australian people in the world outside our shores must assuredly be weighed. But it is not the function of this Court to strike some balance between the Commonwealth and the States: that would be to confuse the political rhetoric of States' Rights with the constitutional question of Commonwealth legislative powers the measure of which at any time is not referable to the powers previously exercised by the States. In the present

case, the scope of the external affairs power invoked by the Commonwealth cannot depend upon the undoubted power of a State to legislate for and to control the use of its waste lands; the scope of the external affairs power here depends upon the existence and content of an obligation owed by Australia to other countries by virtue of the operation of international law upon the provisions of the Convention. (at p528)

34. I should wish to guard against a suggestion that it is necessary to find such an obligation before one can find an external affair which enlivens the power under s. 51(xxix), but in the circumstances of the present case no other foundation for the power appears. There is certainly no obligation erga omnes of the kind to which the International Court of Justice referred in Barcelona Traction, Light and Power Company, Limited I.C.J. Reports 1970, p.3, at p. 32. Whether the Convention gives rise to an international obligation is a matter of interpretation of its terms. The interpretation of the Convention should follow the Articles of the Vienna Convention, the provisions of which codify existing customary law and furnish presumptive evidence of emergent rules of general international law. It is thus appropriate to refer to the Vienna Convention though it had not entered into force when the Convention was adopted; see T.O. Elias, The Modern Law of Treaties (1974) p.13; I. Brownlie, Principles of Public International Law (3rd ed. 1979) pp. 600 et seq; I. M. Sinclair, "Vienna Conference on the Law of Treaties" (1970), 19 I.C.L.Q. 47, at pp. 47 et seq.) Articles 31 and 32 of the Vienna Convention specify the applicable general rules of interpretation:

"Article 31

1. A treaty shall be interpreted in good faith in accordance with the

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. . . .

4. . . ."

"Article 32

Recourse may be had to supplementary means of interpretation, including the

preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonalbe." (at p529)

35. We were invited to refer to travaux preparatoires of the Convention in order to perceive the attenuation of obligatory language from the first draft of the Convention to its final text. In my view that invitation should be rejected. It accords

with the Vienna Convention and with the consistent practice of the International Court of Justice and, earlier, of the Permanent Court of International Justice, generally to decline reference to travaux preparatoires, for "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself"; Conditions of Admission of a State to Membership in the United Nations, I.C.J. Reports 1948, p. 56, at p. 63. In any event, assuming that the obligatory language was attenuated between the drafts and the final text of the Convention, it does not follow that the text adopted excludes an obligation. At the end of the day, the interpretation of the text itself must determine the content of the obligation it imposes. I turn then to the text of the Convention; I do not have recourse to the travaux to arrive at the meaning of the Convention except in relation to one word, "presentation", the meaning of which remains obscure after following the procedure prescribed by Art. 31 of the Vienna Convention. Article 4 of the Convention states that each State Party recognizes that there is a duty belonging primarily to a State on whose territory property being cultural or natural heritage is situated to ensure its "identification, protection, conservation, presentation and transmission to future generations". The duty of "presentation" is not easily understood. The travaux show that the term was inserted in the English text of the Convention in place of the terms "development" or "active development" after objection to the use of the latter term was taken by the United Kingdom in a draft of the proposed Convention with respect to the cultural heritage. The corresponding French text remained unaltered, the Convention following the draft in use of the term "mise en valeur". That term, the drafting Secretariat observed, "when applied to monuments, groups of buildings and sites, is taken to mean conserving and arranging them to bring out their potentialities to best advantage". It seems that "presentation" is the term adopted in the final text to convey that meaning, not only with respect to the cultural heritage but also with respect to the natural heritage. The duty of "presentation" may thus require the provision of lighting or access or other amenities so that the outstanding universal value of the property can be perceived; nevertheless, conservation of the property is an element of its presentation and is not to be sacrificed by presentation. The duty thus requires the protection and conservation of the features which give the property its outstanding universal value. It is the "object and purpose" of the Convention to ensure that those features are protected and conserved. (at p529)

36. The first sentence of Art. 4 is not expressed as an obligation imposed upon a State Party: although it is recognized that that duty "belongs primarily" to the State Party on whose territory the relevant property is situated, it is a duty which, subject to the Articles of the Convention, belongs also to all the parties to the Convention. However, the second sentence of Art. 4 and its expansion in Art. 5 specify the commitment of the State Party on whose territory the relevant property is situated. The critical parts of those Articles are:

> "Article 4
>
> . . . it will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."
>
> "Article 5
>
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> . . .
>
> (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage;. . ." (at p530)

37. The language of these Articles is non-specific; the Convention does not spell out either the specific steps to be taken for the protection, conservation and presentation of the cultural and natural heritage situated on a State Party's territory nor the measure of the resources which are to be committed by the State Party to that end. The variety of properties that are part of the cultural and natural heritage, the economic differences among States Parties and the varying demands upon their respective resources no doubt made it impossible to secure common specific commitments from all States Parties. The want of specificity in Arts. 4 and 5 and the discretion which those Articles leaves to each State Party as to the specific steps which each will take for the protection, conservation and presentation of the cultural and natural heritage situated on its territory raise the question whether the Convention is, at least in its provisions relating to National Protection of the Cultural and Natural Heritage, merely hortatory. Mr. J.E.S. Fawcett, writing on "The Legal Character of International Agreements" in British Year Book of International Law, (1953), vol. 30, 381, at p. 392, suggests that the reservation to a Party of the right to decide the content of its treaty obligation is inconsistent with the existence of a legal obligation: "Suppose that an agreement between States contains only one undertaking, it being the same for each of the parties; and suppose it is so worded that each party is to be the sole judge as to when and to what extent obligations arise for it from that undertaking. How can the question whether or not the undertaking imposes legal obligations on the parties be one for judicial determination? For an obligation cannot be properly called a legal obligation unless its existence and extent are determinable judicially, that is, according to general principles of law; and if the agreement has provided in advance that the parties are to be the judges, each for itself, then cadit quaestio." (at p530)

38. Mr. Fawcett's view stands in contrast with that of the late Sir Hersch Lauterpacht who wrote (International Law (E. Lauterpacht ed., 1978), vol. 4, at pp. 111-112):

"A legal duty must also be deemed to exist in those marginal cases in which, by virtue of the instrument in question, a State reserves for itself the right to determine both the existence and the extent of the obligation undertaken by it, as, for instance, in the case of some declarations of acceptance of the optional clause of Art. 36 of the Statute of the International Court of Justice in which the declaring States have reserved for themselves the right to determine whether a matter falls within their domestic jurisdiction. For such determination must take place in accordance with the implied obligation to act in good faith. The fact that the interested State is the sole judge of the existence of the obligation is, while otherwise of considerable importance, irrelevant for the determination of the legal character of the instrument." (at p530)

39. It is not necessary to resolve the conflict between the views of the learned writers. No doubt the point at which expressions of ideals and aspirations merge into definite legal obligations "constitutes one of the most delicate and difficult problems of law and especially so in the international arena where generally accepted objective criteria for determining the meaning of language in light of aroused expectations are more difficult to ascertain and apply than in domestic jurisdictions" as Dillard J. observed in his opinion in the Appeal Relating to the Jurisdiction of the ICAO Council (I.C.J. Reports 1972, p.46, at p. 107n). However, we are not concerned with a jurisprudential analysis of the terms of the Convention; what is in form an obligation can be taken to be an obligation for the purposes of s. 51(xxix) if a failure to act in conformity with those terms is likely to affect Australia's relations with other nations and communities. That can be easily tested. Would those relations be affected if Australia failed to take any step in accordance with Arts. 4 and 5 towards the protection and conservation of a property situated in Australia of such outstanding universal value that it is part of the cultural heritage or natural heritage of the world (especially a property listed under Art. 11) when a step is needed to avert or minimize damage to the property? Unless Australia were to attribute hypocrisy and cynicism to the international community, only an affirmative answer is possible. There is a clear obligation upon Australia to act under Arts. 4 and 5, though the extent of that obligation may be affected by decisions taken by Australia in good faith. (at p530)

40. Tasmania argued for an analogy between treaty obligations and obligations arising from contracts in municipal law. Though the analogy is imperfect, the cases cited are instructive. Placer Development Ltd. v. The Commonwealth [1969] HCA 29; (1969), 121 C.L.R. 353 was relied on as an instance of an illusory contract where the content of the obligation is dependent entirely upon the discretion of the obligor. The manifest difficulty in finding that what the parties express in contractual form is a mere illusion is reflected in the division of opinion in that case. However, the relevant rule upon

which Tasmania would rely is expressed in that case by Kitto J., at p. 356:

". . . wherever words wich by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought at all." (at p530)

41. The obligation under Art. 4 of the Convention leaves no discretion in a party as to whether it will abstain from taking steps in discharge of the "duty" referred to in that Article. Each party is bound to "do all it can . . . to the utmost of its own resources" and the question whether it is unable to take a particular step within the limits of its resources is a justiciable question. No doubt the allocation of resources is a matter for each party to decide and the allocation of resources for the discharge of the obligation may thus be said to be discretionary, but the discretion is not at large. It must be exercised "in good faith", as Art.26 of the Vienna Convention requires. If a party sought exemption from the obligation on the ground that it had allocated its available resources to other purposes, the question whether it had done so in good faith would be justiciable. An analogy in the law of contract can be found in Meehan v. Jones [1982] HCA 52; (1982), 56 A.L.J.R. 813 where it was held that a contract did not fail for uncertainty when a "subject to satisfactory finance" clause was construed as requiring the purchaser to act honestly and reasonably. Mason J. said, at p. 820:

"There is in this formulation no element of uncertainty - the courts are quite capable of deciding whether the purchaser is acting honestly and reasonably. The limitation that the purchaser must act honestly, or honestly and reasonably, takes the case out of the principle . . .", that is, out of the principle stated by Kitto J. in Placer Development Ltd. (at p531)

42. When a contract is made with a public body under a duty to act and decide according to a recognizable principle, "the court may be willing to find an obligation which requires that body to reach a decision, in accordance with that principle, as to a matter left to its decision in the contract itself, and so find an enforceable contract where one might not be found between private parties"; Cudgen Rutile (No. 2) Ltd. v. Chalk, (1975) A.C.520, at p. 536. An agreement, even between private parties, is not void for uncertainty "because it leaves one party or group of parties a latitude of choice as to the manner in which agreed stipulations shall be carried into effect, nor does it for that reason fall short of being a concluded contract"; per Kitto J. in Thorby v. Goldberg [1964] HCA 41; [1964] HCA 41; (1964), 112 C.L.R. 597, AT P. 605. (at p531)

43. In my view, no true analogy can be drawn between principles of international law governing treaty obligations and the common law of contract as applied in Australia in relation to illusory contracts. A relevant analogy would have to assume a correspondence between the functions of and remedies available in Australian courts and the functions of and remedies available in international judicial tribunals. But, however imperfect or uncertain the analogy may be, it tends to support the existence of a legal obligation arising under Arts. 4 and 5 of the Convention. (at p531)

44. The conclusion that each State Party is under an obligation to act with respect to the cultural and natural heritage situated on its territory in the manner specified in Arts. 4 and 5 of the Convention is confirmed by the adoption by the General Conference of UNESCO, contemporaneously with the adoption of the Convention, of recommendations with respect to properties of lesser significance ("special value") than the properties dealt with by the Convention. (at p531)

45. The next matter for consideration is Art. 34 of the Convention: the federal clause. It is drawn upon the hypothesis that the acceptance of an obligation under the Convention does not affect the antecedent powers of the federal and state governments of the federations to which the clause applies, and that the obligations arising under the Convention will fall to be implemented by one or other of those governments according to the antecedent constitutional distribution of powers in that federation. The hypothesis is not consistent with the constitutional law of Australia. On acceptance by Australia of its obligations under the Convention, if not before, the power to implement the Convention came "under the legal jurisdiction of the federal or central legislative power". By force of Art. 34(a) the obligation of the federal government is thus "the same as for those States Parties which are not federal States". (at p531)

46. Although the obligation imposed by the Convention upon a State Party with respect to the cultural and natural heritage situated on its territory is expressed in general terms, once a property answering the Convention description of cultural heritage or natural heritage is identified, the primary obligation of the Party is quite precise: it is to protect and conserve the property so far as it can with the resources available to it, whether from national or international sources. As the obligation falls to be discharged with respect to particular properties it is necessary now to trace the steps by which the Parks were identified as part of the cultural heritage and natural heritage. (at p531)

47. A request that the Parks be nominated for inclusion in the World Heritage List was made by letter dated 22nd September, 1981, from the then Premier of Tasmania to the then Prime Minister of Australia. On 13th November, 1981, Australia nominated the whole area. (The HEC land had not then been excised). The nomination had not been accepted when, after a change of government in Tasmania, the Premier wrote to the Prime Minister seeking withdrawal of the nomination. That was on 28th June, 1982, the day on which the Act authorizing the construction of the Gordon below Franklin Scheme was assented to. The Commonwealth declined to withdraw the nomination. The Commonwealth Minister for Home Affairs and the Environment announced on 8th December, 1982, however, that the then Commonwealth Government had decided not to intervene in the construction of the dam. (at p531)

48. At a meeting of the World Heritage Committee in Paris later in that month, Australia pursued the nomination of the Parks. The Committee had defined the criteria for including properties in the List, as it had been required to do by cl. 5 of Art. 11 of the Convention. In nominating the Parks for inclusion, Australia had submitted that the region contained significant Aboriginal archaeological sites, particularly Fraser Cave (now known as Kutikina Cave), which was described as "one of the six archaeologically richest limestone cave sites in the Western Pacific". There was said to be evidence of human occupation 21,000 years ago, thus establishing southern Tasmania as "the most southerly known penetration of the earth's land surface during ice age times. The earliest date for Tierra del Fuego is some 11,000 years later". It was also stated that the region satisfied all four criteria required for nomination to the List as natural property. The International Council of Monuments and Sites (ICOMOS) made a recommendation to the Committee (at first provisionally but later affirmed) that the Parks answered three of the listing criteria for cultural heritage, namely, that a property should -

"(iii) bear a unique or at least exceptional testimony to a civilization which has disappeared; or

(iv) be an outstanding example of a type of structure which illustrates a significant stage in history; or

(vi) be directly or tangibly associated with events . . . of outstanding universal significance;"

though the lastmentioned criterion justifies inclusion in the list only in exceptional circumstances or in conjunction with other criteria. The International Union for Conservation of Nature and Natural Reserves (IUCN) recommended listing of the property as part of the world natural heritage and it identified some of the "key features" as being "the last wild river in Australia; outstanding scenic values; a major part of the temperate rainforest, including the best habitat of some endangered species; and the archaeological sites of crucial worldwide significance". (at p532)

49. The Committee resolved to include the property in the World Heritage List. When the Committee included the Parks in the List it expressed concern at the likely effect of the dam construction:

"The Committee is seriously concerned at the likely effect of dam construction in the area on those natural and cultural characteristics which make the property of outstanding universal value. In particular, it considers that flooding of parts of the river valleys would destroy a number of cultural and natural features of great significance, as identified in the ICOMOS and IUCN reports. The Committee therefore recommends that the Australian authorities take all possible measures to protect the integrity of the property. The Committee suggests that the Australian authorities should ask the Committee to place the property on the List of World Heritage in Danger until the question of dam construction is resolved." (at p532)

50. Upon a change in the government of the Commonwealth the decision that the Commonwealth should not intervene in the construction of the dam was reversed. Work on the HEC land had commenced on 14th July, 1982. The statement of facts upon which the parties to this litigation agree states that an area of approximately 6 hectares has been cleared. That area is close to Warners Landing on the Gordon River. A camp is being constructed on that area and a docking area alongside the river and associated facilities are also being constructed. An access road is being cleared and constructed from the camp to Warners Landing and from the camp towards the dam site, and other minor construction owrk is being carried out including the clearing of helicopter pads and the cutting of survey transect lines. It is agreed that those things have been done and are being done for the purpose of the construction of the proposed dam, coffer dam and generating works. (at p532)

51. The Wilderness Regulations were made on 30th March, 1983. They apply only to the HEC land. Regulations 5(1) and (2) provide as follows:

"(1) Except with the consent of the Minister, a person shall not, within an area to which these Regulations apply, whether by himself or by his servant or agent -

(a) construct a dam or associated works or do any act in the course of, or for the purpose of, the construction of a dam or associated works;

(b) carry out any excavation works;

(c) erect a building or other substantial structure or do any act in the

course of, or for the purpose of, the erection of a building or other substantial structure;

(d) kill, cut down, damage or remove any tree;

(e) construct or establish any road or vehicular track;

(f) use explosives; or

(g) carry out any other works.

Penalty: $5,000.

(2) Except with the consent of the Minister, a person shall not, within an

area to which these Regulations apply, whether by himself or by his servant or agent, do any act, not being an act referred to in sub-regulation (1), that is likely adversely to affect the conservation or preservation of that area as part of the world cultural heritage or natural heritage.

Penalty: $5,000." (at p532)

52. The Wilderness Regulations were stated to bind the Crown in right of the State of Tasmania (Reg. 4(1)). Although the State of Tasmania is not liable to be prosecuted for an offence, any servant or agent of the State of Tasmania is liable to be prosecuted (Reg. 4(2) and (3)), and the controller of the area is liable to prosecution for failure to take reasonable

steps to prevent the doing of any act referred to in Reg. 5(1) (Regs. 5(3) and (4)). (at p532)

53. The constitutional authority for the making of these Regulations is derived from the obligation imposed upon Australia to protect and conserve the listed property. The extent of the legislative power "must depend upon the terms of the convention, and upon the rights and duties it confers and imposes" (per Evatt and McTiernan JJ. in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936), 55 C.L.R. 608, AT P.688). The obligation imposed by the Convention, as we have seen, does not condescend to detail in prescribing the steps to be taken, though the taking of appropriate legal measures necessary for the protection and conservation of the property is one of the appropriate steps mentioned in Art.5. It is clear, however, that the selection of the appropriate legal measures is left by the Convention to the party who is to discharge the obligation to protect and conserve the property. It does not follow that the charter of Commonwealth power extends to whatever the Commonwealth thinks appropriate and necessary for the protection and conservation of the property. The obligation being to take appropriate legal measures for the protection and conservation of the property, the power is to make laws which are conducive to that end rather than to make laws which are thought by the Commonwealth to be conducive to that end. As Fullagar J. said in Australian Communist Party v. The Commonwealth (1951), 83 C.L.R.1, at p.258:

"The validity of a law . . . cannot be made to depend on the opinion of the law-maker. . .that the law. . . is within the constitutional power upon which the law in question itself depends for its validity." (at p533)

54. When an international obligation is expressed in terms of a result to be achieved or aimed at, the means being left to Australia, it gives rise to a legislative power which - like the defence power - looks to the purpose to be achieved by its exercise. Such a power authorizes the making of laws that might "reasonably be considered conducive to the main purpose" as Dixon C.J. said in Marcus Clark & Co. Ltd. v. The Commonwealth [1952] HCA 50; (1952), 87 C.L.R. 177, at p. 220. The Court's function is not to determine what is appropriate or necessary for implementing the Convention (cf. R. v. Poole; Ex parte Henry (No. 2) [1939] HCA 19; (1939), 61 C.L.R. 634, at p. 648) but to say whether the law or any part of it cannot reasonably be considered conducive to the performance of the obligation imposed by the Convention. In R. v. Burgess; Ex parte Henry, Dixon J. stated the relevant criterion, at pp. 674-675:

"It is apparent that the nature of this power necessitates a faithful pursuit of the purpose, namely, a carrying out of the external obligation, before it can support the imposition upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth. No doubt the power includes the doing of anything reasonably incidental to the execution of the purpose. But wide departure from the purpose is not permissible, because under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates." (at p533)

55. The scope of the legislative power is defined by the international obligation and the validity of a law made in purported pursuance of the power depends upon whether "the law can fairly be regarded as providing a way of doing what the Commonwealth has undertaken to do; the choice of ways and means being a matter essentially for the Parliament"; per Menzies J. in the Second Airlines Case, at p. 136. Such a legislative power may be said to be purposive in the same way as the defence power is said to be purposive. Where the ambit of the defence power is in question, the facts which may reveal a connection between the law and the power are ordinarily the subject of judicial notice; Stenhouse v. Coleman [1944] HCA 36; (1944), 69 C.L.R. 457, at pp. 469-472. The Court may stand in greater need of evidence when a law is made in purported pursuance of the external affairs power, and the presumption of validity may have a function to perform in some cases. But this is not one of them. The purpose of the laws here in question is to be collected, as Dixon J. said in Stenhouse v. Coleman, at p. 471, "from the instrument in question, the facts to which it applies and the circumstances which called it forth". I do not perceive the need for more evidence upon any of those issues in the present case than is found in the agreed statement of facts. (at p533)

56. The circumstances that have called forth those Commonwealth measures that are referable to the external affairs power are the Convention obligation and the identification of Australian properties including the Parks as the subject of

that obligation. The facts to which those measures apply are the respective areas of land covered by the measures, the proposal to construct the dam and works constituting the Gordon below Franklin Scheme, the work which the HEC had put in hand for the construction of the dam, and the consequence of inundation if the dam should be constructed. Having regard to those circumstances, an examination of the respective measures will reveal whether they are each conducive to the protection and conservation of the cultural and natural heritage. (at p533)

57. The Wilderness Regulations, applying to the HEC land alone, strike directly at the work in hand for the construction of the dam. Regulation 5 (1) (a) prohibits a person from constructing a dam or associated works or from doing any act in the course of or for the purpose of constructing a dam or associated works. The other paragraphs of Reg. 5(1) and Reg. 5(2) would prevent both the interference with the HEC land which is the inevitable concomitant of the building of the dam and the effects which the construction of the dam and the impounding of water by it would have upon other parts of the Parks. The purpose of the Wilderness Regulations is thus to fulfil, pro tanto, the obligation imposed upon Australia by the Convention. (at p533)

58. The Wilderness Regulations do not exhaust Australia's obligations under the Convention. Indeed, the function of protecting and conserving the Parks (other than the HEC land) devolves chiefly upon the Director of the National Parks and Wildlife Service of Tasmania, though his powers no longer extend to the HEC land and he is thus unable to prevent the construction of the dam on that land. It is no objection to the validity of the Wilderness Regulations that the Commonwealth in making those Regulations implements the Convention only in part. The relevant obligation arising under Arts. 4 and 5 is imposed upon Australia but, so far as the performance of the obligation calls for legislative or executive action with respect to a property in a State, the obligation may be performed by the Commonwealth or by the State or partly by each of them. Where a treaty obligation gives rise to a legislative power in the Commonwealth to perform the obligation fully and the Commonwealth chooses to exercise the power only to a limited extent, the validity of the law it chooses to make is not affected by its failure to exercise its powers and to perform Australia's obligation more fully. Unless such a law, on its true construction, could not fairly be regarded as "sufficiently stamped with the purpose of carrying out the terms of the convention" (R. v. Burgess; Ex parte Henry per Evatt and McTiernan JJ., at p.688), it would be a valid law. The Wilderness Regulations protect and conserve the Parks from the consequences of carrying out the Gordon below Franklin Scheme on the HEC land: to that extent those Regulations perform Australia's obligation with respect to the Parks. It is a law with respect to external affairs. (at p534)

59. A further attack upon the validity of the Wilderness Regulations was made on the ground that, even though s. 51(xxix) would confer the power to make a law in the terms of the Wilderness Regulations, s. 69(1) of the Commonwealth National Parks Act did not authorize the Governor-General to make them. The attack was not upon the ground that the legislative power arising under s. 51(xxix) could not be delegated to the Govenor-General (we have heard no argument on that), but upon the ground that the authority to make regulations conferred by s. 69(1) was limited to regulations for the establishment and management of parks and reserves on land acquired by the Commonwealth under Pt. II of the Commonwealth National Parks Act. Section 69(1) provides:

"The Governor-General may make regulations for and in relation to giving effect to an agreement specified in the Schedule."

The agreements specified in the Schedule are five agreements between Australia and other countries including the Convention. The other four agreements relate to Wetlands of International Importance, Conservation of Antarctic Seals, International Trade in Endangered Species and the Protection of Migratory Birds and Birds in Danger of Extinction. Section 6 (1) (e) declares that one of the objects of Pt. II is to make provision for the establishment and management of parks and reserves "for facilitating the carrying out by Australia of obligations under, or the exercise by Australia of rights under, agreements between Australia and other countries". If regulations under s. 69 could be made to implement the Convention in all respects, the argument runs, s. 6(1) (e) would be unnecessary. To give s. 6 (1) (e) and s. 69 a complementary function it was submitted that s. 69 should be confined in its operation to parks and reserves established under Pt. II on land acquired by the Commonwealth, so that regulations made under s. 69 should supplement the provisions of Pt. II regulating those parks and reserves. But s. 6 (1) (e) furnishes no foundation for reading down the general language of s. 69 (1) further than is necessary to avoid inconsistency between regulations made under s. 69 and the provisions of Pt. II. Part II does not purport to do more than to provide for the establishment and management of parks and reserves by the Commonwealth; it is not otherwise adapted to the implementing of any of the agreements in

the Schedule. The implementing of those agreements, insofar as Pt. II does not provide what is appropriate for giving effect to them, is necessarily left to the regulations made under s. 69. The Wilderness Regulations fall within the statutory power. Deferring for the moment consideration of the arguments based on s. 51 (xxxi) and s. 100 of the Constitution, I would hold the Wilderness Regulations to be a valid law of the Commonwealth.

2. The external affairs power and sections 6 and 9 of the Act (at p534)

60. The legislative power arising from the obligation under Arts. 4 and 5 falls to be exercised with respect to specific properties. The restrictions on use of land which are expressed in s. 9 (1) and (2) of the Act can be applied only to an "identified property" as defined in s. 3 (2) which, if it is situated in a State, satisfies one or more of the criteria set out in the paragraphs of s. 6 (2). Identified property is not necessarily property with respect to which the legislative power may be exercised. A property which is submitted to the World Heritage Committee as suitable for inclusion in the World Heritage List (and is accordingly identified property under s. 3 (2) (a) (i) may not prove to be part of the cultural or natural heritage. A property which is declared by the regulations to form part of the cultural heritage or natural heritage (and is accordingly identified property under s. 3 (2) (a) (ii)) may not in fact be part of the cultural or natural heritage. In an attempt to ensure that s. 9 applied only to identified property in a State with respect to which Commonwealth legislative power may be exercised, the draftsman has inserted the qualifying paragraphs of s. 6 (2). (at p534)

61. Paragraph (b) relates to property the protection or conservation of which is a matter of international obligation, whether by reason of the Convention or otherwise. This criterion of external affairs is, for reasons which I endeavoured to explain in Koowarta, at pp. 663-664, a particular instance of a matter which affects or is likely to affect Australia's relations with other countries. And therefore a property which satisfies the criterion set out in par. (b) is a property with respect to which the Commonwealth may exercise such power under par. (xxix) as arises from the obligation in question. It is unnecessary in the present case to decide the validity of the other paragraphs in s. 6 (2). I observe, however, that the first limb of par. (c) and par. (d) owe their form to some passages in the majority judgments in Koowarta, but I find no judicial warrant for the provisions of par. (a) or par. (e). The Parks, including the HEC land, being included on the World Heritage List, are the subject of Australia's obligation under Arts. 4 and 5 of the Convention. As the provisions of par. (b) are thus attracted to support the proclamations made under s. 6 (3), it is undesirable to consider the sufficiency of the criteria expressed by the other paragraphs of s. 6 (2). (at p535)

62. The next question is whether the Commonwealth may, under the power arising from the obligation imposed by Arts. 4 and 5, make a law which restricts the use of any identified property the protection and conservation of which is a matter of international obligation in the ways specified in s. 9(1) (a) to (g). That question is to be determined without reference to the features of the particular properties which have been or may hereafter be declared under s. 6 (3) to be properties to which s. 9 applies, for pars. (a) to (g) prohibit the doing of specified acts on every kind of identified property that Australia is obliged to protect and conserve. The protection and conservation of some properties may be ill-served by the imposition of such restrictions. Take the present case. If the Commonwealth has validly exercised its power to halt construction of the dam, there may be some structures already there that should be removed to allow the area to return, as far as may be, to a condition of wilderness. In that event, the obligation of conservation would be impeded by the statutory prohibition against destroying a structure (par. (d)). The fact is that protection and conservation are functions that can only be performed with respect to an individual property; those functions have to be performed according to the condition of the property at the time and with reference to any threat that may then be posed by specific dangers. That fact is reflected in the drafting of the World Heritage in Danger provisions of the Convention (Art.11 cl.4). The difficulty with pars. (a) to (g) of s. 9 (1) is that they generally prohibit the kinds of acts therein specified whenever done on any property to which s. 9 applies or may be made to apply. It is impossible to say that such provisions, in their application to all such properties at all times, would conduce to the protection and conservation of those properties. They are too wide. But are they saved by the Minister's power to consent in writing to the doing of the acts mentioned? Section 13(1) confines the Minister's discretion:

"In determining whether or not to give a consent pursuant to section 9 in relation to any property to which that section applies, the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the

Convention, of the property."

A prohibition that would be invalid because it is too wide to be conducive to the purpose for which the law might validly be made can sometimes be saved if the law provides for a discretionary power to lift the prohibition. A licensing system may be provided for, and such a system will be valid if the law so confines the exercise of the discretion that the licensing authority cannot have regard to factors foreign to the purpose for which law might validly be made; see the Second Airlines Case, especially per Kitto J. at pp. 112-113. Section 13(1) of the Act precludes the Minister from having regard to factors foreign to the purpose of fulfilling the Convention obligation, and it might reasonably be thought that the Minister's exercise of his discretion to consent in particular cases would secure the faithful pursuit of that purpose in those cases. But I cannot think that the reposing of a discretion in the Minister is a real attempt to create a licensing system for the mass of cases that might arise. The Minister's consent might be sought by persons wishing to do trivial acts upon any property declared under s. 6(3); the property may be in any part of the six States; the Minister is given no power to delegate his power to consent; and the Act makes no provision for an administrative system for the reception and disposition of applications for consent. If the validity of a law depends upon the creation of a licensing system, a failure to make provision for administration of the system where such provision is necessary is fatal to the law's validity; cf. per Williams J. in Armstrong v. The State of Victoria [1955] HCA 26; (1955), 93 C.L.R 264, at p.281. The Act fails to provide an administrative system by which the discretion conferred on the Minister might ensure that the operation of the Act faithfully pursues the purpose of protection, conservation and presentation under the Convention. It follows that pars. (a) to (g) of s. 9(1) are, in my opinion, invalid. (at p535)

63. Paragraph (h) and sub-s. (2) are drawn more narrowly, Paragraph (h) permits the prescription of an act in relation to a particular property and thus authorizes the making of a regulation which is conductive to the protection and conservation of the property. The validity of a regulation made under par. (h) of s. 9(1) depends upon its terms, and upon the property to which it applies. Subsection (2) again contains a general prohibition against damage or destruction that appears to be too wide. It may be that the damage of or destruction to "any property to which this section applies" could be construed as a provision protecting the property as a whole. Upon that construction, a particular act which, though damaging to or destructive of a part of the property, is beneficial to the whole, would not be regarded as falling within sub-s. (2). That construction does not accord with s. 3(2)(b) which requires any part of identified property to be treated as identified property so that an act which is beneficial to the whole nevertheless will fall within the prohibition if it involves damage or destruction to any part. It follows that in my view sub-s. (2) is invalid. (at p535)

64. I turn then to the regulations made under s. 3(2)(a)(ii), to the proclamations made under s. 6(3), and to the regulations made under s. 9(1)(h). By that complex of instruments, particular acts are prohibited in relation to particular property. (at p535)

65. The whole of the Parks as they stood before the excision of the HEC land is "identified property" by virtue of s. 3(2)(a)(i). On 25th May, 1983, regulations were made declaring certain property to be part of the natural heritage and certain property to be part of the cultural heritage pursuant to s. 3(2)(a)(ii). The World Heritage Properties Conservation Regulations (S.R. No. 65 of 1983) declared that the State reserves consituting the Parks as they stood prior to excision of the HEC land and an area (described in Sch. 1 to the Regulations) of the Franklin-Lower Gordon Wild Rivers National Park form part of the natural heritage (Reg. 2), and that an area (described in Sch. 2 to the Regulations) of the same National Park, Kutikina and Deena Reena Caves and all other archaeological sites within the Sch. 2 area form part of the cultural heritage (Reg. 3). The greatest part of the area described in Sch. 2 lies within the area described in Sch. 1. Both the Sch. 1 area and the Sch. 2 area encompass the greater part of the future HEC land, and each of those areas covers a part of the HEC land. (at p536)

66. By proclamations made on 26th May, 1983, and published in the Gazette on the same day, the Governor-General proclaimed the several areas to which s. 9 of the Act is to apply. Section 9 was declared to apply to-

(i) the Franklin Lower Gordon Wild Rivers National Park as it stood on 13th November, 1981;

(ii) the Sch. 1 land within the boundaries of the HEC land and the future HEC land;

(iii) the Sch. 2 land within the boundaries of the HEC land and the future HEC land;

(iv) Kutikina Cave and Deena Reena Cave;

(v) an open archaeological site at the base of the flying-fox pylon on the

west bank of the Franklin River at a given reference point (hereafter the open archaeological site. . .) . (at p536)

67. Regulations were made on 26th May, 1983, (S.R. No. 67 of 1983) prescribing acts in relation to particular property under s. 9(1)(h). The prescribed acts were prohibited only in relation to each of three properties (called a relevant property . . .) specified in Reg. 4(1), namely,

(a) the Sch. 2 land within the boundaries of the HEC land and the future HEC land;

(b) the Kutikina Cave and the Deena Reena Cave; and

(c) the open archaeological site. (at p536)

68. The acts prescribed in relation to each relevant property by Reg. 4(2) were:

"(a) carrying out works in the course of constructing or continuing to construct a dam that, when constructed, will be capable of causing the inundation of that relevant property or of any part of that relevant property;

(b) carrying out works preparatory to the construction of such a dam;

(c) carrying out works associated with the construction or continued

construction of such a dam." (at p536)

69. In my opinion, the acts thus prescribed in relation to each relevant property are conducive to the performance of the obligation under Arts. 4 and 5 of the Convention. The reasons which compel upholding the validity of the Wilderness Regulations establish the validity of the Regulations made under s. 9(1)(h) in its application to the relevant properties.

The corporations power and sections 7 and 10 of the Act. (at p536)

70. The circumstance which gives rise to a question of constitutional validity under ss. 7 and 10 is the incorporation of the HEC unders. 4 of the HEC Act. It is said to be a trading corporation and within the legislative power granted by s. 51(xx) of the Constitution. The constitutional issue should not be addressed if the HEC is not a trading corporation, for unless it is a trading corporation it is not bound by the prohibitions contained in s. 10 of the Act. (at p536)

71. By s. 15(2) of its Act, the HEC is empowered to carry on and conduct any business "relating to or connected with the generation, reception, transmission, distribution, supply, and sale of electrical energy" and to "provide, sell, let for hire . . . electric lines, fittings, apparatus, or appliances for lighting, heating and motive-power, and for all other purposes for which electrical energy can or may be used . . .". The activities of the HEC include the carrying out of those functions. It maintains twenty-three hydro power stations and one thermal power station. It sells electricity to about 190,000 customers including some major industrial load customers who are supplied at a special tariff. It has a work force of 4,843 and from time to time it carries out work for other authorities or persons and receives payment for

that work. During the financial year ended 30th June, 1982, it derived $55,191,339 from the bulk sale of power, $105,629,431 from the retail sale of power and $2,602,000 from accrued retail sales. During the same period it made a gross profit of $103,789,800 and a net profit of $5,965,947 after allowing for interest, depreciation of fixed assets, contribution to the consolidated revenue of Tasmania (being 5 per cent of its total revenue from retail sales of electrical energy) and an amount provided for equalization of fuel cost to the thermal station. Its trading activities are thus a substantial part of its overall activities, if not the predominant part. The HEC is an independent statutory corporation; Launceston Corporation v. The Hydro-Electric Commission [1959] HCA 12; (1959), 100 C.L.R. 654, at p. 660. Consistently with the views which have prevailed in this Court (see State Superannuation Board v. Trade Practices Commission [1982] HCA 72; (1982), 57 A.L.J.R. 89; R. v. Federal Court of Australia; Ex parte W.A. National Football League (Adamson's Case) [1979] HCA 6; (1979), 143 C.L.R. 190) the HEC must be held to be a trading corporation. (at p536)

72. The constitutional issue thus arises: are the prohibitions contained in s. 10 laws with respect to trading corporations? Laws with respect to trading corporations are laws with respect to artificial persons. To be such a law, the law must discriminate: that is to say, it must be a law which operates to confer a benefit or impose a burden upon those persons when its operation does not confer a like benefit or impose a like burden on others; Fontana Films, at p. 385. Section 10 of the Act is discriminatory. It imposes a restriction upon the use of property by the several categories of corporations mentioned in pars. (a), (b) and (c) of s. 10(2), which include trading corporations formed within the limits of the Commonwealth, but it does not impose a like restriction on other persons. Sections 10(2) and (3) direct their commands to trading corporations without any relevant qualification;s. 10(4) directs its commands to trading corporations where the corporation does the relevant act in contravention of a command "for the purposes of its trading activities". Subsections (2) and (3) give rise to the question whether a law which merely prohibits trading corporations from doing an act that may be unconnected with its trade is a law with respect to trading corporations. That question has not hitherto been decided by this Court. In Strickland v. Rocla Concrete Pipes Ltd. (1971), 124 C.L.R. 468, Barwick C.J. expressed the opinion that a law addressed specifically to trading corporations is not, without more, sufficient to attract the corporations power; see pp. 489-490. Menzies J. left that question open (see p. 508). It was unnecessary to decide it in Fontana Films. If sub-s. (4) of s. 10 applies to the HEC's construction of the dam, the question need not be decided now. For the reasons which I stated in Fontana Films (at p. 386), I should not wish to decide a question wider than the circumstances of the case require. The acts prohibited by sub-s. (4) are the acts referred to in sub-ss. (2) and (3), and the qualification "for the purposes of its trading activities" results in the affection of the trading activities of trading corporations. It is clearly a law with respect to trading corporations, but can its validity be sustained without deciding the validity of sub-ss. (2) and (3)? (at p537)

73. It is unnecessary to decide the validity of sub-ss. (2) and (3). Even if sub-ss. (2) and (3) were invalid, their invalidity would not affect sub-s. (4). Subsection (4) is not dependent upon sub-ss. (2) and (3): the opening words of sub-s. (4) ("(w)ithout prejudice to the effect of sub-sections (2) and (3)") show that it has an independent operation. The opening words of subs. (4) preserve the operation of sub-ss. (2) and (3); they do not affect the operation of sub-s. (4). Subsection (4) draws upon the text of sub-ss. (2) and (3) merely as a shorthand means of avoiding repetition of pars. (d) to (m) of sub-s. (2) and sub-s. (3). Paragraphs (d) to (k) of sub-s. (2) and sub-s. (3) contain the same prohibitions as those set out in s. 9(1)(a) to (g) and s. 9(2), but when they are imported into sub-s. (4) they are not struck with invalidity. The corporations power, unlike the power arising from Australia's acceptance of the Convention obligations, does not look to the purpose to be served by laws made under it. (at p537)

74. Does sub-s. (4) apply to the HEC's activities in constructing the dam? The agreed facts show that the HEC land has been vested in the HEC for the purpose of carrying out the Gordon below Franklin Scheme in order to produce electrical energy, the commodity in which the HEC trades. The dominant if not exclusive purpose of constructing the dam is to provide additional generating capacity for the HEC system, an element in the HEC's coordinated activity of generation, distribution and sale of electrical energy. The carrying out of the Gordon below Franklin Scheme is thus for the purposes of the HEC's trading activities. Upon the agreed facts, the construction activities of the HEC fall within s. 10(4). (at p537)

75. By Proclamations made on 26th May, 1983, the Governor-General proclaimed the areas to which s. 10 applies. It applies to:

(i) the Sch. 1 land within the boundaries of the HEC land and the future HEC land;

(ii) the Sch. 2 land within the boundaries of the HEC land and the future HEC land;

(iii) Kutikina Cave and Deena Reena Cave. (at p537)

76. Regulations were made on 26th May, 1983, (S.R. No. 67 of 1983) pursuant to s. 10(2)(m) of the Act prescribing the same acts (that is, works in the course of, preparatory to and associated with the construction of the dam) as were prescribed pursuant to s. 9(1)(h). The relevant area in relation to which those acts were prescribed was the same area as that prescribed under s. 9(1)(h). The area in respect of which any prohibition imposed by s. 10(4) applies is immaterial to the validity of that subsection. The proclamations and regulations so far as they affect the operation of s. 10(4) are valid.

Power to make special laws for the people of any race and sections 8 and 11 of the Act (at p537)

77. Section 51(xxvi) of the Constitution was amended in 1967 by deleting the words "other than the aboriginal race in any State" from the original text which granted power to make laws with respect to "(t)he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:". No doubt par. (xxvi) in its original form was thought to authorize the making of laws discriminating adversely against particular racial groups; see Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901) p. 623. The approval of the proposed law for the amendment of par. (xxvi) by deleting the words "other than the aboriginal race" was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the Racial Discrimination Act manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws. (at p537)

78. Where Parliament seeks to confer a discriminatory benefit on the people of the Aboriginal race, par. (xxvi) does not place a limitation upon the nature of the benefits which a valid law may confer, and none should be implied. It was submitted that, as ss. 8 and 11 do not confer legal rights, powers or privileges upon Aboriginal people in addition to the legal rights, powers or privileges conferred upon the public generally, those provisions are not supported by par. (xxvi). Is it sufficient that the discriminatory benefit is found in the special importance or significance which the people of a race attach to the rights, powers or privileges generally conferred? In Koowarta Stephen J. noted at p.643 that the "necessary special quality might perhaps be sufficiently attracted by facts dehors the legislation". The concept of "race" suggests the answer. (at p538)

79. "Race" is not a term of art; it is not a precise concept; see Ealing London Borough Council v. Race Relations Board, (1972) A.C. 342, at p.362 per Lord Simon of Glaisdale. There is, of course, a biological element in the concept. The UNESCO studies on race and racial discrimination reveal some difficulty in giving a precise definition even to this element. Senor Hernan Santa Cruz, the Special Rapporteur on Racial Discrimination, in his report to the United Nations ("Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres" (1971), U.N. Document No. E/CN.4/Sub 2/307Rev.1, pp. 12-13) traces some of the findings of experts:

"A conference of experts assembled in Moscow by UNESCO in August 1964 to give their views on the biological aspects of the race question, adopted a set of proposals on this subject. They stated inter alia that all men living today belong to a single species and are derived from a common stock (Art.I); that pure races in the sense of genetically homogeneous populations do not exist in the human species (Art,III); and that there is no national, religious, geographic, linguistic or cultural group which constitutes a race ipso facto (Art,XII). The proposals concluded:

"The biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way

pretend to have any scientific foundation.

". . .

"Popular notions of 'race', however, have frequently disregarded the

scientific evidence. Prejudice and discrimination on the ground of race, colour or ethnic origin occur in a number of societies, where physical appearance - notably skin colour - and ethnic origin are accorded prime importance." (at p538)

80. A need to identify the biological element of the concept followed the enactment of a Race Relations Act in New Zealand and in England. In New Zealand the question arose in King-Ansell v. Police, (1979) 2 N.Z.L.R.531. Richardson J. said, at p.542:

". . . all four expressions 'race', 'colour', 'national origins' and 'ethnic origins' are concerned with antecedent rather than acquired characteristics.

"It does not follow that the identifying characteristics must be genetically determined at birth. The ultimate genetic ancestry of any New Zealander is not susceptible to legal proof. Race is clearly used in its popular meaning." (at p538)

81. His Honour discounted the importance of, if not the necessity for, scientific proof of the biological element:

"The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins." (at p538)

82. In England in Mandla v. Dowell Lee, (1983) 1 Q.B.1, Kerr L.J. in reference to the words "race or ethnic or national origins" said, at p.19:

". . . they clearly refer to human characteristics with which a person is born and which he or she cannot change, any more than the leopard can change his spots." (at p538)

83. Membership of a race imports a biological history or origin which is common to other members of the race, but Richardson J. is surely right in denying the possibility of proving ultimate genetic ancestry. However, in my respectful opinion, I do not think his Honour was propounding his "real test" of common regard as being conclusive or exhaustive. Actual proof of descent from ancestors who were acknowledged members of the race or actual proof of descent from ancestors none of whom were members of the race is admissible to prove or to contradict, as the case may be, an assertion of membership of the race. Though the biological element is, as Kerr L.J. pointed out, an essential element of membership of a race, it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race. As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by par. (xxvi). The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the

people of any race in any of these aspects of their group life falls within the power. (at p538)

84. A law which, on its face, does not discriminate in favour of the people of a race, may nevertheless be valid if it discriminates in favour of those people by its operation upon the subject matter to which it relates. That involves no departure from the ordinary processes of constitutional interpretation. The characterization of a law requires that the operation of the law be ascertained by reference to its terms and their application to the circumstances in which the law operates. If the power under par. (xxvi) were restricted to a discriminatory conferring of legal rights or a discriminatory imposition of legal obligations on the people of a race, laws for the general protection of historical memorabilia, of religious or spiritual shrines or of cultural practices which are of particular significance to the people of particular races would not be valid. The things which are a focus of the life of the race would lie outside the boundaries of a power which is expressed to authorize special laws for its people. (at p539)

85. I would not construe par. (xxvi) as requiring the law to be "special" in its terms; it suffices that it is special in its operation. Section 8 ensures that s. 11 is special in its operation. It was argued that such a construction was impliedly rejected in Koowarta, for the proscribing of racial discrimination must surely have been a matter of special significance for the people of the Aboriginal race. If racial discrimination were peculiarly a practice affecting Aborigines, there would be much force in the argument. But victims of racial discrimination may sadly be found in many races: the people of many races may say with Shylock (The Merchant of Venice, Act III, Scene I):

"If you prick us, do we not bleed? if you tickle us, do we not laugh? if you poison us, do we not die? and if you wrong us, shall we not revenge?" (at p539)

86. Section 11 of the Act operates only in protection or conservation of a site which is of particular significance to the people of the Aboriginal race (s.8(2)(b) and which is declared to be a site to which s.11 applies (s.8(3)). The support for these sections must be found in their operation in protection of a site of "particular significance". The phrase "particular significance" in s. 8 cannot be precisely defined. All that can be said is that the site must be of a significance which is neither minimal nor ephemeral, and that the significance of the site may be found by the Aboriginal people in their history, in their religion or spiritual beliefs, or in their culture. A group of whatever size who, having a common Aboriginal biological history, find the site to be of that significance are the relevant people of the Aboriginal race for whom the law is made. To confine the legislative power conferred by par. (xxvi) so as to preclude it from dealing with situations that are of particular significance to the people of a given race merely because the statute on its face does not reveal its discriminatory operation would be to deny the power the high purpose which the Australian people intended when the people of the Aboriginal race were brought within the scope of its beneficial exercise. (at p539)

87. Of course, an issue remains as to whether the sites proclaimed under s.8 are in truth sites of particular significance to the people of the Aboriginal race. That is a question of fact that can be resolved by evidence if need be. It is not appropriate to specify, by reference to the statement of contentions by the parties, what evidence will prove to be admissible. (at p539)

88. A declaration of sites to which s. 11 applies was made on 26th May, 1983. Section 11 was proclaimed to apply to three sites: Kutikina Cave, Deena Reena Cave and the open archaeological site. The prohibitions contained in s.11 correspond broadly with the prohibitions contained in ss. 9(1) and 10(2) except that they are restricted in their application to specified sites. Section 11(1)(j) permits the prescribing of an act in relation to a particular site to which the section applies, following the pattern of ss. 9(1)(h) and 10(2)(m). On 26th May, 1983, a regulation was made specifying for the purposes of s. 11(1)(j) Kutikina Cave, Deena Reena Cave and the open archaeological site. The regulation prohibited the doing of those acts that were prohibited by the regulations under ss.9(1)(h) and 10(2)(m), namely, the carrying out of works in the course of, preparatory to, or associated with the construction of the dam. The first two of these sites lie within the future HEC land and are presently part of the Wild Rivers Park. I assume that the third site lies within the same area. (at p539)

89. The protection of sites of particular significance to the Aboriginal people is a purpose which attracts the support of s. 51(xxvi). But it is a question whether the prohibitions imposed by s. 11 are conducive to the fulfilment of that purpose.

Difference considerations apply under s. 11 to those which apply under s. 9, for s. 11 applies only to specific sites that have the required significance for the Aboriginal people. The protection of particular sites from any physical interference might reasonably be regarded as conducive to maintaining their significance for the Aboriginal people, and ss.8 and 11 are therefore valid.

Acquisition on just terms (at p539)

90. Section 51(xxxi) of the Constitution has a dual function. It grants power to make laws with respect to the acquisition of property and it limits the exercise of such a power by requiring that a law with respect to the acquisition of property provide just terms. Neither the grant of the power nor the limitation suggests that the concept of "property" be narrowly confined. The concept comprehends "innominate and anomalous interests" in addition to those estates in land or those interests in land or in a chattel or in a chose in action which are recognized at law or in equity; per Dixon J. in Bank of N.S.W. v. The Commonwealth, at p. 349. The free enjoyment of proprietary rights so various in nature may be affected by a great variety of laws, but par. (xxxi) extends only to laws for the acquisition of proprietary rights. The terms of par. (xxxi), from which its purpose is to be gathered, are not directed to the possession or enjoyment of proprietary rights by a State or by a person but to the acquisition of those rights from the State or person in whom they are vested. Dixon J. must have spoken elliptically when, in the Bank of N.S.W. v. The Commonwealth, at p. 349, he described one of the purposes of par. (xxxi) to be the protection of the individual or the State "against governmental interferences with his proprietary rights without just recompense" (emphasis added). In Attorney-General (Cth) v. Schmidt [1961] HCA 21; (1961), 105 C.L.R. 361, his Honour attributed a different operation to s. 51(xxxi), saying, at p. 372:

"The scope of s.51(xxxi) is limited. Prima facie it is pointed at the acquisition of property by the Commonwealth for use by it in the execution of the functions, administrative and the like, arising under its laws. It is perhaps not easy to express in a paraphrase the extent of the operation of s. 51(xxxi) and thus to define its full scope and application but it is at least clear that before the restriction involved in the words 'on just terms' applies, there must be a law with respect to the acquisition of property (of a State or person) for a purpose in respect of which the Parliament has power to make laws." (at p540)

91. Where neither the Commonwealth nor any other person acquires proprietary rights under a law of the Commonwealth, there is no acquisition upon which par. (xxxi) may fasten. And so, in Trade Practices Commission v. Tooth & Co. Ltd.(1979), [1979] HCA 47; 142 C.L.R. 397, at p.408, Gibbs J. observed that "not every compulsory divesting of property is an acquisition within s. 51(xxxi)". (at p540)

92. In the United States, where the Fifth Amendment directed that private property should not be "taken" without just compensation, the Supreme Court construed the provision as one "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (Armstrong v. United States 364 U.S.40 (1960), at p. 49 (4 Law. Ed. 2d 1554, at p. 1561)). If this Court were to construe s. 51(xxxi) so that its limitation applies to laws which regulate or restrict the use and enjoyment of proprietary rights but which do not provide for the acquisition of such rights, it would be necessary to identify a touchstone for applying the limitation to some regulatory laws and not to others. The experience of the Supreme Court of the United States was frankly stated in Penn Central Transport Co. v. New York City [1978] USSC 180; 438 U.S. 104 (1978), at p. 124 (57 Law.Ed.2d 631, at p. 648):

". . . this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (at p540)

93. In this Court, the limitation in par. (xxxi) has not been thought hitherto to apply to a regulatory law that did not effect an acquisition of property. In Tooth's Case, the distinction between a law that provides for an acquisition of

property and a law that does not was clearly drawn. Thus Mason J. said, at p. 428:

"It is one thing to say that a law which is merely regulatory and does not provide for the acquisition of title to property is not a law with respect to acquisition of property. It is quite another thing to say that a law which does provide for the compulsory acquisition of title to property and which also happens to be regulatory is not a law with respect to the acquisition of property." (at p540)

94. In the present case the Wilderness Regulations and ss. 9, 10 and 11 of the Act affect the freedom of the State of Tasmania and of the HEC to use the Wild Rivers National Park and the HEC land for the construction of the proposed dam. But that is not sufficient to attract the operation of par. (xxxi). Unless proprietary rights are acquired, par. (xxxi) is immaterial to the validity of the impugned Commonwealth measures. Though the Act conferred a power upon the Minister to consent to the doing of acts which were otherwise prohibited on or in relation to land, that power was not a proprietary right. In my opinion, the Commonwealth acquired no property from Tasmania. It follows that the question of just terms does not arise.

Section 100 of the Constitution (at p540)

95. Section 100 prohibits the Commonwealth by law or regulation from abridging the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation, but the prohibition relates only to a "law or regulation of trade or commerce". The phrase "(a) law or regulation of trade or commerce" is apt to describe a law or regulation in reference to the power that does or could support it, for it is a phrase speaking of a class of laws or regulations identified elsewhere in the Constitution. A law or regulation of trade or commerce is a law supported by s. 51(i) or by s. 51(i) and s. 98 in conjunction. That view is consistent with the opinion of the Court in Morgan v. The Commonwealth [1947] HCA 6; (1947), 74 C.L.R. 421, at pp. 454- 455, 458-459. None of the Commonwealth measures is a law or regulation of trade or commerce. It follows that s. 100 contains no impediment to the validity of the Commonwealth measures. (at p540)

96. I would therefore answer the questions reserved for consideration of the Full Court:

Actions No. C6 and No. C8 of 1983

Question 1.(a)"Yes".

Question 1.(b)"Yes".

Question 2."No".

Question 3."No".

Question 4.Does not arise.

Question 5. "Not invalid but ineffective unless the Commonwealth Minister consents".

Question 6.Not necessary to answer.

Action No. C12 of 1983

Question 1.(a)"Yes, apart from (i) Paragraphs (a) (c) (d) and (e) of s. 6(2), the validity of which it is not necessary to determine;(and) (ii) Paragraphs (a) (b) (c) (d) (e) (f) and (g) of s. 9(1),and s. 9(2)".

Question 1. (b)(i) "Section 7 is valid; (and) (ii) subss. (1) and (4) of s. 10 are valid. It is unnecessary to determine the validity of sub-ss. (2) and (3) of s. 10 independently of their application for the purposes of sub-s. (4) of s. 10".

Question 1.(c)"Yes, in their entirety".

Question 1.(d)Does not arise.

Question 2. "No, save as to Reg. 5 of the World Heritage Properties

Conservation Regulations and the two Proclamations made under s. 8(3) on 26th May, 1983, the validity of which depends on whether Kutikina Cave, Deena Reena Cave and the open archaeological site are sites of particular significance to people of the Aboriginal race".

Question 3. Does not presently arise.

Question 4. See answer to Question 2.

Question 5.(a)"Yes".

Question 6. "Not invalid but ineffective unless the Commonwealth Minister

consents".

Question 7. Not necessary to answer.

Question 8."Yes". (at p541)

DEANE J. The questions before the Court are questions of law. They concern the validity of an entanglement of provisions of Commonwealth statutes, regulations and proclamations by which the Commonwealth seeks to obstruct the proposed construction of a dam across the Gordon River below its junction with the Franklin. Those questions fall to be resolved in accordance with legal method and legal principle. The general identification and assessment of any advantages or disadvatanges which would probably or possibly result from the construction of the dam are not matters for the Court. They are matters for those who have authority, under the Constitutions and valid legislation of the Commonwealth and of Tasmania, to determine the political question whether the construction of the dam should proceed. (at p541)

2. The Commonwealth and its Attorney-General (the Commonwealth) point to four perceived heads of legislative power as the basis of the impugned statutory provisions. Section 6(2)(e) of the World Heritage Properties Conservation Act 1983 (Cth) (the Act) is said to be based on what was described as an "inherent power deriving from nationhood". Section 69 of the National Parks and Wildlife Conservation Act 1975 (Cth) (the National Parks Act) and ss. 6 (excluding sub-s. 2(e)) and 9 of the Act are said to be supported by s. 51(xxix) of the Commonwealth Constitution: the external affairs power. Sections 7 and 10 of the Act are claimed to be within legislative competence as being laws with respect to trading and foreign corporations: Constitution, s. 51(xx). Sections 8 and 11 of the Act are said to be valid under s. 51(xxvi) of the Constitution for the reason that they are special laws for the people of "the Aboriginal race". (at p541)

3. For its part, the State of Tasmania (supported by its Premier, its Attorney-General and the Hydro-Electric Commission of Tasmania) disputes that the relevant statutory powers can be sustained by reference to the designated heads of Commonwealth legislative power. It also propounds two distinct grounds of overriding invalidity. First, it asserts that, to the extent to which they would preclude construction of the dam, the provisions of the Commonwealth statutes, regulations and proclamations are invalid in that they would transgress the guarantee of s. 100 of the Constitution that the Commonwealth should not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. Secondly, it submits that, if they be otherwise valid, the provisions of the Commonwealth statutes, regulations and proclamations cannot stand for the reason that they are laws with respect to the acquisition of property from a State which fail to provide for the just terms which s. 51(xxxi) of the Constitution exacts as the price of validity. The first of those suggested grounds of overriding invalidity can be summarily disposed of. That based on s. 51(xxxi) requires to be considered in greater detail and will be discussed subsequently. (at p541)

4. In Morgan v. The Commonwealth [1947] HCA 6; (1947), 74 C.L.R. 421, at pp. 455 and 458-459, it was held by this Court, in a case involving an alleged preference against retailers in Victoria contrary to the provisions of s. 99 of the Constitution, that the references in ss. 99, 100 and 102 to any law or regulation of trade or commerce must be read as restricted to laws which could be made under the power conferred by s. 51(i) of the Constitution, that is to say, laws with respect to trade and commerce with other countries and among the States. It was submitted on behalf of Tasmania that that decision was wrong and should not be followed. I find it unnecessary to consider that submission however since it appears to me to be plain that none of the provisions involved in the present case could properly be described as a "law or regulation of trade or commerce" regardless of whether those words are given the restricted meaning attributed to them in Morgan's Case. None of the impugned provisions in the present case is, either in character or in legal operation, a law or regulation of international, inter-State or intra-State trade or commerce. (at p541)

5. The validity of the various regulations and proclamations depends upon the validity and scope of the statutory provisions in pursuance of which they were purportedly made. The convenient starting point is therefore the consideration of whether all or any of the statutory provisions are prima facie within the legislative competence of the Commonwealth Parliament. It will then be necessary to consider whether the provisions of any regulation or proclamation purportedly made in pursuance of prima facie valid statutory provisions come within the regulation or proclamation making power conferred by those statutory provisions. Finally, it will be necessary to examine: whether any general constitutional limitation on Commonwealth legislative power or the requirement of "just terms" contained in s. 51(xxxi) has the effect of invalidating any otherwise valid provision of a Commonwealth statute, regulation or proclamation; whether, if the provisions of ss. 7 and 10 of the Act are valid, the Hydro-Electric Commission of Tasmania is a "trading corporation" for the purposes of those provisions; and whether, in the light of conclusions reached in relation to the above matters, the Gordon River Hydro-Electric Power Development Act 1982 (Tas.) is valid. I shall, except to the extent necessary for discussion, endeavour to avoid repetition of background circumstances or the provisions of Acts, regulations, proclamations and international conventions which are adequately canvassed or set out in other judgments. Legislative competence

The "inherent power": Section 6(2)(e) of the Act (at p542)

6. There are many statements in judgments in this Court which support the proposition that, in the context of s. 51(xxxix) and s. 61 of the Constitution, each of the Commonwealth Parliament and Executive is vested with certain powers which are inherent in its existence or in the fact of Australian nationhood and international personality (see, generally, Attorney-General (Vict.) v. The Commonwealth (Dale's Case) [1945] HCA 30; (1945), 71 C.L.R. 237, at p. 269; Victoria v. The Commonwealth and Hayden [1975] HCA 52; (1975), 134 C.L.R. 338, at pp. 397 and 412-413). At the heart of such powers, there lies "the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities"; Black's American Constitutional Law, (2nd ed. 1910), s. 153, p. 210, quoted by Dixon J. in Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951), 83 C.L.R. 1, at p. 188 and see, to the same effect, per Latham C.J. in Burns v. Ransley [1949] HCA 45; (1949), 79 C.L.R. 101, at pp. 109- 110. The outer limits of such powers remain unexplored. They have been suggested, in the context of an appropriation of

moneys from consolidated revenue, to include, for example, exploration itself in both physical and intellectual fields; see per Barwick C.J. in Victoria v. The Commonwealth and Hayden, at p. 362). (at p542)

7. As one moves away from those matters which lie at the heart of the inherent powers of the Commonwealth, it becomes increasingly predictable that any such powers will be confined within areas in which there is no real competition with the States. There are, no doubt, areas within the plenitude of executive and legislative power shared between Commonwealth and States (see Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth [1912] HCA 94; (1912), 15 C.L.R. 182; Smith v. Oldham [1912] HCA 61; (1912), 15 C.L.R. 355) which, while not included in any express grant of legislative power, are of real interest to the Commonwealth or national government alone. Even in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority: an example is the mere appropriation and payment of money to assist what are truly national endeavours. It is unnecessary to pursue the subject here however. It suffices, for present purposes, to say that I consider that the inherent powers of the Commonwealth could not, on any proper approach, be seen as including the power to enact a law imposing drastic restrictions of the type contained in s. 9 of the Act in respect of "identified property" (as defined in s. 3(2) of the Act) in relation to which the requirements of sub-ss. 2(e) and (3) of s. 6 of the Act are satisfied. Those restrictions would involve the potential freezing of the "identified property" to which they were applied and would, to no small extent, override and displace the ordinary legislative and executive powers of the State, in which such property was situate, to authorize or regulate conduct thereon. The fact that particular physical property or artistic, intellectual, scientific or sporting achievement or endeavour is "part of the heritage distinctive of the Australian nation" may well be decisive of the question whether the protection, preservation or promotion of such property, achievement or endeavour may be made the object of an appropriation of money by the Commonwealth Parliament or of Commonwealth action to assist or complement actions of a State. In the absence of any relevant grant of power to the Commonwealth however, that fact cannot constitute the basis of some unexpressed power in the Commonwealth to arrogate to itself control of such property, achievement or endeavour or to oust or override the legislative and executive powers of the State in which such property is situate or such achievement or endeavour has been effected or is being pursued. (at p542)

8. It follows that s. 6(2)(e) of the Act cannot be sustained as an exercise of any inherent or unexpressed legislative power. The Commonwealth did not suggest that the paragraph could be justified by reference to any express grant of power. Accordingly, s. 6(2)(e) is invalid.

The external affairs power: National Parks Act, section 69; Act, sections 6 (other than subsection 2(e)) and 9 (at p542)

9. Section 51(xxix) of the Constitution provides that the Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs. The phrase "external affairs" is, like the phrase "foreign affairs" and "foreign relations", a composite one in which the noun exists in its plural form; see, for example, "affair": Oxford English Dictionary, at p. 150; "foreign affairs": Webster's Third New International Dictionary, at p. 889). The use of the singular "external affair" to refer to a particular matter or aspect of "external affairs" is not only inapposite: it is liable to convey incorrect shades of meaning which will assume added significance if one proceeds to engage in the reverse process of defining the limits of the external affairs power by reference to whether a particular matter or object can or cannot properly be described as an "external affair". It was, in my view, for that reason that, up until Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965), 113 C.L.R. 54, at p. 85, the singular "external affair" was not used in judgments in this Court in relation to the legislative power conferred by s. 51(xxix). Thus, one finds in the judgments in Rex v. Burgess; Ex parte Henry [1936] HCA 52; (1936), 55 C.L.R. 608 the consistent use of the phrases "external affairs", "external relations", "foreign affairs" and "foreign relations" - phrases "between which" Latham C.J. stated that he could "draw no distinction" (supra, at p. 643) - and of phrases such as "a matter of external affairs" or "an aspect of external affairs" when it was necessary to refer to a single subject. More importantly, "the meaning" which Latham C.J. gave to the phrase "external affairs" and the words in which Evatt and McTiernan JJ. explained what is comprehended by the phrase, in the passages set out below, lie ill indeed with the notion that the reference to "external affairs" in s.51(xxix) can properly be regarded as a reference to a number of distinct items each of which can appropiately be identified as "an

external affair". (at p543)

10. The grant of legislative power contained in s.51(xxix) is, like those contained in the other paragraphs of s.51, subject to the express general limitations of the Constitution. It is also subject to any general overriding constitutional principle that Commonwealth legislative powers cannot be exercised in a way which would involve an indirect amendment to the Constitution or which would be inconsistent with the continued existence of the States and their capacity to function or involve a discriminatory attack upon a State "in the exercise of its executive authority", see Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947), 74 C.L.R. 31, at p.83. Otherwise, it is a plenary grant of power to make laws for the peace, order and good government of the Commonwealth with respect to all that is comprehended in the phrase "external affairs". It is not to be limited by reference to notions of legislative powers being reserved to the States. Nor is it to be limited by the notion that to give the words conferring the power their full effect would imperil the balance between Commonwealth and States which was achieved by the distribution of legislative powers contained in the Constitution. To the contrary, it was pursuant to that distribution that the Commonwealth was given a full and complete grant of legislative power with respect to external affairs. As Latham C.J. commented in Burgess' Case, at pp.636- 637:

"In approaching the consideration of this matter I first emphasize the fact that the power to legislate with respect to external affairs is a power expressly conferred upon the Commonwealth Parliament by the Constitution. No question of interference with the rights of the States arises. The Commonwealth Parliament constitutionally possesses the power to legislate as it thinks proper with respect to external affairs, and, if any State legislation is inconsistent with Federal legislation on this subject, the State legislation is, to the extent of the inconsistency, invalid under s. 109 of the Constitution". (at p543)

11. It was suggested in argument that to give the power conferred by s. 51(xxix) the full scope which a "literal interpretation" would give it would not be "consonant" with what the Constitution was "intended" to achieve. I can discern little legal force in that submission. It is, in any event, unduly harsh in its assessment of the foresight of the architects of our nation. As early as the 1891 Convention, Sir Henry Parkes identified, as a basic object of the proposed Federation, the creation of "one great union government which shall act for the whole". "That government", he continued, "must, of course, be sufficiently strong to act with effect, to act successfully, and it must be sufficiently strong to carry the name and the fame of Australia with unspotted beauty and with uncrippled power throughout the world. One great end, to my mind, of a federated Australia is that it must of necessity secure for Australia a place in the family of nations, which it can never attain while it is split up into separate colonies.. .", Official Record of the Debates of the National Australasian Convention (1891), at p. 14; and see, also, the comments of Mr. Alfred Deakin made at the Imperial Conference of 1907 and quoted by Evatt and McTiernan JJ. in Burgess' Case, at p. 685. (at p543)

12. If it was not already obvious,Burgess' Case and its sequel, Rex v. Poole; Ex parte Henry (No.2) [1939] HCA 19; (1939), 61 C.L.R. 634, established that the power to make laws for the peace, order and good government of the Commonwealth pursuant to s. 51(xxix) includes the power to make laws which operate within the Commonwealth. As a matter of characterization, it may be more apparent that a law whose operation is external to Australia is a law with respect to external affairs. As a matter of legislative power however, the Parliament's power to legislate with respect to external affairs is not limited by considerations of whether the law operates within or without Australia. If the law does not conflict with constitutional prohibitions and can properly be characterized as a law with respect to external affairs, it is within power. (at p543)

13. Burgess'Case was the first occasion on which this Court was required to consider the scope of the external affairs power. Latham C.J., in his judgment, and Evatt and McTiernan JJ., in their joint judgment, explained the meaning and scope of the phrase "external affairs" in s. 51(xxix) in words which remain authoritative and with which I respectfully agree. Latham C.J. said, at p. 643:

"The establishment of a political community involves the possibility, indeed the practical certainty in the world as it exists today, of the establishment of relations, between that community and other political communities. Such relations are necessarily established by governments, which act for their people in relation to other peoples, rather than by

legislatures which make laws for them. This fact of international intercourse is unaffected by the fact that a government may think it wise or (as in the United States of America) be bound, to obtain legislative approval of certain of its international acts. The regulation of relations between Australia and other countries, including other countries within the Empire, is the substantial subject matter of external affairs. Such regulation includes negotiations which may lead to an agreement binding the Commonwealth in relation to other countries, the actual making of such an agreement as a treaty or convention or in some other form, and the carrying out of such an agreement." (emphasis added). (at p543)

14. Evatt and McTiernan JJ. said(at p. 684):

"Therefore the real question is - what is comprehended by the expression 'external affairs'. It is an expression of wide import. It is frequently used to denote the whole series of relationships which may exist between States in times of peace or war. It may also include measures designed to promote friendly relations with all or any of the nations. Its importance is not to be measured by the output of domestic legislation on the topic because this sphere of government is characterized mainly by executive or prerogative action, diplomatic or consular. As has already been noted, the phrase 'external affairs' occurs, and is used in the very widest sense, in the Imperial Conference declaration of 1926. It would seem that, in s. 51 of the Constitution, the phrase 'external affairs' was adopted in preference to 'foreign affairs,' so as to make it clear that the relationship between the Commonwealth and other parts of the British Empire, as well as the relationship between the Commonwealth and foreign countries, was to be comprehended." (at p544)

15. They concluded, at p.687:

"It would seem clear, therefore, that the legislative power of the Commonwealth over 'external affairs' certainly includes the power to execute within the Commonwealth treaties and conventions entered into with foreign powers." (at p544)

16. Latham C.J. and Evatt and McTiernan JJ. constituted a majority of the Court in Burgess' Case. The actual decision in the case is direct authority for the proposition that legislation empowering the Governor-General to make regulations for carrying out and giving effect to the Paris Convention on Aerial Navigation (1919) and to the provision of any amendment of that Convention was a valid exercise of the external affairs power. The subject of the Paris Convention possessed characteristics which made it "indisputably international in character" and the judgment of Dixon J. proceeds on that basis; see at p. 669. Starke J., at p. 658, referred to the possibility that it "may be . . . that . . . laws will be within power" only if their subject matter is, in words used by Willoughby in connection with the United States treaty-making power, "of sufficient international significance to make it a legitimate subject for international co-operation and agreement"; The Constitutional Law of the United States, (2nd ed. 1929), at p. 519. Such a qualification, if accepted, would be less restrictive than that suggested by Dixon J. It would, however, seem more appropriate as a qualification upon the power of the Executive to make treaties than upon the power of the Parliament to carry them into effect: this is particularly so in the context of Starke J.'s statement (supra) that, subject to the express and implied limitations which restrain generally the exercise of Federal powers, the legislative power conferred by s.51(xxix) "is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States" (emphasis added). Be that as it may, such a qualification was not an essential element in the reasoning of the other members of the Court. Latham C.J., at pp. 640-641, expressly referred to - and rejected - an argument that "the power to legislate with regard to external affairs is limited to matters which in se concern external relations or to matters which may properly be the subject matter of international agreement". He concluded, after reference to some of the treaties to which Australia was a party or which affected Australia, that "the possible subjects of international agreement are infinitely various" and that it is "impossible to say a priori that any subject is necessarily such that it could never properly be dealt with by international agreement". Evatt and McTiernan JJ., at p. 681, stated that the prerogative "to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise" and expressed the view that "the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt

with by the agreement". Burgess' Case is authority for the proposition that the "substantial subject matter of external affairs" includes "the carrying out", within or outside Australia, of an agreement binding the Commonwealth in relation to other countries whatever the subject matter of the agreement may be. (at p544)

17. In Koowarta v. Bjelke-Petersen [1982] HCA 27; (1982), 56 A.L.J.R. 625, a majority of the Court (Stephen, Mason, Murphy and Brennan JJ; Gibbs C.J., Aickin and Wilson JJ. dissenting) held that ss.9 and 12 of the Racial Discrimination Act 1975 (Cth) represented a valid exercise of the external affairs power. The individual judgments of the members of the Court contain an instructive canvassing of the considerations relevant to the determination of the true scope of the external affairs power. There is, however, nothing in the judgments which causes me to modify my acceptance of, and agreement with, the views expressed by a majority of the Court in Burgess' Case as to the meaning of the phrase "external affairs" and as to the scope of the legislative power which s. 51(xxix) confers. (at p544)

18. The establishment and protection of the means of conducting international relations, the negotiation, making and honouring (by observing and carrying into effect) of international agreements, and the assertion of rights and the discharge of obligations under both treaties and customary international law lie at the centre of a nation's external affairs and of the power which s. 51(xxix) confers. They do not, however, cover the whole field of "external affairs" or exhaust the subject matter of the legislative power. The full scope of the power is best left for determination on a case by case basis - "by a course of decision in which the application of general statements is illustrated by example"; per Dixon J. in Burgess' Case, at p.669. It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation. This was recognized by Evatt and McTiernan JJ. in Burgess' Case when, in the sentences following the extract, from p. 687, of their judgment set out above, they commented that:

". . . it is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions" and illustrated the comment by adding that "the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations." (at p545)

19. Circumstances could well exist in which a law which procured or ensured observance within Australia of the spirit of a treaty or compliance with an international recommendation or pursuit of an international objective would properly be characterized as a law with respect to external affairs notwithstanding the absence of any potential breach of defined international obligations or of the letter of international law. (at p545)

20. On the other hand, a law cannot properly be characterized as a law with respect to external affairs if its direct operation is upon a domestic subject matter which is not in itself within the ambit of external affairs and if it lacks the particular operation which is said to justify such characterization. Thus, a law would not properly be characterized as a law with respect to external affairs if it failed to carry into effect or to comply with the particular provisions of a treaty which it was said to execute (see Burgess' Case; Airlines of N.S.W. (No. 2) or if the treaty which the law was said to carry into effect was demonstrated to be no more than a device to attract domestic legislative power; Burgess' Case, at pp. 687, 642 and 669; Koowarta, at pp. 651 and 664. More importantly, while the question of what is the appropriate method of achieving a desired result is a matter for the Parliament and not for the Court (see Poole (No. 2), at pp. 644, 647-648 and 655; Airlines of N.S.W. (No.2), at p. 136), the law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs; cf. per Starke J., speaking of the scope of the regulation-making power, in Burgess' Case, at pp. 659-660 and in Poole (No. 2), at p. 647, and per Barwick C.J. in Airlines of N.S.W. (No. 2), at p. 86). In that regard, the purpose which a law operating upon a domestic subject matter is intended to achieve (for example, the carrying into effect of a treaty, the performance of an international obligation or the obtaining of an international benefit) is likely to assume an importance in deciding questions of characterization in relation to s. 51(xxix) which is comparable to its importance in characterization in relation to the defence power (s. 51 (vi)) since it will commonly be that purpose which, in the factual context, is called in aid to provide the character of a law with respect to external affairs. As Dixon J. observed in

Burgess' Case, at p. 674:

"It is apparent that the nature of this power necessitates a faithful pursuit of the purpose, namely, a carrying out of the external obligation, before it can support the imposition upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth. No doubt the power includes the doing of anything reasonably incidental to the execution of the purpose. But wide departure from the purpose is not permissible, because under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates." (at p545)

21. Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for ther to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it. Thus, to take an extravagant example, a law requiring that all sheep in Australia be slaughtered would not be sustainable as a law with respect to external affairs merely because Australia was a party to some international convention which required the taking of steps to safeguard against the spread of some obscure sheep disease which had been detected in sheep in a foreign country and which had not reached these shores. The absence of any reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterization as a law with respect to external affairs notwithstanding that Tweedledee might, "contrariwise", perceive logic in the proposition that the most effective way of preventing the spread of any disease among sheep would be the elimination of all sheep. The law must be seen, with "reasonable clearness", upon consideration of its operation, to be "really, and not fancifully, colourably, or ostensibly, referable" to and explicable by the purpose or object which is said to provide its character; cf., as regards the defence power, Rex v. Foster [1949] HCA 16; (1949), 79 C.L.R. 43, at p. 84; Shrimpton v. The Commonwealth [1945] HCA 4; [1945] HCA 4; (1945), 69 C.L.R. 613, at pp. 623-624; Marcus Clarke & Co. Ltd. v. The Commonwealth [1952] HCA 50; (1952), 87 C.L.R. 177, at pp. 215-216 and 256. In that regard, the "peculiar" or "drastic" nature of what the law provides or the fact that it pursues "an extreme course" is relevant to characterization; cf. Rex v. Foster, at pp. 96-97. (at p545)

22. It is not suggested, in the present case, that the Western Tasmania Wilderness National Parks (the Wilderness National Parks) and the construction of a dam across the Gordon River are, in themselves, matters of external affairs. A law with respect to them would not, without more, be even arguably within s. 51(xxix). What is claimed, on behalf of the Commonwealth, to enliven the external affairs power and to support the specific statutory provisions is Australia's participation in the Convention for the Protection of the World Cultural and Natural Heritage (the Convention) which was adopted by the General Conference of UNESCO on 16th November, 1972, combined with the entry, on the nomination of Australia, of the Wilderness National Parks upon the World Heritage List which is kept pursuant to the provisions of the Convention. The Convention, which was ratified by Australia on 22nd August, 1974, is an international treaty between seventy-four nations. It is common ground that Australia's entry into it was within Commonwealth power. (at p546)

23. International agreements are commonly "not expressed with the precision of formal domestic documents as in English law". The reasons for this include the different importance attributed to the strict text of agreements under different systems of law, the fact that such agreements are ordinarily "the result of compromise reached at the conference table" and the need to accommodate structural differences in official languages; see Wynes, Legislative, Executive and Judicial Powers in Australia, (5th ed., 1976), at p. 299. It is, therefore, not surprising that, in a Convention to which more than seventy States are parties and which was drawn up in no less than five "equally authoritative" official languages (Art. 30), the terms in which the obligations of "the States Parties" are defined do not possess the degree of precision which is desirable in a private contract under the common law. That absence of precision does not, however, mean any absence of international obligation. In that regard, it would be contrary to both the theory and practice of international law to adopt the approach which was advocated by Tasmania and deny the existence of international obligations unless they be defined with the degree of precision necessary to establish a legally enforceable agreement under the common law. To adopt a phrase that has been the subject of some discussion in this Court, Australia would, in truth, be an "international cripple" if it needed to explain to countries with different systems of law and completely different domestic rules governing the enforceability of agreements that the ability of its national

Government to ensure performance of "obligations" under an international convention would depend upon whether those obligations were or were not held by an Australian court to be merely "illusory" within the principles explained in the case of Placer Development Ltd. v. The Commonwealth [1969] HCA 29; (1969), 121 C.L.R. 353 to which the Court was referred. (at p546)

24. However loosely such obligations may be defined, it is apparent that Australia, by depositing its instrument of ratification, bound itself to observe the terms of the Convention and assumed real and substantive obligations under them. Apart from the obligation to pay contributions (Art.16), the most clearly defined obligations assumed by Australia under the Convention are those relating to properties, such as the Wilderness National Parks, which have been included, on Australia's nomination, in the World Heritage List. Such properties have been specifically identified as properties in respect of which obligations undertaken by parties to the Convention are applicable (see Arts. 6(1) and (2), 11 and 13). A main purpose of the provisions relating to establishing and keeping the World Heritage List with its requirement that a property be not entered without the agreement of the State in whose territory it is situated is to identify property which is indisputably subjected to the terms of the Convention. Those obligations include the primary "duty of ensuring", among other things, the protection, conservation and presentation of the relevant property (Art. 4) and an express undertaking to "endeavour, in so far as possible, and as appropriate for each country", to "take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation" thereof (Art.5(d)). The burden of international obligation in respect of properties entered upon the World Heritage List is, at least to some extent, counterbalanced by the express recognition, on the part of other States Parties, that those properties constitute a World Heritage "for whose protection it is the duty of the international community as a whole to cooperate" and by an express undertaking by such other States Parties, in accordance with the provisions of the Convention, to give their help in the identification, protection, conservation and preservation of such properties (Art.6). For its part, the World Heritage Committee is required to receive and study requests for international assistance formulated by States Parties with respect to such properties (Art.13). Such assistance may take the form of expert advice, labour, supply of equipment, interest-free loans and, in exceptional circumstances, non-repayable subsidies (Art.22). Unless one is to take the view that over seventy nations have engaged in the solemn and cynical farce of using words such as "obligation" and "duty" where neither was intended or undertaken, the provisions of the Convention impose real and identifiable obligations and provide for the availability of real benefits at least in respect of those properties which have, in accordance with the procedure established by the Convention, been indisputably made the subject of those obligations and identified as qualified for those benefits by being entered, upon the nomination of the States in which they are situated, on the World Heritage List. Those obligations have been undertaken by Australia in relation to, amongst other "properties", the Wilderness National Parks. (at p546)

25. Article 34 of the Convention makes special provision in respect of States Parties to the Convention which have a federal or non-unitary constitutional system. It provides that, with regard to the provisions of the Convention whose implementation comes under the legal jurisdiction of the federal or central legislative power, "the obligations of the federal or central government shall be the same as for those States Parties which are not federal States" and that, with regard to those provisions whose implementation "comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons", "the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption". It was submitted on behalf of Tasmania that the effect of the provisions of Art. 34 is to absolve the Commonwealth of the obligation to carry the Convention into effect in so far as the protection or conservation of properties situated within a State is concerned. In my view, there is a plain answer to that submission. Article 34 acts on the distribution of powers under the Constitution. As I have indicated, I consider that, under that distribution of powers, the carrying into effect of the Convention is within the paramount legal jurisdiction of the Commonwealth Parliament by virtue of the express grant of legislative power contained in s. 51(xxix). It follows that, far from absolving the Commonwealth of the obligation to implement the provisions of the Convention, Article 34 underlines, in express terms, the "obligations" of the Commonwealth in that regard. I would add that, even if I had been persuaded that the Commonwealth could avoid the obligation to carry the Convention into effect by relying upon the provisions of Art. 34, I would have been of the view that the decision whether or not reliance should, in fact, be placed on the provisions of that Article would be a matter for decision by the Commonwealth in the conduct of Australia's external affairs. (at p547)

26. It follows that, subject to any general constitutional restrictions, s. 51(xxix) of the Constitution confers upon the Commonwealth the legislative power necessary for carrying the Convention into effect including the power to make

laws for procuring the performance within Australia of all or any of the obligations assumed by Australia under it. (at p547)

27. Section 69(1) of the National Parks Act provides that the "Governor-General may make regulations for and in relation to giving effect to an agreement specified in the Schedule". The Convention is one of five international agreements listed in the Schedule. It was argued on behalf of Tasmania that, in its context in the National Parks Act, s. 69(1) should be construed as applying only to authorize the making of regulations in relation to parks or reserves established under Pt. II of that Act. The clear words of s. 69(1), the presence of the regulation-making power contained in s. 71 and consideration of the nature and content of the agreements listed in the Schedule combine to make clear that that submission cannot be accepted. Inappropriate though the setting provided by the National Parks Act may be, s. 69(1) must, in my view, be construed as including a general grant to the Governor-General of power to make regulations for and in relation to giving effect to the Convention. While such a general delegation to the Executive of the legislative power to give effect to the Convention may be thought undesirable, there is strong authority to support the view that it is not, for that reason, beyond power (Roche v. Kronheimer [1921] HCA 25; (1921), 29 C.L.R. 329; Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan [1931] HCA 34; (1931), 46 C.L.R. 73; Burgess' Case, at p. 657) and no submission was made on behalf of Tasmania that s. 69(1) was invalid on the ground that it constituted an excessive delegation of legislative power. (at p547)

28. The scope of the regulation-making power which s. 69(1) confers will be considered in greater detail subsequently when consideration is given to the validity of the World Heritage (Western Tasmania Wilderness) Regulations purportedly made under the subsection. For immediate purposes, it suffices to say that s. 69(1) would only authorize the making of regulations which were capable of being reasonably considered to be appropriate and adapted to giving effect to the Convention (Poole (No. 2), at pp. 647 and 654-655). That being so, the provisions of s. 69(1) are, in so far as they authorize the making of regulations for and in relation to giving effect to the Convention, a law with respect to external affairs within s. 51(xxix) of the Constitution. (at p547)

29. Section 3(2) of the Act provides that a reference to "identified property" shall be read as a reference either to property, forming part of the cultural or natural heritage (as defined in the Convention), which the Commonwealth has submitted to the World Heritage Committee as suitable for inclusion in the World Heritage List or which has been declared by the regulations to form part of the cultural or natural heritage or to any part of such property. Paragraphs (a), (b), (c) and (d) of s. 6(2) contain a number of sets of circumstances which, either alone or in any combination, will result in "identified property" situated within a State being property in relation to which a proclamation can be made under s. 6(3). Some, and possibly all, of those sets of circumstances are such as would give rise to a power in the Commonwealth Parliament to legislate, under s. 51(xxix) of the Constitution, to protect and conserve "identified property" in respect of which the specified circumstances exist. At least one of the sets of circumstances which would give rise to such a power exists in respect of both the whole and any part of the Wilderness National Parks, namely, that contained in s. 6(2)(b): "identified property", within a State, which is property of which the protection or conservation by Australia is a matter of international obligation under the terms of the Convention. It is unnecessary to decide whether all of the other sets of circumstances contained in s. 6(2)(a), (b), (c) and (d) would give rise to a corresponding legislative power since the subsection could be read down, pursuant to the provisions of s. 15A of the Acts Interpretation Act 1901 (Cth), to exclude any of them which would not. (at p547)

30. Two points should be made about s. 6(2). The first is that the range of possible property which might satisfy one or other of the specified sets of circumstances is all but unlimited. It might, for example, include a monument, a sculpture, a painting, an inscription, a building, a geological or physiographical formation, a particular site or a defined area of land (Convention, Arts. 1 and 2). It might constitute cultural heritage or natural heritage or, conceivably, both. It might be small in size or, as in the case of the Wilderness National Parks, be measured in hundreds of thousands of hectares. It might be owned by the Crown in right of a State or by a private individual. The range of the possible nature and source of damage or likely damage and the range of the appropriate means for combating such damage or likely damage to such property are as vast as is the range of possible property. The second point is that the Act does not entitle the Commonwealth to assume control of identified property merely because of the existence of any one or more of the sets of circumstances specified in s. 6(2) in relation to it. A list of the properties which would, at least arguably, qualify for inclusion in Australia's natural and cultural heritage would plainly be a formidable one and would include some very large areas of land. Already, Lord Howe Island and the Barrier Reef are included, with the Wilderness National Parks,

in the World Heritage List. To take substantial control of all properties which might satisfy the provisions of s. 6(2) regardless of the existence or nature of likely damage would lack any reasonable proportionality to the purpose of discharging the obligation or attaining the objective of protection and conservation of such properties. (at p548)

31. Section 6(3) of the Act provides that where the Governor-General is satisfied that any property in respect of which a Proclamation may be made under the subsection is being or is likely to be damaged or destroyed he may, by Proclamation, declare that property to be property to which s. 9 applies. Paragraphs (a) to (g) (inclusive) of s. 9(1) prohibit a very wide range of acts ranging from carrying out excavation work or using explosives to damaging a tree or constructing a vehicular track. In combination, they would effectively prevent any real development or improvement of land to which they applied. Section 13(1) of the Act provides that, in determining whether to give a consent pursuant to s. 9, the Minister shall have regard "only" to the protection, conservation and presentation, within the meaning of the Convention, of the property. It would seem to follow that consent to the doing of any of the specified acts can only be obtained if the doing of them would be positively conducive to the "protection, conservation and presentation" of the relevant property. (at p548)

32. The overall effect of s. 3(2), s. 6(2) and (3), s. 9(1) and s. 13(1) is that all of the prohibitions contained in paragraphs (a) to (g) (inclusive) of s. 9(1) are automatically imposed in respect of any property which is proclaimed by the Governor-General pursuant to s. 6(3) regardless of their appropriateness for the purpose of protecting or conserving the property and regardless of whether any relationship at all exists between all or any of the prohibited acts and the nature and source of likely damage to the property. In these circumstances, there is a lack of any reasonable proportionality between the provisions of s. 9(1)(a) to (g) and the purpose of protecting and conserving the relevant property. Those paragraphs are not capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Since it is the purpose of protecting and conserving the property and thereby complying with the obligations under the Convention (or achieving one of the other international objectives referred to in s. 6(2)(a), (b), (c) and (d) that is said to warrant characterization as a law with respect to external affairs, it follows that, in that absence of the necessary relationship with that purpose, paragraphs (a) to (g) (inclusive) of s. 9(1) of the Act cannot be sustained by s. 51(xxix). They are invalid. (at p548)

33. Section 9(1)(h) and s. 9(2) are in a different category. Paragraph (h) of s. 9(1) prohibits the doing, without the consent of the Minister, of an act which is prescribed for the purposes of the paragraph in relation to particular property to which s. 9 applies. The power to prescribe such acts is vested in the Governor-General by s. 21. It is not an arbitrary power and must be construed in its context. It is exercisable only in respect of property which has been prescribed by the Governor-General pursuant to s. 6(3) upon his being satisfied that the property is being or is likely to be damaged or destroyed. In that context and in the context of s. 6(2), the power to prescribe an act for the purposes of paragraph (h) is limited by the purpose for which it exists, namely, the purpose of preventing or avoiding damage or further damage to or destruction of the particular property, and is exercisable only in relation to an act which could reasonably be considered to be a possible cause of, or a contributing factor to, such damage or further damage or destruction (see Re Toohey; Ex parte Northern Land Council [1981] HCA 74; (1981), 56 A.L.J.R. 164, at pp. 173, 177, 183, 201 and 208-209). Section 9(2) provides that, except with the consent in writing of the Minister, it is unlawful for a person to do any act, not being an act the doing of which is unlawful by virtue of sub-s. (1), that damages or destroys any property to which the section applies. (at p548)

34. Section 9(1)(h) and s. 9(2) are, by reason of the provisions of s. 15A of the Acts Interpretation Act 1901, severable from the invalid provisions of paragraphs (a) to (g) (inclusive) of s. 9(1). Both s. 9(2) and s. 9(1)(h) are capable of being considered as appropriate and adapted to the purpose of discharging the international obligation under the Convention to protect or conserve the relevant property. That being so and subject to any general constitutional limitations, including whether "just terms" were required or provided, they are within the legislative competence of the Parliament pursuant to s. 51(xxix) of the Constitution. (at p548)

35. It was submitted, by Tasmania, that the relevant provisions of the Act are not within s. 51(xxix) because, to the extent that they represent implementation of the Convention, that implementation is partial only. It should be apparent from what has been said that I do not accept the proposition that a law under s. 51(xxix) for the carrying into effect of a treaty or for the discharge of treaty obligations must, as a condition of validity, carry into effect the whole treaty or completely discharge all the obligations. It is competent for the Parliament, in a law under s. 51(xxix), partly to carry a

treaty into effect or partly to discharge treaty obligations leaving it to the States or to other Commonwealth legislative or executive action to carry into effect or discharge the outstanding provisions or obligations or leaving the outstanding provisions or obligations unimplemented or unperformed. On the other hand, if the relevant law "partially" implements the treaty in the sense that it contains provisions which are consistent with the terms of the treaty and also contains significant provisions which are inconsistent with those terms, it would be extremely unlikely that the law could properly be characterized as a law with respect to external affairs on the basis that it was capable of being reasonably considered to be appropriate and adapted to giving effect to the treaty. That was the position in Burgess' Case where, as Latham C.J. pointed out (at p. 646), some of the regulations were "in conflict with fundamental principles of the convention". The relevant provisions of the Act and s. 69 of the National Parks Act do not fall within that category in that they do not conflict with the provisions of, or obligations assumed by Australia under, the Convention.

The corporations power: Act, sections 7 and 10 (at p549)

36. The grant of power contained in s. 51(xx) of the Constitution is to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. It is now well settled that that grant is a plenary grant which, like the other grants contained in s. 51, must be given a liberal construction. In particular, it must not be read down by reference to any presumption that the various grants of power contained in s. 51 should be construed as being mutually exclusive; see the cases cited by Professor Zines, The High Court and the Constitution (1981), at pp. 18-21, and, in particular, Strickland v. Rocla Concrete Pipes Ltd. (1971), 124 C.L.R. 468, at p. 510, per Menzies J., rejecting the assumed dichotomy between the grant of legislative power upon which Higgins J. "based" his decision in Huddart, Parker & Co. Pty. Ltd. v. Moorehead [1909] HCA 36; (1909), 8 C.L.R. 330. (at p549)

37. It was submitted, on behalf of Tasmania, that the power to legislate with respect to trading corporations should be construed as being restricted to a power to make laws with respect to the trading activities of trading corporations. On that approach, a statute, which was entitled "An Act with respect to Trading Corporations formed within the limits of the Commonwealth" and which regulated and controlled, in separate sections, the general activities of trading corporations, would be a law with respect to trading corporations in its application to their trading activities and would not be a law with respect to trading corporations in its application to their nontrading activities. In other words, to the extent that a law prohibited trading corporations from engaging in activities which were appropriate to their character, it would be a law with respect to trading corporations but to the extent to which it prohibited trading corporations from engaging in activities which were, or might be, inappropriate to that character, it would not be a law with respect to trading corporations. I find it more than difficult to accept that such a construction of s. 51(xx) accords with the well-established principle that constitutional grants of legislative power should be construed expansively rather than pedantically. (at p549)

38. Examination of the words and structure of s. 51(xx) discloses no reason in language or in principle of legal interpretation why the power to legislate with respect to trading corporations should be given such a restricted meaning. The paragraph contains no mention at all of trading activities. Three specified types of corporation are made the subject of the one grant of legislative power. It could not be seriously suggested that the power to legislate with respect to foreign corporations should be confined to a power to legislate with respect to their foreign activities. Consistency would support the approach that the power to legislate with respect to trading or financial corporations formed within the limits of the Commonwealth should not be artificially confined to the trading or the financial activities of such corporations. (at p549)

39. Nor, in my view, is there any reason in logic or history for so confining the grant of legislative power contained in s. 51(xx). No one with knowledge of the political and other non-trading activities of trading corporations in and since the days of the East India Company would suggest that the non-trading activities of trading corporations are any less appropriate to be placed under the legislative control of a national government than are their trading activities. Nor is it realistic to treat the trading activities of a trading corporation as compartmentalized and isolated from its non-trading activities. The trading activities and the non-trading activities are likely to be conducted in the context of overall corporate strategy and financial planning and restraints. Their viability and financial stability are likely to be

interdependent. Power and success on one side are likely to contribute to power and success on the other. Failure on one side is likely to involve failure of the whole. In my view, the legislative power conferred by s. 51(xx) is not restricted to laws with respect to trading corporations in relation to their trading activities. It is a general power to make laws with respect to trading corporations. (at p549)

40. As has been said, it is settled law that there is no general dichotomy between the grants of legislative power contained in the various paragraphs of s. 51. It is also settled that a single law can possess more than one character. It suffices for constitutional validity if any one or more of those characters is within a head of Commonwealth power. In determining validity, the task is not to single out the paramount character. It suffices that the law "fairly answers the description of a law 'with respect to' one given subject matter appearing in s. 51" regardless of whether it is, at the same time, more obviously or equally a law with respect to other subject matter; see Actors & Announcers Equity v. Fontana Films Pty. Ltd. [1982] HCA 23; (1982), 56 A.L.J.R. 366, at p. 375. (at p550)

41. A law which applied only to cobblers (identified by reference to their trade) and prohibited them from engaging in certain activities away from their lasts could not properly be characterized as a law with respect to the boot-making activities of cobblers; it could, however, properly be characterized both as a law with respect to cobblers and as a law with respect to the prohibited activities. Likewise, a law which applies only to trading corporations (identified by reference to their character as such) and prohibits them from engaging in certain non-trading activities cannot properly be characterized as a law with respect to the trading activities of trading corporations; it can, however, properly be characterized both as a law with respect to trading corporations and as a law with respect to the prohibited activities. Indeed, the position is plainer in the case of the trading corporation than in the case of the cobbler for the reason that one can readily isolate the non-trading activities of the cobbler from his boot-making work in a manner in which it is quite impossible to isolate the non-trading activities of a trading corporation from its trading activities. (at p550)

42. Section 10(2) of the Act is directed only to foreign corporations, corporations incorporated in a Territory and trading corporations incorporated within the limits of the Commonwealth (other than in a Territory). In the context of ss. 3(2) and 7, it provides that those three specifically identified types of corporation shall not, without the Minister's consent, perform certain acts on property which forms, or is declared by regulation to form, part of Australia's cultural or natural heritage and which the Governor-General, being satisfied that the property is being or is likely to be damaged or destroyed, has declared to be property to which s. 10 applies. The acts prohibited are either acts which could have some physical effect on the property or acts which are particulary identified, by proclamation, in respect of a specific property. (at p550)

43. In so far as trading corporations are concerned, the effect of s. 10(2) is to impose a prohibition by reference to their character as trading corporations. As I followed the argument, it was not disputed that, if the prohibited acts were limited to acts performed by a trading corporation in and for the purposes of its trading activities, the law prohibiting trading corporations from engaging in those activities could properly be characterized, for the purposes of s. 51(xx), as a law with respect to trading corporations. In effect, the submission against the validity of s. 10(2) was to the effect that a law which prohibits trading corporations, by express reference to their character as such, from engaging in certain activities will or will not be a law with respect to trading corporations according to whether or not the prohibited activities are trading or non-trading activities. For reasons which I have already given, I do not accept that submission. (at p550)

44. The provisions of s. 10(1) and (2), in their application to trading corporations, are properly to be characterized both as a law with respect to activity on endangered property associated with Australia's cultural or natural heritage and as a law with respect to trading corporations. Subject to any general constitutional limitation, including any question of "just terms", they are within the legislative power conferred by s. 51(xx) of the Constitution. A similar conclusion applies in relation to s. 10(3) of the Act which provides that, except with the consent of the Minister, it is unlawful for a trading corporation (or a foreign or Territory corporation) to do any other act that damages or destroys identified property which is the subject of a proclamation under s. 7. It follows from the foregoing that s. 10(4) is also a valid law under s. 51(xx). (at p550)

45. I would mention that nothing in the foregoing should be construed as suggesting that a law comes within the power conferred by s. 51(xx) "simply because" it happens to apply to corporations of the kind described in that paragraph; see

Actors & Announcers Equity v. Fontana Films Pty. Ltd. at p. 370. Strickland v. Rocla Concrete Pipes Ltd. makes clear that that is not so. The provisions of s. 10(2) and (3) do not "simply happen" to apply to foreign, trading and Territory corporations. They are laws which apply to foreign, trading and Territory corporations by reference to their character as such and whose operation is restricted to the regulation and control of activities of such corporations. I would also mention that it does not necessarily follow from the foregoing that every law which commences "a trading corporation shall" or "a trading corporation shall not" is a law with respect to trading corporations for the purposes of s. 51(xx). That is a question which does not arise in the present case and it is unnecessary to express any view in relation to it.

Laws with respect to the people of any race: Act, sections 8 and 11 (at p550)

46. The Constitution, as originally adopted, contained but two references to Australian Aboriginals. Both were dismissive. Section 51(xxvi), in its original form, empowered the Parliament to make laws with respect to "(t)he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws". Section 127 was an enigmatic directive that "(i)n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted". By alteration of the Constitution effected pursuant to a referendum held on 27th May, 1967, the words "other than the aboriginal race in any State" were deleted from s. 51(xxvi) and s. 127 was deleted in its entirety. Since then, the Constitution has contained no express reference at all to the people of the Aboriginal race. (at p551)

47. As Professor Sawer comments ("The Australian Constitution and the Australian Aborigine", (1966-67), 2 F.L.Rev. 17), the architects of the Constitution paid no attention at all to the position of the Aboriginal people of Australia. Their express exclusion from the provisions of s. 51(xxvi) could not be attacked as adversely discriminatory since that grant of power was primarily seen as a power to permit adverse discrimination against the people of a particular race rather than as a power to pass a law for the benefit or protection of such people; see Professor Harrison Moore, The Constitution of the Commonwealth of Australia, (2nd ed. 1910), at p. 464. As it became increasingly clear that Australia, as a nation, must be diminished until acceptable laws be enacted to mitigate the effects of past barbarism, the exclusion of the people of the Aboriginal race from the provisions of s. 51(xxvi) came to be seen as a fetter upon the legislative competence of the Commonwealth Parliament to pass necessary special laws for their benefit. The referendum of 27th May, 1967, deleting the reference in s. 51(xxvi) and deleting s. 127 altogether, was carried by an overwhelming majority of the voters in every State of the Commonwealth. The power conferred by s. 51(xxvi) remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967, that power has included a power to make laws benefiting the people of the Aboriginal race. (at p551)

48. Section 8(3) of the Act provides that where the Governor-General is satisfied that an "Aboriginal site" is being or is likely to be damaged or destroyed or that any artefacts or relics situated on an "Aboriginal site" are being or are likely to be damaged or destroyed, he may, by Proclamation, declare that site to be a site to which s. 11 applies. Section 8(2) provides that a reference in the section to an "Aboriginal site" is a reference to a site that is, or is situated within, "identified property" and "the protection or conservation of which is, whether by reason of the presence on the site of artefacts or relics or otherwise, of particular significance to the people of the Aboriginal race". It follows that the power of the Governor-General to declare a site to be a site to which s. 11 applies is restricted to a site which is, or has been declared to be, part of Australia's cultural or natural heritage and which is of particular significance to the people of the Aboriginal race. (at p551)

49. Section 11(1) of the Act provides that, except with the consent in writing of the Minister, it is unlawful for a person to do a variety of things on a site declared to be a site to which the section applies. The prohibited acts consist of acts of a kind which are likely to have some physical effect upon a site or acts prescribed for the purpose of s. 11 in relation to a particular site. Section 11(2) prohibits the doing, without the consent of the Minister, of any other act which damages or destroys, or is likely to result in damage to or the destruction of, a declared site. Section 11(3) provides that, except with the consent in writing of the Minister, it is unlawful for a person to do any act preparatory to the doing of an act that is unlawful by virtue of sub-s. (2). (at p551)

50. It is unnecessary, for the purposes of the present case, to consider the meaning to be given to the phrase "people of any race" in s. 51(xxvi). Plainly, the words have a wide and non-technical meaning; see, for example, King-Ansell v. Police, (1979) 2 N.Z.L.R. 531; Mandla v. Dowell Lee, [1982] UKHL 7; (1983) 2 W.L.R. 620. The phrase is, in my view, apposite to refer to all Australian Aboriginals collectively. Any doubt, which might otherwise exist in that regard, is removed by reference to the wording of par. (xxvi) in its original form. The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aboriginals. By "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal. While it is unnecessary to express a concluded view on the matter, the reference in s. 8(2)(b) of the Act would appear to be a reference to the Australian Aboriginal people generally rather than a reference to any particular racial sub-group. (at p551)

51. The validity of a declaration under s. 8(3) is dependent upon the existence of a number of objective facts. The site must be, or be situated within, "identified property". The protection or conservation of that site must be of particular significance to the people of the Aboriginal race. There is a dispute between the Commonwealth and Tasmania as to whether those conditions are satisfied in the present case which may need to be subsequently resolved if it be held that ss. 8 and 11 are valid laws of the Parliament. For present purposes, it is to be assumed that the conditions are in fact satisfied. The immediate question is whether the provisions of ss. 8 and 11 can properly be characterized as laws with respect to the people of any race for whom it is deemed necessary to make special laws. (at p551)

52. Mr. Gleeson Q.C., who argued this aspect of the case on behalf of Tasmania, submitted that the provisions of ss. 8 and 11 were not within the legislative power conferred by s. 51(xxvi) for the reason that they were not a "special law" for the people of the Aboriginal race and for the additional reason that their character was not that of a law with respect to the people of that race. By definition, it was said, an "Aboriginal site" must be "identified property" and, therefore, it must be of outstanding universal significance: a law for the protection and conservation of sites if, and only if, they are of significance to the whole of mankind is the antithesis of a special law for the people of a particular race. In so far as the character of the law is concerned, it was submitted that a law which addresses no command either to Aboriginals as such or to other people in regard to their dealings with Aboriginals cannot properly be characterized as a law with respect to the people of the Aboriginal race. (at p552)

53. The relationship between the Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life. Past violations of Aboriginal culture and of Aboriginal life, both traditional and otherwise, have not obliterated the fundamental importance to the Aboriginal people of Australia of their ancient sites. To the contrary, one effect of the years since 1788 and of the emergence of Australia as a nation has been that Aboriginal sites which would once have been of particular significance only to the members of a particular tribe are now regarded, by those Australian Aboriginals who have moved, or been born, away from ancient tribal grounds, as part of a general heritage of their race. The dual requirement that a declaration can only be made in respect of a site if it is both "of outstanding universal value" and "of particular significance to the people of the Aboriginal race" means that only those Aboriginal sites which are of extraordinary significance qualify for protection and conservation under ss. 8 and 11. A law protecting such sites is, in one sense, a law for all Australians. It appears to me however, on any approach to language, that a law whose operation is to protect and preserve sites of universal value which are of particular importance to the Aboriginal people is also a special law for those people. (at p552)

54. The question remains whether the provisions of ss. 8 and 11 are within the scope of the grant of the legislative power to make laws with respect to the people of any race. In approaching that question, one should bear in mind the well-known words of Dixon C.J., McTiernan, Webb and Kitto JJ. in Grannall v. Marrickville Margarine Pty. Ltd. [1955] HCA 6; (1955), 93 C.L.R. 55, at p. 77, where, speaking of the grant of legislative power contained in s. 51(i) of the Constitution, their Honours remarked that the words "with respect to" should never be neglected in considering the extent of legislative power conferred by s. 51 for the reason that "what they require is a relevance to or connection with the subject assigned to the Commonwealth Parliament" (emphasis added). Their Honours commented that that was something "very different" from the strict "criterion of operation" test which had been employed in the exposition of s. 92 of the Constitution. They continued:

"In the next place, every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws

governing or affecting many matters that are incidental or ancillary to the subject matter." (at p552)

55. The characterization of a law for the purposes of s. 51 of the Constitution is not an unrealistic or pedantic procedure to be performed by extracting the words that constitute the heart of the legislative power from their context in a plenary grant of power and then proceeding to the abstract question of whether the appropriate description of the impugned law is a law with respect to the extracted words. It is a task to be discharged with regard to substance and with reference to the full scope of the grant of legislative power. As has been previously mentioned, it is settled that a law may exhibit a number of characters and that, provided one of the characters comes within the ambit of the grant of legislative power, the law is within power. Thus, it was recently held by this Court (Actors & Announcers Equity v. Fontana Films Pty. Ltd.) that a law which directed no command to trading corporations but which was concerned with the protection of their trading activities was a law with respect to trading corporations. Viewed as a matter of substance, a special law which protects the persons or the property or the activities of Aboriginal people is not only a law with respect to the prohibited actions against such persons, property or activities. It is also a law with respect to people of the Aboriginal race. Indeed, so much was rightly conceded in argument. In my view, a law which protects those - and only those - endangered Aboriginal sites included in the "cultural heritage" which satisfy the requirement that they are of particular significance to people of the Aboriginal race is not only a law with respect to Aboriginal sites. It is law of a character which comes within the primary scope of the grant of legislative power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws. The reference to "people of any race" includes all that goes to make up the personality and identity of the people of a race; spirit, belief, knowledge, tradition and cultural and spiritual heritage. A power to legislate "with respect to" the people of a race includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting property which is of particular significance to that spiritual and cultural heritage. Subject to any general constitutional restriction and any question of "just terms", ss. 8 and 11 of the Act are within the legislative power conferred upon the Parliament by s. 51(xxvi).

Regulations and proclamations

World Heritage (Western Tasmania Wilderness) Regulations (the Wilderness Regulations) (at p552)

56. The World Heritage (Western Tasmania Wilderness) Regulations are dated 30th March, 1983. They were made by the Governor-General in intended exercise of the regulation-making power conferred by s. 69 of the National Parks Act. They apply to areas of land containing a total of 14,125 hectares or thereabouts. This land (the HEC land) had formerly been included in one of the three parks which are proclaimed State reserves pursuant to the National Parks and Wildlife Act 1970 (Tas.) and which together comprise the Wilderness National Parks. (at p553)

57. The HEC land was excised from the relevant National Park (the Franklin-Lower Gordon Wild Rivers National Park) as from 2nd September, 1982, by Proclamation made under s. 16(1) of the National Parks and Wildlife Act 1970. By that Proclamation, it was provided that a further area of 780 hectares (the future HEC land) would be excised from that Park as from 1st July, 1990. By a Proclamation made on 7th September, 1982, under the Hydro-Electric Commission Act 1944 (Tas.), the HEC land was vested in the Hydro-Electric Commission of Tasmania (the HEC) for the purposes of that Act as from 16th September, 1982, and it was provided that the future HEC land would vest in the HEC on 2nd July, 1990. By the Gordon River Hydro-Electric Power Development Act 1982 (Tas.), the HEC is authorized to construct a hydro-electric power scheme in south-west Tasmania including the proposed dam. The HEC has, on the HEC land, commenced construction of the works involved in that power scheme and the dam. (at p553)

58. Regulation 5 of the Wilderness Regulations prohibits any person, without the consent of the Minister, doing a number of specified acts in the area to which the Regulations apply. The prohibited acts include the construction of a dam or associated works and "any act in the course of, or for the purpose of, the construction of a dam or associated

works". They also include a variety of other specific acts of a kind which would be likely to have a physical effect on the land. Finally, they include the carrying out of "any other works". (at p553)

59. As has been seen, the power conferred upon the Governor-General by s. 69(1) of the National Parks Act is, for present purposes, a power to "make regulations for and in relation to giving effect" to the Convention. It is at least as wide as the regulation-making power which was upheld in Burgess' Case (that is, "for the purpose of carrying out and giving effect to the convention"). The judgments in Burgess' Case and Poole (No. 2) make clear that such a power includes both the taking of whatever steps are involved in the mechanical execution of the terms of the Convention and the making of provisions which reflect discretionary decisions as to the means of ensuring that obligations under the Convention are honoured and that the provisions of the Convention are observed. An example of such a provision is the imposition of a penalty for non-observance of a prohibition imposed for the purpose of carrying out the Convention. (at p553)

60. In Poole (No. 2), at pp. 654-655, Evatt J. summarized the various tests which had been suggested by members of the Court in Burgess' Case for determining whether any particular regulation or series of regulations should be regarded as having been made for the purpose of carrying out or giving effect to the Aerial Navigation Convention in that case. His Honour concluded that there was "no substantial difference" between those tests. They included the requirement of "a faithful pursuit of . . . a carrying out of the external obligation" (per Dixon J.) and a requirement that the regulations must be "sufficiently stamped with the purpose of carrying out the terms of the Convention" (per Evatt and McTiernan JJ.). The Wilderness Regulations are plainly directed to protecting and conserving the land to which they relate which is part of the area which has been listed on the World Heritage List pursuant to Australia's nomination. As has been said, it is not for this Court to determine what is the appropriate method of achieving the objective under the Convention to protect and conserve that land. The Regulations will survive the above-mentioned tests if they are capable of being reasonably considered to be appropriate and adapted to the protection and the conservation of the HEC land in accordance with Australia's obligations under the Convention to protect and conserve the Wilderness National Parks. (at p553)

61. The restrictions imposed by the Wilderness Regulations on the use, without the Minister's consent, of the HEC land are extremely wide. They would prevent any real development of that land. If such restrictions had been purportedly imposed in respect of the whole of the Wilderness National Parks, I would have had little hesitation in concluding that they displayed such a lack of proportionality as to render them incapable of being reasonably considered appropriate for the discharge of Australia's obligations under the Convention. As has been seen however, they are restricted in their operation to the area of land which has already been vested in the HEC for the purpose of the construction of the dam and associated works. With some hesitation, I have come to the view that, in a situation where the HEC land is the central site of the proposed power scheme which will undoubtedly have a far-reaching physical effect, particularly in relation to the surrounding land, the restrictions imposed are capable of being reasonably considered appropriate and adapted to the protection and preservation of the HEC land and the adjoining areas of the Wilderness National Parks. (at p553)

62. I therefore conclude that, subject to the effect of any general constitutional limitations including any question of "just terms", the Wilderness Regulations are within the regulation-making power conferred by s. 69(1) of the National Parks Act.

World Heritage Properties Conservation Regulations (S.R. 1983 No. 65) and Proclamations (at p553)

63. The World Heritage Properties Conservation Regulations were made under the Act. Regulation 2 declared that the Wilderness National Parks and an area adjacent to the Franklin and Gordon Rivers which includes the dam site (the Franklin natural area) form part of the natural heritage. Regulation 3 declared that a specific area of the Franklin-Lower Gordon Wild Rivers National Park which is adjacent to the Franklin River (the Franklin cultural area), Kutikina and Deena Reena Caves and all other archaeological sites within the Franklin cultural area form part of the cultural heritage. The effect of those declarations was that the Wilderness National Parks and the relevant sites were "identified property"

pursuant to s. 3(2)(a)(ii) of the Act. By ten Proclamations made on 26th May, 1983, the Governor-General declared a number of areas and sites as property to which ss. 9, 10 or 11 of the Act applied. The Franklin-Lower Gordon Wild Rivers National Park, as it stood before the excision of the HEC land, was declared as property to which s. 9 applied. Two areas, being that part of the Franklin natural area and that part of the Franklin cultural area within the HEC land and the HEC future land, were declared as properties to which both ss. 9 and 10 applied. Kutikina Cave and Deena Reena Cave were declared as property to which ss. 9, 10 and 11 applied. An open archaeological site within the Franklin cultural area was declared as property to which ss. 9 and 11 applied. (at p554)

64. The validity of these Proclamations depends upon the validity of the provisions of the Act in intended pursuance of which they were made. If any of ss. 6, 7 or 8 of the Act is held to be invalid by reason of a failure to provide for just terms or for any other reason, the Proclamations made thereunder will fail. The validity of the declaration of sites for the purposes of s. 11 will also depend upon whether the sites in question satisfy the requirement of being of particular significance to the people of the Aboriginal race.

World Heritage Properties Conservation Regulations (Amendment)(S.R. 1983 No. 67) (at p554)

65. The World Heritage Properties Conservation Regulations (Amendment) are also dated 26th May, 1983. They were made in intended pursuance of the regulation-making power conferred by the Act (s. 21(1)(a)) and prescribe acts for the purposes of ss. 9(1)(h), 10(2)(m) and 11(1)(j) which respectively prohibit the doing, without the Minister's consent, of particular acts prescribed for the purpose of the relevant paragraph in respect of specific properties. The particular acts which were prescribed for the purposes of ss. 9(1)(h) and 10(2)(m) apply in relation to that part of the Franklin cultural area which is within the HEC land and the HEC future land, the Kutikina and Deena Reena Caves and the open archaeological site. The prescribed acts for the purposes of s. 11(1)(j) of the Act apply in relation to these two Caves and the open archaeological site. In each instance, the prescribed acts are as follows:

"(a) carrying out works in the course of constructing or continuing to construct a dam that, when constructed, will be capable of causing the inundation of that relevant property (or site) or of any part of that relevant property (or site);

(b) carrying out works preparatory to the construction of such a dam;

(c) carrying out works associated with the construction or continued

construction of such a dam." (at p554)

66. The power to prescribe acts for the purposes of ss. 9(1)(h), 10(2)(m) and 11(1)(j) must be exercised for the purpose for which it is conferred, namely, the protection and conservation of the property in respect of which prohibited acts are prescribed. Plainly, the prescription of the above acts in relation to the two Caves and the open archaeological site satisfied the requirement of being capable of being reasonably considered to be appropriate and adapted to that purpose. The same can, in my view, be said of the prescription of the acts for the purposes of ss. 9(1)(h) and 10(2)(m) in relation to the Franklin cultural area within the HEC land and the future HEC land. If, however, any of ss. 9(1)(h), 10(2)(m) or 11(1)(j) is found to be invalid, the Regulations will to that extent fail.

Constitutional restrictions and limitations

General limitations (at p554)

67. A broad submission was developed on behalf of Tasmania to the effect that the Wilderness Regulations and the relevant provisions of the Act and of the Regulations and Proclamations made under the Act "are invalid because they interfere with, inhibit, curtail or impair the legislative and executive functions of the State of Tasmania and the prerogative of the Crown in right of Tasmania in relation to the lands". Mr. Ellicott Q.C., for Tasmania, emphasized that this submission did not involve any attempt to reassemble the pieces of the "exploded" doctrine of the reserve powers of the States. The basis of the submission lies in the principle, to which reference has already been made, that the legislative powers of the Commonwealth are subject to a general limitation that they cannot be exercised in a manner which would be inconsistent with the continued existence of the States and their capacity to function or which would involve a discriminatory attack upon a State in the exercise of its executive authority; see Melbourne Corporation v. The Commonwealth. The question whether that principle should be treated as it would sometimes appear to be, as if it were embodied in the Constitution as an express overriding guarantee is a matter which it is unnecessary to pursue here. (at p554)

68. The fact that the Wilderness National Parks comprise more than 11 per cent of the land area of Tasmania provided a setting in which this submission was advanced with an effectiveness that, in my view, does not survive closer scrutiny. The declaration, in Reg. 2 of the Regulations under the Act, of the Wilderness National Parks as part of the natural heritage, which is the only provision which relates to the whole of the Wilderness National Parks, did not involve any operative interference at all with the legislative or executive powers of Tasmania in respect of that land. Nor, in my view, can the actual prohibitions and restrictions which the Act, Regulations and Proclamations impose in respect of more limited areas properly be seen as in any way inconsistent with the continued existence of Tasmania or its capacity to function. (at p554)

69. The mere fact that land is Crown land or waste land provides, under the Constitution, no immunity against the paramount legislative powers of the Commonwealth. This is underlined by the express grant of power in s. 51(xxxi) of the Constitution to make laws with respect to the acquisition of property on just terms from any State. The relevant provisions of the Act, Regulations and Proclamations do restrict the legislative and executive powers of Tasmania in that they operate to invalidate any inconsistent Tasmanian law. That is, however, the case with every valid law of the Commonwealth. To that extent, they no doubt "interfere with, inhibit, curtail or impair the legislative and executive functions of the State of Tasmania". They do not however, in any relevant sense, involve "a discriminatory attack" upon the exercise by Tasmania of its executive authority.

The acquisition of property on just terms: Constitution, section 51(xxxi) (at p555)

70. Section 51(xxxi) of the Constitution expressly deals with the power of the Parliament to make laws with respect to the "acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". It would seem (see R.L. Hamilton, "Some Aspects of the Acquisition Power of the Commonwealth", (1973) 5 F.L. Rev. 265ff) that this head of legislative power was included in the Constitution to remove any room for doubt about the power of the Parliament to make legislative provision for the acquisition of property. It has, however, assumed the status of a constitutional guarantee (see, for example, Minister of State for the Army v. Dalziel [1944] HCA 4; (1944), 68 C.L.R. 261, at pp. 276 and 284-285) not of just terms but against acquisition without just terms. It is settled that the effect of the presence of paragraph (xxxi), with its requirement of "just terms", in s. 51 is that other heads of power, including the incidental power (s.51(xxxix), do not authorize legislation for the acquisition of property; see, for example, Trade Practices Commission v. Tooth & Co. Ltd. [1979] HCA 47; (1979), 142 C.L.R. 397, at pp. 403, 407, 427. It also settled that a law can be a law with respect to the acquisition of property for any purpose in respect of which the Parliament has power to make laws notwithstanding that the acquisition is not by the Commonwealth; see McClintock v. The Commonwealth [1947] HCA 39; (1947) 75 CLR 1, at pp 23 and 36; PJ Magennis Pty. Ltd. v. The Commonwealth [1949] HCA 66; (1949), 80 C.L.R. 382, at p. 401. (at p555)

71. There are two obvious limitations to the proposition that the other paragraphs of s. 51 do not authorize a law with respect to the acquisition of property; see per Dixon C.J. in Attorney-General (Cth) v. Schmidt [1961] HCA 21; (1961), 105 C.L.R. 361, at p. 372. They are related. The first is that some laws which are plainly authorized under other heads of

power necessarily involve the acquisition of property for the purposes of the Commonwealth: the compulsory payment of tax, the forfeiture of prohibited imports and the sequestration of the property of a bankrupt are obvious examples. The second is that the proposition "does not apply except with respect to the ground actually covered by par.(xxxi)" (supra). Unless what the law effects can properly be described as an "acquisition of property", one will not enter the area which has, subject to the first limitation, been made the exclusive domain of s. 51(xxxi). (at p555)

72. In Bank of N.S.W. v. The Commonwealth [1948] HCA 7; (1948), 76 C.L.R. 1, at p.349, Dixon J. pointed out the s.51(xxxi) is "not to be confined pedantically to the taking of title. . . to some specific estate or interest in land recognized at law or in equity. . ., but. . . extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property". In the same judgment, at p.350, his Honour was at pains to emphasize that the Constitution did not permit the Parliament to achieve by indirect or devious means what s.51 did not allow to be done directly. (at p555)

73. On the other hand,laws which merely prohibit or control a particular use of, or particular acts upon, property plainly do not constitute an "acquisition" of property for purposes of the Commonwealth. Commonly, such laws are of general application and apply to property by reason of its being property of a paticular description or by reference to the nature of the use or act prohibited or controlled. While a law which restricts or controls the use or enjoyment of property by means of specific identification of the property effected comes closer to the area of acquisition of property, it is, as a matter of ordinary language, impossible to say that there has been any acquisition of property if all that is involved is restriction of what can be done upon it; see, for example, Belfast Corporation v. O.D. Cars Ltd., (1960) AC 490 The mere extinguishment or deprivation of rights in relation to property does not involve acquisition. (at p555)

74. Difficult questions can arise when one passes from the area of mere prohibition or regulation into the area where one can identify some benefit flowing to the Commonwealth or elsewhere as a result of the prohibition or regulation. Where the benefit involved represents no more than the adjustment of competing claims between citizens in a field which needs to be regulated in the common interest, such as zoning under a local government statute, it will be apparent that no question of acquisition of property for a purpose of the Commonwealth is involved. Where, however, the effect of prohibition or regulation is to confer upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s. 51(xxxi) is involved. The benefit of land can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised; see, for example, Council of the City of Newcastle v. Royal Newcastle Hospital [1957] HCA 15; (1957), 96 C.L.R. 493; (1959), 100 C.L.R. 1. Thus, if the Parliament were to make a law prohibiting any presence upon land within a radius of 1 kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land in its unoccupied state notwithstanding that neither the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected. (at p556)

75. In Trade Practices Commission v. Tooth & Co. Ltd, at pp.414-415, Stephen J. Referred to the distinction which has been recognized in the United States between the regulation of proprietary rights and the taking of property; see, for example, Penn Central Transportation Co. v. New York City [1978] USSC 180; 438 U.S. 104 (1978), at pp. 123-128 and 139-146. After referring to the differences between the United States Fifth Amendment and s. 51(xxxi) of the Australian Constitution, his Honour quoted, as of "some guidance in the Australian context", the followin passage from 29A Corpus Juris Secundum ("Eminent Domain", par. 6):

"There is no set formula to determine where regulation ends and taking begins; so the question depends on the particular facts and the necessities of each case and the Court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest." (at p556)

76. Stephen J. continued:

"On the one hand, many measures which in one way or another impair an owner's exercise of his proprietary rights will involve no 'acquisition' such as pl. (xxxi) speaks of. On the other hand, far reaching restrictions upon the use of property

may in appropriate circumstances be seen to involve such an acquisition. That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered wherever consitutional regulation of compulsory acquisition is sought to be applied to restraints, short of actual acquisition, imposed upon the free enjoyment of proprietary rights. In each case the particular circumstances must be ascertained and weighed and, as in all questions of degree, it will be idle to seek to draw precise lines in advance." (at p556)

77. I agree with Stephen J.'s approach and propose to adopt a similar approach in the present case. I turn to consider the effect of the relevant provisions of the Act, Regulations and Proclamations. (at p556)

78. It is apparent that there has been no acquisition by the Commonwealth of the whole of the Wilderness National Parks. The declaration of those Parks as part of the natural heritage has the effect that they are "identified property" for the purposes of the Act in the twofold sense that they come within (a)(ii) as well as (a)(i) of the definition contained in s. 3(2) of the Act. That declaration did not, however, impose any operative restriction upon Tasmania's or the HEC's interest in or control of land constituting those Parks. A similar comment can be made as regards the declarations that each of the designated area of the Franklin-Lower Gordon Wild Rivers National Park, Kutikina and Deena Reena Caves and the other archaeological sites form part of the cultural heritage. (at p556)

79. Nor, in my view, did the proclamation of the Franklin-Lower Gordon Wild Rivers National Park, those parts of the Franklin natural area and the Franklin cultural area within the HEC land and the future HEC land, the two Caves and the open archaeological site as property to which s. 9 of the Act applied and the prescription of the prohibited acts for the purposes of s. 9(1)(h) in respect of that part of the cultural area, those Caves and that site consitute an acquisition of either the land, the Caves or the site for the purposes of s. 51(xxxi). The only prohibited acts under the valid provisions of s. 9(see above) are acts done, without the consent of the Minister, involving damage to or destruction of the relevant property or the carrying out of works in the course of preparatory to, or associated with, the construction or continued construction of a dam. Those restrictions upon the use of property are, particularly in the circumstances of the present case, far from insignificant. They do not, however, enter the area of acquisition of property. (at p556)

80. The proclamation of the parts of the Franklin natural and cultural areas and the two Caves as property to which s. 10 applied, coupled with the prescription of acts for the purposes of s. 10(2)(m) in respect of that part of the cultural area, the Caves and the open archaeological site, had the effect that trading, financial and Territory corporations were prohibited from doing a wide variety of acts on the relevant land without the Minister's consent. The acts varied from acts associated with the construction of a dam to a wide variety of acts which would be involved in development and, possibly, improvement of the land. The limited nature of the restriction upon activity (that is, a prohibition addressed only to corporations of the three types), even in a context where the owner of some and the future owner of the rest of the land (the HEC) is a trading corporation, precludes the imposition of the restrictions effected by the Proclamation from constituting an acquisition of property. (at p556)

81. The difficult problem, in relation to s.51(xxxi), arises in relation to the making of the Wilderness Regulations in respect of the HEC land and in respect of the declaration of the Caves and archaeological site as property to which the provisions of s. 11 apply. It is convenient to consider the question of the effect of the Wilderness Regulations on the HEC land first. (at p556)

82. As has been seen, the Wilderness Regulations prohibit, in the absence of the Minister's consent, a wide variety of specific activities culminating in a general prohibition of "any other works". Their purpose is, in accordance with Australia's obligations under the Convention, to protect and conserve the land as part of the cultural or natural heritage. They effectively preclude development and what would, in an ordinary context, be described as "improvement" of the land without the Minister's consent: no building or other substantial structure can be erected; no tree can be cut down or removed; no vehicular track can be established; no works can be carried out. The Regulations apply indefinitely. The land remains vested in the HEC. The HEC, however, is not only prohibited, in the absence of a consent which there is every reason to believe will not be forthcoming, from building the proposed dam; it is, without such consent, effectively excluded from putting the land to any active use at all. (at p557)

83. If the Commonwealth could, in these circumstances, be seen as gaining for itself a material benefit of a proprietary nature from the restrictions imposed in respect of the HEC land, I would have no hesitation in concluding that there had been an acquisition of property for the purposes of the Commonwealth. With some hesitation, I have come to the view that the absence of any material benefit of that nature does not, in the circumstances of the present case, avoid the conclusion that there has been such an acquisition. The Commonwealth has, by the Wilderness Regulations, brought about a position where the HEC land is effectively frozen unless the Minister consents to development of it. On its own case in this Court, it has brought about that position for the purpose of fulfilling its international obligations under the Convention. On its own case, it has set out to protect and conserve the HEC land as a natural park. If there were any reason in principle to prevent the achievement of that objective, by the imposition of restrictions, constituting an acquisition of property, the safeguard of s. 51(xxxi) would be ineffective to preclude the Commonwealth from effectively dedicating the property of others to its purposes without compensation whenever such dedication could be achieved by the imposition of carefully worded restrictions upon an owner's use and enjoyment of his land. In my view, there is no such reason in principle. The benefit of a restrictive convenant, which prohibits the doing of certain acts without consent and which ensures that the burdened land remains in a state which the person entitled to enforce the covenant desires to have preserved for purposes of his own, can constitute a valuable asset. It is incorporeal but it is nonetheless property. There is no reason in principle why, if "property" is used in a wide sense to include "innominate and anomalous" interests, a corresponding benefit under a legislative scheme cannot, in an appropriate case, be regarded as property. (at p557)

84. In the present case, the Commonwealth has, under Commonwealth Act and Regulations, obtained the benefit of a prohibition, which the Commonwealth alone can lift, of the doing of the specified acts upon the HEC land. The range of the prohibited acts is such that the practical effect of the benefit obtained by the Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property for a purpose in respect of which the Parliament has power to make laws. The "property" purportedly acquired consists of the benefit of the prohibition of the exercise of the rights of use and development of the land which would be involved in the doing of any of the specified acts. The purpose for which that property has been purportedly acquired is the "application of the property in or towards carrying out" Australia's obligations under the Convention; see Schmidt, at p. 372. The compensation which would represent "just terms" for that acquisition of property would be the difference between the value of the HEC land without and with the restrictions. (at p557)

85. The effect of the declaration of the two Caves and the archaeological site as property to which the provisions of s. 11 apply was only marginally less comprehensive as regards the restriction of the use or development of the land comprised in those sites is concerned. Under s. 11 of the Act, it is unlawful, without the Minister's consent, for any person, including the Crown in right of Tasmania as the owner and the HEC as the future owner, to excavate or to exploit those sites. More importantly for immediate purposes, it is also unlawful, without such consent, to erect any building or substantial structure, to kill or damage any tree or to establish any vehicular track. These are all prohibitions which apply regardless of whether the relevant activity is directed towards the construction of the dam: acts which would be involved in the construction of the dam are, as has been seen, specifically prescribed for the purposes of s. 11(1)(j). The reasoning which leads me to conclude that there has been a purported acquisition of property for the purposes of the Commonwealth by the operation of the Wilderness Regulations on the HEC land leads me also to conclude that there has been a purported acquisition of property for the purposes of the Commonwealth by the operation of the declaration of the Caves and site as land to which s. 11 of the Act applies. The property purportedly acquired consists of the benefit of the prohibition, which the Commonwealth can enforce or relax, of the exercise of those rights of use and development of land which would be involved in the doing of the specified acts. The purpose of the purported acquisition is the protection and conservation of the sites as sites of particular significance to people of the Aboriginal race, that being a purpose which the Parliament is empowered to pursue under s. 51(xxvi) of the Constitution. (at p557)

86. It becomes necessary to consider whether the purported acquisitions were upon just terms as required by s. 51(xxxi). That involves consideration of the complicated provisions of s. 17 of the Act which currently apply both in respect of any acquisition which has resulted from the operation of the Act and in respect of any acquisition which has resulted from the operation of the Wilderness Regulations; see the definition of "Regulations" in s. 17(1) and the repeal, by s.

19(2), of the former Reg. 7 of the Wilderness Regulations. In that regard, it should be mentioned that the argument has proceeded, on all sides, on the basis that the question of "just terms" in relation to the Wilderness Regulations is to be answered by reference to the provisions of s. 17 of the Act and not by reference to the former Reg. 7. (at p558)

87. The relevant provisions of s. 17 of the Act are set out in the judgment of the Chief Justice. In summary, their effect is as follows. Where a person (the claimant) considers that the operation of the Act or of the Regulations has resulted in an acquisition of property from him, he may give notice in writing to the Minister requesting the Minister to pay a specified amount of compensation (the claimed amount) in respect of the acquisition (s. 17(3)). If, within three weeks, the Minister gives notice advising that he does not consider that there has been such an acquisition, the claimant may apply to the High Court for a declaration that there has been (s. 17(4)). If the Minister does not give such a notice within three weeks, the operation of the Act or the Regulations shall be taken to have resulted in such an acquisition (s. 17(5)). If the Minister has given such a notice and the High Court subsequently declares that there has been such an acquisition, the Commonwealth is then liable to pay such compensation as is agreed or, failing agreement, "as is determined in accordance with the succeeding provisions of this section" (s. 17(6)). The procedure established for determining the amount of compensation varies according to whether the amount claimed is less than $5 million. If the amount claimed is less than $5 million, the claimant may apply to the Federal Court to "determine the compensation that is fair and just in respect of the acquisition" (s. 17(14)(a)). If the amount claimed is equal to or more than $5 million, the Act establishes a compulsory waiting period of six months in which agreement as to the amount might be reached. After that waiting period without agreement, the Governor-General shall, after fourteen days' notice, establish a Commission of Inquiry (s. 17(7)(b)). The Commission of Inquiry shall, before the expiration of twelve months after its establishment, report in writing to the Governor-General setting out its "recommendation" as to the compensation that is "fair and just in respect of the acquisition" (s. 17(10)). Within three months of the receipt of those recommendations, the Governor-General shall "if the person and the Commonwealth have not reached agreement as to the compensation payable, having regard to the report of the Commission and to such other matters as the Governor-General considers relevant, determine the compensation that the Governor-General considers to be fair and just in respect of the acquisition" (s. 17(12): (emphasis added). If the claimant considers that the amount determined by the Governor-General is not fair and just, he may then apply to the Federal Court to "determine the compensation that is fair and just in respect of the acquisition" (s. 17(14)). (at p558)

88. Before proceeding to consider whether the provisions of s. 17 of the Act satisfy the requirement of "just terms", it is convenient briefly to mention a number of relevant matters. First, s. 51(xxxi) of the Constitution does not confer upon any person an enforceable right to claim just terms in respect of an acquisition of property. The effect of the paragraph is that a law providing for an acquisition of property for the purposes of the Commonwealth otherwise than on just terms is invalid. Secondly, there is no precise definition of the meaning of the phrase "just terms" in s. 51(xxxi). Compensation provided by the Commonwealth for an acquisition may assume a variety of forms any of which would satisfy the requirement of "just terms". It is implicit in s. 51(xxxi) that it is for the Parliament to determine what is the appropriate compensation in respect of an acquisition. If that compensation satisfies the requirement of "just terms", the Court will not declare the terms unjust and the law in excess of power for the reason that the Court entertains an opinion that other terms would have been fairer or more appropriate (see Grace Bros. Pty. Ltd v. The Commonwealth [1946] HCA 11; (1946), 72 C.L.R. 269, at p. 295; Minister of State for the Army v. Dalziel, at p. 291; McClintock v. The Commonwealth, at p. 24). Thirdly, where the Parliament does not specify the amount of compensation but provides a procedure for determining what is fair and just, the Court will examine the nature and extent of the entitlement of a claimant under the procedure established and the nature of the procedure itself in deciding whether the acquisition for which the law provides is "on just terms". (at p558)

89. It was not suggested, by any of the parties, that the provisions of s. 17 of the Act should be dissected so as to enable the question whether they provided just terms in respect of an acquisition where the compensation claimed was less than $5 million and the question whether they provided just terms when the compensation claimed was equal to or more than $5 million to be separately considered. The scheme contained in s. 17 is an overall one. If it does not satisfy constitutional requirements in respect of claims equal to or in excess of $5 million, it must fail as a whole. Otherwise, the result would be plainly one which could not have been intended by the Parliament, in that an acquisition would be made unconstitutional by a claimant simply claiming compensation in excess of $5 million or alternatively a claimant would be in a position where he was obliged to claim less than $5 million or enjoy no right to claim compensation at all. (at p558)

90. The provisions of s. 17 do not confer any immediate right to be paid compensation upon the acquisition of property. All they confer is a right to set a procedure in chain. If the Minister contests that there has been an acquisition, the Commonwealth is under no obligation to pay compensation unless and until the claimant has instituted proceedings in the High Court and obtained a declaration that there has been an acquisition. Inevitably, the obtaining of such a declaration will involve the passage of time. If such a declaration is obtained and the amount claimed is in excess of $5 million, the claimant is still not entitled to enforce payment of any amount of compensation. He is only entitled to have a Committee of Inquiry established. It is instructive to consider the situation which exists if he obtains a favourable recommendation from that Committee of Inquiry. At that stage, the Act envisages that more than eighteen months plus whatever time may be involved in obtaining a declaration in the High Court may have expired. The claimant is still not entitled to be paid an ascertained amount of compensation or to apply to have a binding determination of such an amount. He has to wait for the next step which is for the Governor-General to determine what the Governor-General considers to be "fair and just" compensation in respect of the acquisition. The Governor-General will, of course, act on the advice of the relevant Minister of the Commonwealth. He is not obliged to accept the recommendations of the Committee of Inquiry. It is only after the Governor-General has determined what he considers to be "fair and just" compensation that the claimant has the right to seek compensation in a tribunal which has authority to make a binding decision. (at p559)

91. There is not, of course, anything intrinsically unfair in the Parliament providing a procedure for determining the quantum of compensation outside the ordinary judicial process. There is however something intrinsically unfair in a procedure which, in effect, ensures that, unless a claimant agrees to accept the terms which the Commonwealth is prepared to offer, he will be forced to wait years before he is allowed even access to a court, tribunal or other body which can authoritatively determine the amount of the compensation which the Commonwealth must pay. In the case of s. 17 of the Act, this intrinsic unfairness is heightened by a failure to make any provision in respect of the payment of interest during the period between the time when the acquisition is made and the time when the person whose property is acquired can finally institute an effective claim for compensation. In my view, the system established by s. 17 for ascertaining whether compensation is payable and, if it is, the amount which should be paid is quite unacceptable and unfair according to the ordinary standards of "fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence"; Nelungaloo Pty. Ltd. v. The Commonwealth [1952] HCA 11; (1952), 85 C.L.R. 545, at p. 600. (at p559)

92. In the result, the acquisitions which I have found to have been purportedly effected by the operation of the Wilderness Regulations and by the operation of the Proclamation under s. 8 were not upon just terms. They were beyond the constitutional competence of the Commonwealth. It is unnecessary to consider whether the provisions of s. 17 are invalid, as was submitted on behalf of Tasmania, on the further ground that they represent an attempt to exclude the original jurisdiction of the Court under the Constitution. It should be mentioned in that regard, however, that I consider it to be plain that the only compensation to which a claimant is entitled under s. 17 is the amount determined in accordance with the provisions of that section. That being so, no independent claim for compensation could be instituted in this Court. (at p559)

93. The Wilderness Regulations are only applicable in respect of the HEC land. Their only operative provisions (Reg. 5) are those which effect the acquisition. The consequence of a failure to provide just terms is that the Wilderness Regulations are, in their entirety, invalid. (at p559)

94. The reasoning which leads me to conclude that an acquisition of property was involved in the application of the provisions of s.11 to the relevant sites would apply in respect of any application of those provisions to any area of land which constituted an Aboriginal site. I have been troubled as to whether it would be appropriate to read down the provisions of s.11 in an endeavour to preserve the validity of those parts which, if left on their own, would not constitute an acquisition of the property to which they applied. The Court has not had the benefit of argument on that matter. I have come to the view that such a reading down is not justified in the context of provisions which, when taken as a whole, involve an acquisition of property otherwise than on just terms. It follows that s.11 is, in its entirety, invalid. Sections 8, 13(7) and 14(5) fall with s.11.

Two outstanding questions

Is the HEC a "trading corporation"? (at p559)

95. The HEC is not the Crown or an emanation of the Crown (Launceston Corporation v. The Hydro-Electric Commission [1959] HCA 12; (1959), 100 C.L.R. 654, at pp.661-663). It is a statutory corporation established by and under the provisions of the Hydro-Electric Commission Act 1944 (Tas.). It performs a number of functions of a semi-governmental nature including the recommending of regulations and orders in council and the making of by-laws with the approval of the Governor. Its precise functions, duties and powers are set out in the Hydro-Electric Commission Act 1944 and in other legislation such as the Water Resources Investigation Act 1937 (Tas.) and the Water Act 1957 (Tas.). It carries on an extensive trading activity of selling the power which it generates. (at p559)

96. During the financial year ended 30th June, 1982, the HEC derived over $55 million from the bulk sale of power, over $105 million from the retail sale of power and over $2 million from accrued retail sales. During that period, it made a gross profit on its Trading Account of over $103 million which was carried to its profit and loss account. It supplies electricity to approximately 190,000 customers (at p559)

97. In State Superannuation Board v. Trade Practices Commission [1982] HCA 72; (1982), 57 A.L.J.R. 89, at pp.96-97, Mason J., Murphy J. and I pointed out that the approach taken by the majority in Reg. v. Trade Practices Tribunal; Ex parte St. George County Council [1974] HCA 7; (1974), 130 C.L.R. 533 had been subsequently disapproved by the majority of the Court in Reg. v. Federal Court of Australia; Ex parte The Western Australian National Football League (Adamson) [1979] HCA 6; (1979), 143 C.L.R. 190. We went on to express the view that the fact that a trading corporation carries on extensive non-trading activities which might properly warrant its being categorized as a corporation of some other type will not prevent it from being properly categorized as a trading corporation by reason of its trading activities. In that regard, we referred to a comment of Mason J. in Adamson, at p. 233 that the expression "trading corporation" is essentially "a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation". (at p560)

98. The HEC is, by virtue of its wide semi-governmental powers and functions, a corporation of an unusual type. It could not inaccurately be described as a "public utility" corporation. It is, nonetheless, a corporation of which a main objective is the sale of power to consumers in Tasmania and which carries on the trading activity of selling such power on a very large scale indeed. Whatever other description might be applied to it, it is, in the context of its overall activities as described in the agreed facts, a trading corporation both for the purposes of s.51(xx) of the Constitution and s.10 of the Act. (at p560)

99. The questions asked include the question whether, if, as I have held, the HEC is a trading corporation and s. 10(4) is valid, the HEC is carrying out the acts referred to in s. 10(2) and (3) for the purposes of its trading activities. In my view, that question must be answered in the affirmative. The "Development" upon the Gordon River below the junction with the Franklin is being carried out by the HEC for the purpose of acquiring a new source of power to be sold in the course of its ordinary trading activities. That being the case, the acts involved in the Development are being done "for the purposes of" those trading activities within s. 10(4) of the Act.

Is the Gordon River Hydro-Electric Power Development Act 1982(Tas.) invalid? (at p560)

100. Section 16 (1) of the Hydro-Electric Commission Act 1944 provides that no new power development shall be undertaken or constructed by the HEC unless it has been authorized by the Parliament of Tasmania. The Gordon River Hydro-Electric Power Development Act 1982 (Tas.) authorizes the HEC to construct the proposed Gordon below Franklin power development, including the dam, at a cost not exceeding $452,891,000. (at p560)

101. The effect of valid provisions of the Act and of the Regulations and Proclamations made under it (the Commonwealth laws) is that the acts which would be essential to the construction of the power development are prohibited by valid laws of the Commonwealth unless the consent of the Commonwealth Minister is obtained. There is no fundamental inconsistency between a provision of the law of Tasmania that the HEC is vested with authority to do an act which it is prohibited under Tasmanian law from doing without such authority and a valid law of the Commonwealth that no person shall do that act without the permission of a Commonwealth Minister. Theoretically at least, it is conceivable that the consent of the Commonwealth Minister to the doing of the acts involved in the building of the power scheme might be forthcoming. (at p560)

102. The result of the prohibitions imposed by the operation of the Commonwealth laws is not the total invalidity of the Tasmanian Act pursuant to s.109 of the Constitution. It is that the authority conferred by the Tasmanian Act to construct the power development is subject to the prohibition, imposed by the Commonwealth laws, of the doing of acts involved in the construction of the development without the consent of the Commonwealth Minister. The Tasmanian Act is ineffective to authorize the doing of any of those acts without that consent.

Conclusion (at p560)

103. I would answer the questions asked as follows:

Actions No. C6 and No. C8 of 1983

Question 1. (a) "Yes".

Question 1. (b) "It does not enable the making of those Regulations in their present form without the provision of 'just terms' in respect of the acquisition of property which they effect."

Question 2. "No."

Question 3. "Yes. The said Regulations are all invalid by reason only of a failure to provide 'just terms' as required by s. 51(xxxi) of the Constitution."

Question 4. Does not arise.

Question 5. "Not invalid, but ineffective unless the Commonwealth Minister consents."

Question 6. Unnecessary to answer.

Action No. C12 of 1983

Question 1. (a) "Yes, apart from (i) pars. (a),(c) and (d) of s. 6(2), the validity of which it is not necessary to determine; (and) (ii) par. (e) of s. 6(2) and pars. (a), (b), (c), (d), (e), (f) and (g) of s. 9(1) which are invalid."

Question 1. (b) "Yes, in their entirety."

Question 1. (c) "No. They are invalid in their entirety by reason only of a failure to provide 'just terms' as required by s. 51(xxxi) of the Constitution."

Question 1. (d) "No."

Question 2. "No."

Question 3. "The Regulations are invalid to the extent to which they are made pursuant to ss. 8 and 11. The Proclamations made pursuant to s. 8 are invalid. Otherwise, no."

Question 4. Does not arise.

Question 5. (a). "Yes."

Question 6. "Not invalid, but ineffective unless the Commonwealth Minister consents."

Question 7. Unnecessary to answer.

Question 8. "Yes." (at p561)

DAWSON J. The factual setting of the questions for decision in this case, the relevant legislative provisions and the provisions of the Convention for the Protection of the World Cultural and Natural Heritage (the Convention) are summarized in the judgment of the Chief Justice and it is unnecessary to repeat that summary. What must be decided is whether any valid operation may be given to the World Heritage (Western Tasmania Wilderness) Regulations made under s. 69 of the National Parks and Wildlife Conservation Act 1975 (Cth) and ss. 9, 10 and 11 of the World Heritage Properties Conservation Act 1983 (Cth). Answers to those questions will determine whether the Tasmanian Hydro-Electric Commission may lawfully proceed with the construction of a dam downstream of the junction of the Gordon and Franklin Rivers as part of a new power development authorized by the Gordon River Hydro-Electric Power Development Act 1982 (Tas.). (at p561)

2. The Commonwealth seeks to find the necessary power to support both s. 69 of the National Parks and Wildlife Conservation Act and s. 9 of the World Heritage Properties Conservation Act in s. 51(xxix) of the Constitution (the external affairs power). In addition, it relies upon an implied inherent power said to arise from nationhood to support s. 9 of the World Heritage Properties Conservation Act. It invokes s. 51(xx) of the Constitution (the corporations power) in support of s. 10 of that Act and s. 51(xxvi) of the Constitution (the power to make special laws for the people of any race) in support of s. 11. Tasmania and the Hydro-Electric Commission, in addition to disputing the existence of the power necessary to support the legislation, make a number of submissions. They say that, in any event, the operative provisions of the relevant legislation amount to laws with respect to the acquisition of property but fail to provide for just terms as required by s. 51(xxxi) of the Constitution and are for that reason invalid. They also contend that the legislation is prohibited by s. 100 of the Constitution, which provides that the Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the

waters of rivers for conservation or irrigation. And finally, they submit that the operative provisions of the legislation are invalid because they interfere with Tasmania's legislative and executive functions and with the prerogative powers exercisable in that State. It is convenient to put to one side for the moment the submissions relating to acquisition upon just terms, the abridgement of the right to use water and interference with State functions, and to deal with the matter initially under the heads of power upon which the Commonwealth relies.

External affairs power (at p561)

3. The scope of the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs was, until the recent decision in Koowarta v. Bjelke-Petersen [1982] HCA 27; (1982), 56 A.L.J.R. 625, more uncertain than it now is. The extent of the previous case law upon the subject was succinctly set out by Brennan J. in that case, at p.662:

"Paragraph (xxix) has been held to support legislation for the acceptance and government of the Mandated Territory of New Guinea (Jolley v. Mainka [1933] HCA 43; (1933), 49 C.L.R. 242, at pp. 250, 281, 286), for the reciprocal surrender of persons charged with criminal offences (Ffrost v. Stevenson [1937] HCA 41; (1937), 58 C.L.R. 528, at p. 557), to carry into execution within Australia the provisions of Pt, X of the Treaty of Versailles (Roche v. Kronheimer (1921), [1921] HCA 25; 29 C.L.R. 329, at pp. 338-339; and see The King v. Burgess; Ex parte Henry, at p.641), to give effect to the Paris Convention for the Regulation of Air Navigation (The King v. Poole; Ex parte Henry (No.2) [1939] HCA 19; (1939), 61 C.L.R. 634, at pp.644, 645, 654), to carry out certain provisions of the Chicago Convention on International Civil Aviation (Airlines of N.S.W. Pty. Ltd. v. New South Wales (No.2) [1965] HCA 3; (1965), 113 C.L.R. 54) and to give effect to the Convention on the Territorial Sea and Contiguous Zone (New South Wales v. The Commonwealth, at pp. 361, 364-365, 377, 475-476, 503)." (at p561)

4. Notwithstanding these decisions, there were at least two distinct views of the power afforded by s. 51(xxix) to implement international agreements by domestic legislation. On the one hand there was the view expressed by Evatt and McTiernan JJ. in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936), 55 C.L.R. 608 (Burgess' Case), at p. 687, that the legislative power of the Commonwealth extends to the execution of any bona fide treaty or convention entered into with a foreign country and might even extend to the carrying out of international recommendations or requests "upon other subject matters of concern to Australia as a member of the family of nations". This view, which seemed to Dixon J. in the same case to be extreme, may be contrasted with the opinion expressed by him, at p. 669, that the nature of the external affairs power indicates limits upon the power of the Parliament to pass laws in the implementation of treaty obligations. Those limits are met, upon his view, if a treaty is made which binds the Commonwealth in reference to some matter which is international in character. In that event, a law might be made to secure the observance of the treaty obligations if they are of a nature affecting the conduct of Australian citizens. (at p561)

5. The views of Latham C.J. and Starke J. in Burgess' Case appear to lie somewhere between the views expressed by Evatt and McTiernan JJ. on the one hand, and Dixon J. on the other, although the view of Latham C.J. (see p.640) appears to have a closer affinity with that of Evatt and McTiernan JJ. and the view of Starke J. (see p.658) may at least upon one reading of his judgment, be thought to resemble that of Dixon J. There is little to be gained by any closer analysis of Burgess' Case because the main question posed in that case was dealt with by the decision in Koowarta v. Bjelke-Petersen. It is that decision which now must be the real basis of any examination of the scope of Commonwealth legislative power to implement treaty obligations. (at p562)

6. It is necessary, I think, to refer to only two observations in the cases subsequent to Burgess' Case, other than Koowarta v. Bjelke-Petersen. The first is the expression of a clear view by Barwick C.J. in Airlines of N.S.W. Pty. Ltd. v. New South Wales (No.2) [1965] HCA 3; (1965) 113 C.L.R. 54 (Airlines Case (No.2)), at p.85, that "the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament". (at p562)

7. The second observation is that of Stephen J. in New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 C.L.R. 337, at p.446:

"Whatever limitations the federal character of the Constitution imposes upon the Commonwealth's ability to give full effect in all respects to international obligations which it might undertake, this is no novel international phenomenon. It is no more than a well recognized outcome of the federal system of distribution of powers and in no way detracts from the full recognition of the Commonwealth as an international person in international law." (at p562)

8. Although Stephen J. was in dissent in New South Wales v. The Commonwealth, these remarks have significance in view of the importance, as will be seen, of his judgment in Koowarta v. Bjelke-Petersen. (at p562)

9. Before turning to Koowarta v. Bjelke-Petersen, I may, perhaps, be permitted several general observations upon the nature of the external affairs power. (at p562)

10. There is in the Constitution no express power conferred upon the executive to make treaties with other countries or upon the Parliament to implement treaties if made on behalf of this country. In 1897 the draft Commonwealth of Australia Bill contained a covering cl.7 which provided that all treaties made by the Commonwealth as well as all laws made by the Parliament should be binding throughout the Commonwealth and should be in force on board all British ships whose last port of clearance or whose port of destination was in the Commonwealth. The external affairs power originally referred to "external affairs and treaties". The references to treaties in both the covering clause and par. (xxix) were omitted (see Convention Debates of 9th September, 1897, and 21st January, 1898) and the only reference to treaties in the Constitution is in s. 75(i), which bestows original jurisdiction upon the High Court in all matters arising under treaties. There can be little doubt that the express omission of any reference to the making of treaties was a reflection of the accepted view at the time that the treaty making power was, and was to remain, in the Imperial Crown and was to form no part of the functions of the Commonwealth. It is consistent with this view that s. 61 of the Constitution extends the executive power of the Commonwealth to the execution and maintenance of the Constitution and of the laws of the Commonwealth. In 1901 it was not thought that the Commonwealth executive power extended to the making of treaties with other countries, nor was it thought that it should do so. The events which marked the emergence of Australia to dominion status and finally as an independent international personality were the result, not of any increase in the powers vested in the Commonwealth by the Constitution, but of the removal by the Statute of Westminster of any restrictions upon legislation having extra-territorial effect or repugnant to Imperial legislation and of the de facto recognition of a new status by other nations. No doubt the conclusion of treaties on behalf of Australia is still in the name of the Crown, although obviously not any longer the Imperial Crown, and may perhaps be viewed as an exercise of the Crown prerogative to conclude treaties. Such a view is, however, not without anomaly having regard to s.2 of the Constitution which makes specific provision for the powers and functions of the Crown to be assigned to the Governor-General. The prerogative power to make treaties has not been assigned. (at p562)

11. The matter is for the most part of academic interest only because in the international community de facto recognition is all that is required for the negotiation and conclusion of international agreements and other participation in the community of nations. The existence of the external affairs power is for domestic purposes and, whatever its limitations, it provides the measure of power to implement international obligations. The interest is not, however, entirely academic because the assumption is frequently made that the power under which treaties are now concluded on behalf of this country is to be found in s. 61 of the Constitution. See, for example, Koowarta v. Bjelke-Petersen, per Stephen J., at p.643, and per Murphy J., at p. 654; generally, Zines, Commentaries on the Australian Constitution (1977) Chs. 1 and 2. But if this view were correct, it is unlikely that the debate would have centred upon the external affairs power as it has in this case. The unlimited power of the Commonwealth to conclude treaties is not now to be doubted, but if the source of that power is to be found in s. 61 of the Constitution, an argument would have been available that s. 61 coupled with the incidental power (s. 51(xxix)) is sufficient to support the legislation in question. Such an argument was not put. Compare with Victoria v. The Commonwealth and Hayden [1975] HCA 52; (1975), 134 C.L.R. 338 (Australian Assistance Plan Case), per Jacobs J., at pp. 413-415. Speaking for myself, I cannot see that such an expanded view of s. 61 of the Constitution can be supported textually, historically or logically. It is, however, sufficient to note the view, because what is important for present purposes is that by contrast with the width of the treaty making power, the

legislative power of implementation which is to be found in s. 51 of the Constitution is limited by the words used to describe the power, namely, "external affairs". (at p563)

12. No difficulty has been found with the word "affairs": clearly it is wide enough in its context to embrace the business of government and is used in the sense in which it is used in the phrase "affairs of state". It is the word "external" which provides the limit and the difficulty. The use of synonyms such as "foreign" or "foreign relations" (see Burgess' Case, at pp. 643, 658) does not solve the problem and only serves to restate it. That problem, reduced to its simplest formulation, is where the line is to be drawn between external or foreign affairs on the one hand and those matters which are not external affairs on the other. The description of the power in par.(xxix) requires the line to be drawn and so creates the problem, but does not greatly assist in its solution. (at p563)

13. At the risk of stating the self-evident, I think that it is important at the outset to draw a distinction between the conclusion of a treaty, including the negotiations leading to it, and the obligations which the treaty imposes. Whilst the making of treaties with other countries and the means by which they are made are clearly part of the external affairs of the Commonwealth and hence the legitimate subject matter of Commonwealth legislation, it is another thing, in my view, to say that a law implementing the obligations which a treaty imposes is necessarily a law with respect to external affairs. An agreement with another nation or other nations is necessarily made internationally because it is between nations and the agreement itself is for that reason part of the external affairs of this country. But the agreement may be to do something which is entirely domestic and has no international ramifications at all, save that if it is done it may satisfy an international obligation. Whether the mere satisfaction of an international obligation by the enactment of a law otherwise entirely domestic in character makes that law a law with respect to external affairs has been a question at the very heart of any consideration of the external affairs power. (at p563)

14. It is, of course, true that a law can be a law with respect to external affairs although it is not made in the implementation of any international obligation. The subject matter of the law may of itself be within that category although it is not passed pursuant to any international obligation. Such matters as diplomatic rights and immunities, the treatment of fugitive offenders, the determination of external boundaries or the excitement of disaffection against other countries are affairs which, on their face and without more, are within the legislative power of the Commonwealth; see, for example, R. v. Sharkey(1949), [1949] HCA 46; 79 C.L.R. 121; New South Wales v. The Commonwealth, (supra). However, it is not suggested that the subject matter of the Convention in this case is of such a character. If it is part of the external affairs of the country, it can only be because that characteristic is stamped upon it by some additional circumstance which gives it a sufficiently external or foreign aspect. Whether the existence of the Convention and such obligations as it imposes, or something other than the existence of the Convention, provides that additional characteristic is a question which leads me directly to a consideration of Koowarta v. Bjelke-Petersen. (at p563)

15. In that case it was conceded that ss. 9 and 12 of the Racial Discrimination Act 1975 (Cth) were in conformity with the relevant obligations imposed by the International Convention on the Elimination of All Forms of Racial Discrimination. By a majority of four Justices to three, it was held that those sections were laws with respect to external affairs within the meaning of s. 51(xxix) and were, accordingly, validly enacted. Of the majority of four, however, only three Justices (Mason, Murphy and Brennan JJ.) held that a law implementing an obligation imposed by a treaty bona fide concluded by Australia was, by that fact and without more, a law with respect to external affairs within the meaning of s. 51(xxix). Indeed, Mason and Murphy JJ. went further. Mason J. was prepared to hold "that a matter which is of external concern to Australia having become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it" (see p. 653). Murphy J. was prepared to construe the external affairs power as sufficient to support the law in question because it related "to matters of international concern, the observance in Australia of international standards of human rights, which is part of Australia's external affairs"; see p. 656. But Mason, Murphy and Brennan JJ. were in a minority in giving to the external affairs power the breadth of operation which they did. A majority of the Justices (Gibbs C.J., Stephen, Aickin and Wilson JJ.) held that the mere fact that a law gives effect to treaty obligations will not for that reason alone make it a law with respect to external affairs. At p. 638, Gibbs C.J., with whom Aickin and Wilson JJ. agreed, expressed the view that "a law which carries into effect the provisions of an international agreement will only have the character of a law with respect to external affairs if the provisions to which it gives effect answer that description." And at p. 645, Stephen J. said: "It will not be enough that the challenged law gives effect to treaty obligations." There was, therefore, a clear rejection by the Court in Koowarta v. Bjelke-Petersen of the extreme view of the external affairs power which was propounded in Burgess' Case by Evatt and

16. If I may say so with respect, the rejection of that extreme view was required by all the accepted canons of construction. No doubt, as those who hold the contrary view assert, the external affairs power is, as are the other legislative powers of the Commonwealth, a plenary power. But that is not to relieve the Court of the task of construing the power in order that it may be given its full effect; see Bank of N.S.W. v. The Commonwealth [1948] HCA 7; (1948), 76 C.L.R. 1 (Bank Nationalization Case), per Latham C.J., at p. 186. No doubt it is true that in the construction of the Constitution an expression should, where possible, be given a wider rather than a narrower construction. But it is only possible to do so where the context, which above all else emphasizes the federal nature of the Constitution, does not suggest that a narrower interpretation will best carry out the object and purpose of that instrument; see Jumbunna Coal Mine, N.L. v. Victoria Coal Miners' Association (1908), 6 C.L.R. 309, at p. 368. No doubt the legislative powers of the Commonwealth should not be construed with any preconception in mind of the residual powers of the States, but that does not mean that Commonwealth powers should receive an interpretation which has no regard to the federal context in which they are found. The notion that Commonwealth legislative powers are to be given the widest interpretation which the language bestowing them will bear, without regard to the whole of the document in which they appear and the nature of the compact which it contains, is a doctrine which finds no support in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920), 28 C.L.R. 129 (the Engineers Case) and is unprecedented as a legitimate method of construction of any instrument, let alone a constitution. (at p564)

17. Nor is the rejection of the extreme view in disregard of the accepted principle that, where appropriate, the content of Commonwealth legislative powers may expand to embrace new events and changed times. Their denotation remains the same but their connotation may vary according to the circumstances at the time they fall to be interpreted. However, what has changed with the times is the range of matters which are considered to be appropriate as the subject of treaties. Under modern conditions there are few matters which are not regarded as fit subjects for international agreement and any distinction between foreign and domestic affairs for this purpose has practically disappeared. But this presents no problem for, as I have pointed out, the capacity of Australia to conclude treaties with other countries is not to be found in the grant of any power in the Constitution and hence is the subject of no constitutional limitations. It has not been questioned in recent years that the treaty making power of this country is unlimited and there is, therefore, no occasion in the consideration of its scope to resort to the changing connotations of constitutional provisions. (at p564)

18. The external affairs power, on the other hand, is a power specifically conferred upon the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth. It is not a power to make treaties. It is a power to make laws with a domestic application and it requires a distinction to be made between those matters which may be said to be external affairs and those which may not. This is a distinction which may now be largely disregarded for the purposes of international agreement, but that is to throw little light upon the proper construction of s. 51 (xxix). And the proper construction must, of course, be determined before any question can arise concerning the impact of changing circumstances upon the power properly construed. Once it has been determined, as it has been by a majority of this Court, that the matters which may be described as external affairs within the meaning of s. 51(xxix) are not co-extensive with the matters which may form the subject matter of international agreement, then it is axiomatic that any expansion which may have occurred in the treaty making power has not produced a corresponding expansion in the external affairs power. (at p564)

19. It would be superfluous to retrace here the steps by which a majority in Koowarta v. Bjelke-Petersen reached the conclusion that s. 51(xxix) must receive a more limited construction than that favoured by those who took the extreme view. It is sufficient to say that it was recognized by the majority that, because of its elastic nature, the phrase "external affairs" itself suggests no precise meaning and that its proper scope is to be determined consistently with the implications arising from the federal nature of the Australian Constitution rather than by reference to the unlimited scope of the treaty making power. To have done otherwise would have given par.(xxix) of s. 51 the potential to obliterate the limits set by that section upon Commonwealth legislative power. It would have given the paragraph an operation not required by the words of s. 51(xxix), which would have been entirely inconsistent with the context provided by the Constitution and destructive of the federal balance which it was intended to protect. (at p564)

20. At p.638 in Koowarta v. Bjelke-Petersen, Gibbs C.J. pointed out:

"If the 'extreme view' is adopted, and the broadest possible interpretation is given to the words of s.51(xxix), that paragraph would mean that the power of the Commonwealth Parliament could be expanded by simple executive action, and expanded in such a way as to render meaningless that 'limitation and division of sovereign legislative authority' which is 'of the essence of federalism': Spratt v. Hermes [1965] HCA 66; (1965), 114 C.L.R. 226, at p. 274." (at p564)

21. At pp. 660-661, Wilson J. said:

"It is no exaggeration to say that what is emerging is a sophisticated network of international arrangements directed to the personal, economic, social and cultural development of all human beings. The effect of investing the Parliament with power through s.51(xxix) in all these areas would be to transfer to the Commonwealth virtually unlimited power in almost every conceivable aspect of life in Australia, including health and hospitals, the workplace, law and order, the economy, education, and recreational and cultural activity to mention but a few general heads." (at p564)

22. And Stephen J. adopted a position which showed no retreat either in reasoning or result from the passage which I have already cited from his judgment in New South Wales v. The Commonwealth, at p.446, where he referred to the limitations imposed by the federal character of the Constitution upon s.51(xxix); see Koowarta v. Bjelke-Petersen, pp.643, 644. (at p565)

23. The rejection of the extreme view of s.51(xxix) by a majority of the Court in Koowarta v. Bjelke-Petersen did not, however, provide a majority in favour of any one test to identify those matters which are external affairs within the meaning of s.51(xxix). (at p565)

24. At p.638, Gibbs C.J., with whom Aickin and Wilson JJ. agreed, said:

"I consider that a law which carries into effect the provisions of an international agreement will only have the character of a law with respect to external affairs if the provisions to which it gives effect answer that description." (at p565)

25. He went on to say that international concern would not provide the requisite externality:

". . . since under modern conditions there are few matters which are not regarded as fit subjects for international agreement. . . . It is difficult to suggest any more precise test than that indicated by Dixon J. in the same case (Burgess' Case), at p.669 - was the treaty made in reference to some matter international in character? . . .

"What I have said is not intended to suggest that there is a limited class of matters which, by their nature, constitute external affairs, and that only such matters are subject to the power conferred by s.51(xxix). Any subject-matter may constitute an external affair, provided that the manner in which it is treated in some way involves a relationship with other countries or with persons or things outside Australia. A law which regulates transactions between Australia and other countries, or between residents of Australia and residents of other countries, would be a law with respect to external affairs, whatever its subject matter." (at p565)

26. Stephen J. adopted a not dissimilar approach, save that he indicated that a sufficient degree of international concern, such as might be evidenced by customary international law with respect to a subject matter, might provide the necessary international character. At p.645, he said that:

". . . where the grant of power is with respect to 'external affairs' an examination of subject-matter, circumstance and parties will be relevant whenever a purported exercise of such power is challenged." (at p565)

27. He went on to say:

"Neverthless the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation's 'external affairs'. A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'." (at p565)

28. It is clear that in referring to international concern, Stephen J. was referring to concern of a sufficient degree to warrant the description of the subject matter as part of the country's external affairs. Earlier he had dismissed the notion that it would be enough to attract the external affairs power that a law gave effect to treaty obligations. The conclusion of a treaty upon a subject matter is, of course, evidence of some degree of international concern over that subject matter and it is clear that his Honour was referring to something more. And, at p.646, he gives an indication of his view by saying that the prevention of racial discrimination had, by reason of the emphasis which the Charter of the United Nations places upon international recognition of human right and fundamental freedoms, become a legitmate subject of international concern. He saw much in the submission that non-discrimination on the grounds of race is now a part of customary international law and he equated it with slavery and genocide as of immediate relevance to relations within the international community. (at p565)

29. If by applying these criteria which emerge from Koowarta v. B jelke-Petersen it is possible to answer in this case whether the laws in question answer the description of laws with respect to external affairs, then that is the course which I think I should take. I am mindful of the dangers of attempting any formulation of my own and heed the warning of Dixon J., repeated in other judgements, that:

"The limits of the (external affairs) power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example": Burgess' Case at p.669; see also Airlines Case (No. 2), per Barwick C.J., at p. 85; New South Wales v. The Commonwealth, per Stephen J., at p. 449. (at p565)

30. It is convenient to turn first to the views expressed by Stephen J. It is clear that in Koowarta v. Bjelke-Petersen he regarded the subject matter of the Racial Discrimination Act as falling within the external affairs power because it was a subject of sufficient international concern regardless of whether or not it also was the subject of treaty obligations. In that respect he diverged from the views expressed by Gibbs C.J., Aickin and Wilson JJ. It followed that a fortiori Stephen J. regarded the Racial Discrimination Act in relevant respects as being a law with respect to external affairs because it also embodied treaty obligations. But apart from his application of a criterion of international concern and his finding that such concern was evident to the degree required by him, Stephen J. does not appear to have differed in his approach from that of Gibbs C.J. Aickin and Wilson JJ. If the laws in question in this case do not satisfy the test of international concern postulated by Stephen J. in Koowarta v. Bjelke-Petersen, it is then consistent with that authority to turn to the question whether those laws otherwise have the international character required by Gibbs CJ., Stephen, Aickin and Wilson JJ. That requirement will not be satisfied merely because those laws were made in the implementation of a treaty obligation. (at p565)

31. In my view, neither s.69 of the National Parks and Wildlife Conservation Act, in so far as it purports to authorize the making of the World Heritage (Western Tasmania Wilderness) Regulations, nor s.9 (which is the relevant section for present purposes) of the World Heritage Properties Conservations Act, can be said to be a law upon a subject matter of sufficient international concern to be with respect to external affairs. I reach that conclusion upon the assumption, and without expressing any opinion of my own, that what was said by Stephen J. in Koowarta v. Bjelke-Petersen about the significance of international concern ought to be accepted. (at p566)

32. I should say at this point that, for the reason given by the Chief Justice, I reject the submission that s.69 of the

National Parks and Wildlife Conservation Act authorizes the making only of regulations which carry into effect an agreement referred to in the schedule in relation to parks and reserves which are established under Pt. II of the Act. (at p566)

33. The subject matter of the regulations made under s.69 of the National Parks and Wildlife Conservation Act and of s.9 of the World Heritage Properties Conservation Act is the protection and conservation of certain property which forms part of the cultural heritage or natural heritage within the meaning of the Convention. The measure of international concern over the cultural or natural heritage is, I think, to be gauged from the Convention itself, that being the furthest point to which the international community has been prepared to go generally in adopting a common standpoint in relation to those matters. The Court was referred by the Commonwealth to a number of international instruments commencing in 1900 and to the travaux preparatoires of the Convention, all of which indicated world concern about cultural and environmental matters. These culminated, for present purposes, in the UNESCO recommendation concerning the protection, at national level, of the cultural and natural heritage, which was adopted in 1972 shortly before the adoption of the Convention. The recommendation, however, goes no further than to indicate a level of concern similar to that indicated by the Convention. Indeed, the recommendation is in important respects adopted by or reflected in the Convention. Tasmania, on the other hand, pointed to the limited extent to which the international community is prepared to countenance the imposition of international obligations for environmental purposes as evidenced by the Stockholm Declaration on the Human Environment which was also made in 1972. Principle 21 of that document declares that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". In addition, the Court was referred to the Charter of Economic Rights and Duties of States adopted in 1974 which, in Chs. 1 and 2, contains assertions to the same effect as Principle 21 of the Stockholm Declaration. It is pertinent to remark, having regard to Koowarta v. Bjelke-Petersen, that in the same context the Charter affirms without qualification the principle of respect for human rights and fundamental freedoms. (at p566)

34. If, as in my view it does, the Convention represents the highest point in the international expression of concern for the preservation of the cultural and natural heritage of nations generally, then it is necessary to go to the provisions of the Convention to determine the degree of concern. (at p566)

35. Considerable time during the course of argument was spent in examining the question whether the significant provisions of the Convention constitute obligations imposed upon the parties to it or whether, despite being couched in terms giving the appearance of obligations, those provisions are in substance the expression of aspirations rather than obligations. I do not find it profitable to pursue this question. Whilst there is much to be said for the view that no relevant obligation is imposed by the Convention, I am prepared to assume for the purposes of the argument that its provisions are obligatory. Notwithstanding that assumption, it does not appear to me that the level of international concern shown by the adoption of the Convention is such as to make the protection of the cultural and natural heritage of Australia part of its external affairs. (at p566)

36. The material provisions of the Convention are set out in the judgment of the Chief Justice and it would be repetitious to set them out again. What they make clear is that the duty of caring for their cultural and natural heritage is recognized as belonging primarily to the nations which are parties to the Convention. Whilst there is an obligation imposed upon parties to the Convention to undertake measures for the protection, conservation and presentation of the cultural and natural heritage, the measures required are those which are possible and appropriate for each country and it is a matter for each country to decide for itself what is possible and appropriate; see Arts. 4 and 5. Recognition is expressed of the fact that the cultural and natural heritage of individual countries constitutes as a whole a world heritage and that the international community as a whole should cooperate in its protection. This recognition is, however, expressed in guarded terms, being given without prejudice to property rights provided by national legislation and fully respecting the sovereignty of those countries on whose territory the cultural and natural heritage is situated; see Art. 6. The method of international co-operation for which the Convention provides is the establishment of a World Heritage Committee (Art. 8) and a World Heritage Fund (Art. 15). Contributions to the fund by parties to the Convention are compulsory only for those who choose to make them so (Art 16). (at p566)

37. Parties to the Convention may make requests to the World Heritage Committee for international assistance for property forming part of the cultural or natural heritage of outstanding universal value within their territory (Art 19) and assistance may be granted in the form of expert help, the supply of equipment or loans or grants of money from the World Heritage Fund; see Art. 22. Assistance, however, may only be granted in respect of property entered upon the World Heritage List or the List of World Heritage in Danger; see Art. 20. The World Heritage List is compiled by the World Heritage Committee from an inventory of property suitable for inclusion in it, compiled in relation to its territory by each party to the Convention. Only property of outstanding universal value is to be placed upon the World Heritage List and it cannot be placed on the list without the consent of the party concerned. The List of World Heritage in Danger specifies property for the conservation of which major works are necessary and for which assistance has been requested and which is threatened by serious and specific dangers of a type described; see Art. 11. The Convention makes provision for educational programmes and reports upon the measures adopted for the application of the Convention; see Arts. 27, 28 and 29. Finally, there is provision for denunciation of the Convention by any party and for its registration and revision; see Arts. 35, 36, 37 and 38. (at p567)

38. Article 34 contains a federal state clause in the following form:

"The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;

(b) with regard to the provisions of this convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption." (at p567)

39. I have set out Art. 34 in full because of its significance in the Australian context. Although, as will appear, I do not find it necessary to determine the applicability of that clause, it is nevertheless of sufficient importance to return to it. (at p567)

40. What emerges from the Convention with clarity is the extreme care which has been taken to affirm the right of individual parties to determine not only what constitutes the cultural and natural heritage situated upon its territory which is deserving of international attention, but also the right to determine whether it is possible or appropriate to endeavour to take the measures suggested by the Convention for the protection, conservation and presentation of that heritage. The Convention recognizes plainly that in this field of endeavour there can be no absolute imperatives and that difficult decisions must be made which involve the compromise of environmental, social and economic values. Those decisions are left to the individual parties to the Convention with the exhortation that they should endeavour, in so far as possible, and as appropriate for each country, to identify and conserve their heritage. (at p567)

41. It is apparent, I think, from the foregoing that the Convention for the Protection of the World Cultural and Natural Heritage falls short of demonstrating the degree of international concern over its subject matter which Stephen J. would have considered sufficient to stamp it with the characteristics necessary to make it part of this country's external affairs. Indeed, the Convention itself points in the opposite direction. It is at pains to restrict the degree of concern which it shows so that there can be no suggestion of international invasion of the sovereign right of nations to determine for themselves the manner in which they will exploit their resources, notwithstanding the threat of impoverishment of the heritage of the world. All of this is a far cry from the Convention on the Elimination of All Forms of Racial Discrimination which does speak in the unambiguous terms of absolute imperatives. With the latter Convention it was possible to see by the nature of its provisions that any failure on the part of this country to observe them would affect other nations and this country's relations with them. Moreover, the international setting in which that Convention was adopted, as set out in the judgment of Stephen J. in Koowarta v. Bjelke-Petersen, served to emphasize the conclusion

which he reached, which was that racial discrimination, like slavery and genocide, was of immediate relevance to international relations and its unacceptability was, if not a part of customary international law, close to it. Not only does the Convention for the Protection of the World Cultural and Natural Heritage expressly reserve to the parties to it the right to make their own decisions concerning how and when and whether they will act to achieve its objectives, but the international setting in which the Convention was adopted and which is illustrated by the documentary material to which the Court was referred, serves to demonstrate, if anything, that the Convention accurately reflects world opinion. I am for these reasons of the clear view that, even if international concern is a relevant factor in determining whether a law enacted in the implementation of a treaty is a law with respect to external affairs in accordance with the views of Stephen J., in this case no international concern of the requisite kind or degree can be demonstrated in relation to the subject matter of the laws in question or of the treaty obligations which they are intended to implement. It goes without saying that, in my view, if the degree of international concern is insufficient to support the implementation of the Convention, it is insufficient to support legislation upon the subject matter of the Convention independently of it. (at p567)

42. That leaves me with the question whether the relevant obligations of the Convention (which is the treaty in this case - I use the term in a broad sense) were, apart from considerations of international concern, imposed in reference to some matter international in character. I speak of relevant obligations because clearly there are obligations which are, or at least can be, imposed by the Convention which are international in character. The obligation to contribute to the World Heritage Fund, if it is undertaken, is of such a character. The undertaking not to take any deliberate measures which might damage the cultural or natural heritage situated on the territory of some other party would appear to be another. The relevant obligations (again upon the assumption that they are truly obligations) are those which relate to the steps to be taken within their own territory by the parties to the Conventions for the preservation of their cultural and natural heritage. It is in the implementation of those obligations that the relevant laws were evidently passed and if the subject matter of those obligations possesses the necessary characteristics to make it part of this country's external affairs, so also does the subject matter of those laws. (at p568)

43. In my view then it cannot be said that there is anything in the subject matter of those obligations which makes it part of this country's external affairs. (at p568)

44. I have already pointed out that neither the mere fact of international agreement on the subject, nor the degree of international concern demonstrated in this case could, consistently with authority, be sufficient to establish the necessary international character. The relevant obligations are concerned, as are the laws, with the control by this country of activities upon its territory the effect of which is confined to this country. The activities to be controlled are of persons who will ordinarily be Australian citizens or bodies. If, in the event, they are not Australians, that will be merely coincidental and no evidence of any international ramification. There is nothing in the matters dealt with by the relevant treaty obligations or in the laws intended to implement those obligations which involves a relationship with other countries or with persons or things outside Australia. Nor is there anything in those laws which regulates transactions between this country and other countries, or between residents of this country and residents of other countries. (at p568)

45. In my view, s. 69 of the National Parks and Wildlife Conservation Act, to the extent that it purports to authorize the making of regulations to give effect to the Convention for the Protection of the World Cultural and Natural Heritage and, consequently, the World Heritage (Western Tasmania Wilderness) Regulations are beyond power and invalid. It is also my view that s. 9 of the World Heritage Properties Conservation Act is not a law with respect to external affairs and cannot be supported by that legislative power. (at p568)

46. In the foregoing discussion I have been able to avoid, by the assumptions which I have made, the difficult question of how far the legislative implementation of a treaty must conform to the treaty obligations. The view has been forcefully expressed that if treaty obligations are the basis of a law, then it must conform closely to the treaty obligations. In Burgess' Case, at pp. 687-688, Evatt and McTiernan JJ.said:

"But it is a necessary corollary of our analysis of the constitutional power of Parliament to secure the performance of an international convention that the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing. In other words, it must be possible to assert of any law which is, ex hypothesi, passed solely in pursuance of this head of the 'external affairs' power, that it represents the

fulfilment, so far as that is possible in the case of laws operating locally, of all the obligations assumed under the convention. Any departure from such a requirement would be completely destructive of the general scheme of the Commonwealth Constitution, for, as we are assuming for the moment, it is only because, and precisely so far as, the Commonwealth statute or regulations represent the carrying into local operation of the relevant portion of the international convention, that the Commonwealth Parliament or Executive can deal at all with the subject matters of the convention". (at p568)

47. Whilst the wide view taken by Evatt and McTiernan JJ. of the power to implement treaties must be borne in mind, this passage makes it clear that legislation upon the general subject matter of a treaty will not be valid merely because the treaty imposes obligations which are international in character. Of course, as Evatt and McTiernan JJ. go on to point out, the treaty obligations may be such as to allow a discretion as to the method of implementation but I would add that the wider the discretion the less likely it is in some cases (as in this case) that the obligations possess an international character. I do not in this case have to answer this question, but I mention it lest it be thought I have passed over it by default. (at p568)

48. There remains to be made some further mention of Art. 34, the federal state clause, of the Convention. Had I found it necessary to determine the question whether the Convention imposed obligations upon the Commonwealth in any relevant respect, I should have found the conclusive answer in that clause. The nature of the significant obligations imposed by the Convention, if it is appropriate to call them obligations, require the formation of a judgment by each party as to what is possible and what is appropriate by way of measures for the protection, conservation and presentation of the cultural and natural heritage situated on its territory. Such a judgment requires the balancing of environmental, social and economic considerations which are by no means wholly, or even largely, entrusted to the Commonwealth in the division of legislative and executive powers which the Constitution effects between it and the States. Of particular relevance in the present context is the fact that the energy needs of the State of Tasmania and the means by which they are to be met are not matters which are confided to the Commonwealth and, that being so, the Commonwealth is in no position to exercise the judgment which is central to the relevant obligations imposed by the Convention. It follows inevitably, in my view, that the implementation of those provisions of the Convention which are in question in this case do not "come under the legal jurisdiction of the central government" and, hence, the only obligation of the Commonwealth under the Convention with regard to those provisions is to inform the "competent authorities" of the States of those provisions with its recommendation for their adoption. However, having expressed my views upon the assumption that obligations were imposed by the operative provisions of the Convention upon the Commonwealth, I have no need to develop in greater detail my view of the effect of Art. 34.

The corporations power (at p569)

49. Section 10 of the World Heritage Properties Conservation Act, which proscribes for foreign and trading corporations the same activities as are described in s.9, is brought into effect by a proclamation under s.7 as s.9 is brought into effect by a proclamation under s.6. A proclamation may only be made by the Governor-General under s.7 in respect of property which he is satisfied is being or is likely to be damaged or destroyed. The terms "foreign corporation" and "trading corporation" are to be given under sub-s. (1) of s.10 the same meaning as they bear in s. 51(xx) of the Constitution. Section 10 also applies to corporations incorporated in a territory but, putting them on one side, it was not contested that the validity of that section stands or falls upon whether s. 10 can be said to be a law with respect to foreign corporations or trading corporations within the meaning of s. 51 (xx). (at p569)

50. The activities proscribed are, as I have said, set out in s. 10(2), but they are made unlawful by s. 10(3), except with the consent of the Minister. Section 10(4) is a refinement. Without prejudice to sub-ss. (2) and (3), the same activities are made unlawful, except with the consent of the Minister, if done by a trading corporation for the purposes of its trading activities. It is convenient to defer consideration of sub-s (4) for the moment and to turn to s. 10 without regard to it. (at p569)

51. Difficulties in the construction of par. (xx) of s. 51 of the Constitution have long been felt because that paragraph refers to persons, albeit corporate persons, unlike other paragraphs of the section with the exception of pars. (xix) (aliens) and (xxvi) (the people of any race). The nature of most paragraphs of s. 51 was noted by Dixon J. in Stenhouse v. Coleman [1944] HCA 36; (1944), 69 C.L.R. 457, at p. 471, where he said:

"In most of the paragraphs of s. 51 the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognized category of legislation (as taxation, bankruptcy). In such cases it is usual, when the validity of legislation is in question, to consider whether the legislation operates upon or affects the subject matter . . . " (at p569)

52. However, the fact that the legislative power contained in s. 51(xx) is defined by reference to persons of a particular description does not mean that those persons do not form the subject matter of the power or that it is not necessary for the validity of a law made under s. 51(xx) that it be a law with respect to that subject matter. To put it as it was expressed in argument on behalf of the Hydro-Electric Commission, s. 51(xx) of the Constitution treats foreign corporations and trading corporations formed within the limits of the Commonwealth as subjects of legislative power and not as objects of legislative command. To recognize this is to enable a qualified answer to be given to the question whether a law beginning "every foreign or trading corporation shall . . ." or "every foreign or trading corporation shall not . . ." is a valid law; Cf. Strickland v. Rocla Concrete Pipes Ltd. (1971) 124 C.L.R. 468, per Menzies J., at p. 508. For the answer must be that such a law is not necessarily a valid law; its validity will depend upon whether the command or prohibition goes to something which may be said to be within the subject matter, that subject matter being defined by reference to corporations of the description contained in s. 51(xx). As was said by Barwick C.J. in Strickland v. Rocla Concrete Pipes Ltd., at pp. 489- 490:

". . . it does not follow either as a logical proposition, or, if in this instance there be a difference, as a legal proposition, . . . that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with recpect to the subject matter of s. 51(xx). Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law." (at p569)

53. The submission put on behalf of the Commonwealth, when reduced to its essentials, was that an affirmative answer must be given in all cases to the question which I have posed above, but that is a submission which is not consonant with the preponderance of authority and would, if accepted, produce extraordinary results, "big with confusion"; see Huddart, Parker & Co. Pty. Ltd. v. Moorehead [1909] HCA 36; (1908), 8 C.L.R. 330, per Higgins J., at p. 409. (at p569)

54. It is, I think, unnecessary to examine those judgments in which there is reference to the unlimited scope of Commonwealth legislative power which would result if the Commonwealth's submission were accepted; see, for example, Bank Nationalization Case, per Latham C.J., at p. 202; Actors & Announcers Equity v. Fontana Films Pty. Ltd. [1982] HCA 23; (1982), 56 A.L.J.R. 366, per Gibbs C.J., at p. 369. The conception which lies behind the submission is described by Professor Harrison Moore in his Commonwealth of Australia, (2nd ed.), at p. 470, as "the revival of a medieval system of personal laws". Whilst it might be observed, as Gibbs C.J. has done in the case last cited, that such a conception is hardly consistent with the federal nature of the Constitution and is certainly incongruous in the context of s. 51, the real answer to my mind lies in the ordinary application of accepted principles. In the end the question is whether a law is a law with respect to a subject matter enumerated in s. 51, notwithstanding the difficulties which arise in the case of s. 51(xx) because of the definition of the power by reference to persons of a particular description. (at p570)

55. As in Actors & Announcers Equity v. Fontana Films Pty. Ltd., it is unnecessary and undesirable to attempt to define in this case the outer limits of s. 51(xx); see p. 370, per Gibbs C.J. and also Strickland v. Rocla Concrete Pipes Ltd. at p.

490, per Barwick C.J. It is sufficient for present purposes to say that for s. 10 of the World Heritage Properties Conservation Act to be a valid law it must be a law with respect to foreign corporations or trading corporations. (at p570)

56. The words of Gibbs C.J. in Actors & Announcers Equity v. Fontana Films Pty. Ltd., at p. 370 are, I think, apposite in this case. He points out that the descriptive adjectives "foreign", "trading" and "financial" in s. 51(xx) are important and continues:

"The words of par. (xx) suggest that the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws, if they are to be valid: cf. per Walsh J. in Strickland v. Rocla Concrete Pipes Ltd., at p. 519. In other words, in the case of trading and financial corporations, laws which relate to their trading and financial activities will be within the power. This does not mean that a law under s. 51(xx) may apply only to the foreign activities of a foreign corporation, for ex hypothesi the law will be one for the peace, order and good government of the Commonwealth. It means that the fact that the corporation is a foreign corporation should be significant in the way in which the law relates to it." (at p570)

57. It seems to me that the last line of that passage can be applied in the case of a trading corporation (or, for that matter, a financial corporation) as well as a foreign corporation. For a law to be a valid law with respect to a trading or financial corporation the fact that it is a trading or financial corporation should be significant in the way in which the law relates to it. (at p570)

58. In the present case it is apparent, in my view, that there is no significance in the way in which s. 10 of the Act relates to corporations in the fact that they are trading or foreign corporations or, indeed, in the fact that they are corporations at all. They are selected merely as pegs upon which Parliament has sought to hang legislation on an entirely different topic; see Huddart, Parker & Co. Pty. Ltd. v. Moorehead, per Higgins J., at p. 415. If the question is asked whether s. 10 is in fact a law dealing with trading or foreign corporations or dealing with some other subject and applying it to trading and foreign corporations, it admits of only one answer. The section is bereft of any attribute which connects it with corporations other than the fact that the command which it contains is directed to trading and foreign corporations. That is not sufficient to make it a law with respect to corporations, let alone trading or foreign corporations. (at p570)

59. As was said by Menzies J. in Strickland v. Rocla Concrete Pipes Ltd., at pp. 502-503:

"A law is not to be described as with respect to the various persons or classes of persons upon whom it casts obligations. A criminal law of general application is neither a law with respect to all persons to whom its command goes, nor to such of those persons as happen to be criminals." (at p570)

60. The same point was made by Walsh J. in the same case, at p. 516, when he said:

"It is, of course, true of any law that obedience to it can be rendered only by persons and sanctions for disobedience can be imposed only upon persons. But that does not mean that every law is a law with respect to the persons or to the classes of persons who are required to obey it." (at p570)

61. Section 10 of the World Heritage Properties Conservation Act is, as the long title of the Act would indicate, a law relating to the protection and conservation of certain property forming part of the cultural or natural heritage within the meaning of s. 2. It is not a law with respect to corporations. (at p570)

62. The presence of sub-s. (4) of s. 10 may be thought to indicate some doubt as to the validity of the section without it. That sub-section is an attempt, if all else fails, to confine the operation of s. 10 to the trading activities of a trading

corporation, evidently in the hope that to do so would transform the operation of the section into that of a law with respect to trading corporations. The attempt is a transparent one, for even if the activities which s. 10 proscribes are confined to activities for the trading purposes of a trading corporation, it is nevertheless not a law in which the character of a trading corporation has any significance. Activities so confined are not necessarily trading activities. Ultimately anything a trading corporation does is for trading purposes, so that the attempt to narrow the operation of s. 10 by the application of sub-s (4) achieves little if anything. It does no more than direct the same command to trading corporations in another way. It certainly does not convert the law to one with respect to trading corporations. (at p570)

63. For the foregoing reasons it is my view that s. 10 is not a law with respect to trading or foreign corporations and is wholly invalid. That renders it unnecessary for me to go on and consider whether the Hydro-Electric Commission is a trading corporation within the meaning of s. 51(xx). However, had I needed to do so, I should have come to the same conclusion and for the same reasons as the Chief Justice.

The power to make special laws for the people of any race (at p571)

64. Section 51(xxvi) gives power to the Parliament to make laws for the people of any race for whom it is deemed necessary to make special laws. The meaning of the word "race" is otherwise imprecise, but the words "other than the aboriginal race in any State", which were deleted from par. (xxvi) by amendment, make it clear that the term "any race" includes a race which may be described as the Aboriginal race. That does not eliminate all problems of definition, but it is proper, I think, to assume in this case that the Aboriginal race referred to in s. 8 of the World Heritage Properties Conservation Act is sufficiently identifiable and identified as a race within the meaning of s. 51(xxvi). Section 8 of that Act declares that it is deemed necessary to enact ss. 11, 13(7) and 14(5) as special laws for the people of the Aboriginal race. Section 11 is the significant section; it is the provision which prohibits, subject to the consent of the Minister, the same activities as are prohibited by s. 9 with an additional prohibition against removing any artefacts or relics situated on any site to which the section applies. There is also a general prohibition in sub-s (2) against doing anything without the consent of the Minister that damages or destroys or that is likely to result in damage to or the destruction of any site to which the section applies or any artefacts or relics on such a site. Sections 13(7) and 14(5) do not assist for present purposes. An Aboriginal site is defined as a site that is, or is situated within, identified property, the protection of which is, whether by reason of the presence on the site of artefacts or relics or otherwise, of particular significance to the people of the Aboriginal race. It is important to note that Aboriginal sites are by definition confined to identified property which, by definition contained in s. 2, is property forming part of the cultural heritage or natural heritage within the meaning of the Convention for the protection of the World Cultural and Natural Heritage. Section 8(3) enables s. 11 to be brought into operation by proclamation where the Governor-General is satisfied that an Aboriginal site is being or is likely to be damaged or destroyed or that any artefacts or relics situated on an Aboriginal site are likely to be damaged or destroyed. The activities referred to in s. 11 are prohibited except with the consent of the Minister. Whilst s. 13 by sub-s. (1) requires the Minister, in determining whether or not to give consent under s. 9, to have regard "only to the protection, conservation and presentation, within the meaning of the Convention, of the property", there is no such requirement in relation to the consent of the Minister under s. 11. Other than being required to give certain notices under ss. 13(3) and (4), the Minister is at large in determining whether or not to give consent under s. 11. It is significant that in giving or refusing consent, the Minister is not required to have regard to any matters which may be said to be of significance to the people of the Aboriginal race. (at p571)

65. Koowarta v. Bjelke-Petersen makes two things clear. First, the phrase "the people of any race" in s. 51(xxvi) is apt to refer to people of a particular race. Secondly, to fall within s. 51(xxvi), a law must not only be deemed necessary for the people of a particular race, but it must be a special law for those people; see per Gibbs C.J., at p. 632, per Stephen J., at p. 642, per Wilson J., at pp. 657-658 and per Brennan J., at p. 666. (at p571)

66. Whilst Parliament may deem a law to be necessary for the people of any race and so satisfy one of the requirements of s. 51(xxvi), it cannot by so doing determine that the law is a special law for those people and so preclude any examination of its legislative power: Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951), 83 C.L.R. 1. That must remain a question to be determined by an examination of the law for the purpose of ascertaining

whether it is in truth a special law for the people of any race. Moreover, it is essential to keep in mind the distinction between a law which is specially for the people of a particular race and a law which has a special application to the people of a particular race. In the former case, there will be greater difficulty in showing that the law is a special law within the meaning of s. 51(xxvi). No more need be done here than to admit, without going further, the possibility adverted to by Stephen J. in Koowarta v. Bjelke-Petersen, at p. 643, that the "necessary special quality might perhaps be sufficiently attracted by facts dehors the legislation". The mere fact that a law is more significant to people of a particular race than to others or is approved of by them to a greater extent than by others clearly does not make the law a special law for those people. It may be thought that the Racial Discrimination Act, certain provisions of which were declared valid in Koowarta v. Bjelke-Petersen, was a law which had a greater significance to people of the Aboriginal race than to most other people in this country, but the submission that it could be said to be a special law within the meaning of s. 51(xxvi) was rejected by those members of the Court who considered the matter in that case. In the latter case referred to above, that is, the case of a law which has a special application to the people of a particular race, if the special application is a special application in a legal sense, in that it creates a distinction between those people and others in the rights which it confers or the obligations which it imposes, the law is likely to be a special law within the meaning of s. 51(xxvi). (at p571)

67. What is clear is that a law of general application and of significance to all is not a special law for the people of any race. In Koowarta v. Bjelke-Petersen this was pointed out by Stephen J., at p. 642:

"To be within power under par. (26) a law must be special in the sense that it is the particular race, or races, for whom it legislates that gives rise to the occasion for its enactment. The Racial Discrimination Act is not such a law. True, it legislates about race and proscribes discrimination upon the basis of race. But it is a perfectly general law, addressed to all persons regardless of their race and requiring that the members of all races shall be free from discrimination on account of race. It protects no particular race or races. As its recitals attest, its purpose is to give effect to the International Convention, a copy of which is scheduled to the Act. That Convention, in its opening recitals, stresses the promotion of universal respect for human rights and fundamental freedoms for all without distinction; universality of application lies very much at its heart. The Act takes from the Convention this quality, thereby denying to it the character of a special law to which par. (26) refers." (at p572)

68. See also per Gibbs C.J., at p. 632, per Wilson J. at p. 658. (at p572)

69. As was said by Brennan J. at p. 665: "it is of the essence of a law falling within par. (xxvi) that it discriminates between the people of the race for whom the special laws are made and other people." (at p572)

70. Notwithstanding the declaration made in s. 8(1) of the World Heritage Properties Conservation Act, it is plain to my mind that the laws which are deemed necessary for the people of the Aboriginal race are not special laws for those people. The operative provisions, which consist of the prohibitions contained in s. 11, are addressed generally to all persons. The Aboriginal sites in relation to which those prohibitions may operate are, by definition, part of the cultural or natural heritage of the nation. The laws are not laws for the protection of Aboriginal sites or artefacts or relics. There may be, and probably are, Aboriginal sites or artefacts or relics which are far more significant to the people of the Aboriginal race, but the Act has nothing to say about them. It is concerned with "identified property" which is property of significance because it forms part of the cultural heritage or natural heritage of the nation. Even if it can be said, as the Act does, that some of the sites may be of special significance to the people of the Aboriginal race, that does not affect the general application of the relevant law. If that is not otherwise apparent, it is made abundantly clear by the fact that in giving or refusing his consent to do those things which s. 11 otherwise makes unlawful, the Minister is not required to have regard to matters of significance to the people of the Aboriginal race. He may grant or refuse his consent with regard to those matters which he considers significant generally. This generality may be contrasted with the particularity of s. 13(1) which requires the Minister in determining whether or not to give a consent pursuant to s. 9 in relation to any property to which that section applies, to have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property. (at p572)

71. The laws which are contained in ss. 8 and 11 of the World Heritage Properties Conservation Act are no less laws

relating to the protection and conservation of certain property forming part of the Australian cultural or natural heritage than are the other provisions of the Act. They are not special laws for the people of the Aboriginal race.

The implied inherent power said to arise from nationhood (at p572)

72. The submission made by the Commonwealth under this head was directed to s. 6(2)(e) of the World Heritage Properties Conservation Act which provides that s. 9 may be brought into operation by proclamation in relation to identified property if the property is part of the heritage distinctive of the Australian nation by reason of specified qualities or by reason of its international or national renown and if, by reason of the lack or inadequacy of any other available means for its protection or conservation, it is peculiarly appropriate that measures for the protection or conservation of the property be taken by the Parliament and Government of the Commonwealth as the national parliament and government of Australia. It was submitted that the words "peculiarly appropriate" mean no more than "fitting" and that the paragraph gives a valid operation to s. 9 in respect of the property proclaimed under s. 6(3). (at p572)

73. It is not, I think, unfair to say that this submission was but faintly put. From time to time references have been made in the cases to Commonwealth legislative powers which are "incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government"; see Attorney-General (Vict.) v. The Commonwealth [1945] HCA 30; (1945), 71 C.L.R. 237, at p. 269. Generally speaking, the references are explicable in terms of the power to spend, if such is an appropriate term to describe the power arising from ss. 81 and 83 of the Constitution in combination with such other powers as the Commonwealth may possess, and the executive power, both coupled if necessary with the incidental power (s. 51(xxxix)); see Ex parte Walsh and Johnson; In re Yates [1925] HCA 53; (1925), 37 C.L.R. 36, at p. 94; Australian Communist Party v. The Commonwealth, (supra), at p. 188; R. v. Sharkey, (supra), at pp. 135, 148; Burns v. Ransley [1949] HCA 45; (1949), 79 C.L.R. 101, at pp. 109-110, 116. However, if there is some power which extends beyond that which can be drawn from the power to spend, the executive power and the incidental power and which can be described as inherent in nationhood, then it has not, as Barwick C.J. said in Victoria v. The Commonwealth and Hayden, (supra), at p. 362, "been fully explored." Indeed, it has not really been explored at all. (at p572)

74. I would seek to make only one comment in this case because it is relevant to some of my earlier remarks. In speaking of nationhood, it is important to distinguish between the nationhood which was achieved upon federation and the nationhood which may be said to be the result of the attainment of international personality. Powers, executive rather than legislative, may be inherent in nationhood of the latter kind, but they are derived from the recognition of a status rather than from any constitutional provision. It is to the Constitution which one must look to find powers which arise from nationhood of the former kind. (at p573)

75. In this case, however, it is sufficient to say that even if it be thought by some to be fitting that measures for the protection or conservation of the property in question be undertaken by the Commonwealth because that property is part of the heritage of the Australian nation, no such view was taken in the division of power made by the Constitution. Although it can be said that the protection or conservation of the Australian cultural and natural heritage is in the national interest (and the submission can be put no higher), that does not carry with it the implication that the Commonwealth has power to legislate with respect to the matter. There are many matters which may be said to affect the national interest - matters such as education, health, the prevention and punishment of crime - which are not the subject of Commonwealth legislative power and are consequently within the residual powers of the States. Whatever inherent legislative powers the Commonwealth may have, if any, they do not, in my view, extend to the matters dealt with by the World Heritage Properties Conservation Act. I agree with what was said by Gibbs J. in Victoria v. The Commonwealth and Hayden, (supra) at p. 378:

"The legislative power that is said to be incidental to the exercise by the Commonwealth of the functions of a national government does not enable the Parliament to legislate with respect to anything that it regards as of national interest and concern; the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers

carefully effected by the Constitution."

Conclusion (at p573)

76. It will be apparent from what I have written that I regard s. 69 of the National Parks and Wildlife Conservation Act, to the extent that is authorizes the World Heritage (Western Tasmania Wilderness) Regulations, as invalid. It follows that, in my view, those regulations are also invalid. It will also be apparent that I am of the view that each of ss. 9, 10 and 11 of the World Heritage Properties Conservation Act is beyond power and invalid. The operation of ss. 9 (save in so far as it applies pursuant to s. 6(1), 10 and 11 is dependent upon proclamations made under ss. 6, 7 and 8 of the Act and I also regard the latter sections (save for s. 6(1) and the proclamations made under them as invalid. (at p573)

77. It follows as a consequence that in my view the Gordon River Hydro-Electric Power Development Act 1982 (Tas.) is a valid enactment. (at p573)

78. These conclusions make it unnecessary for me to consider the submissions made in relation to the acquisition of property on just terms, the abridgement of the right to use the waters of rivers or the interference with State legislative or executive functions or with prerogative powers. It is also unnecessary for me to answer specifically the questions asked in each action. I would answer those questions in accordance with the views which I have expressed. (at p573)

ORDER

ACTIONS No. C6 OF 1983 COMMONWEALTH v. TASMA- NIA AND NO. C8 OF 1983 ATTORNEY-GENERAL (TAS.) v. COMMONWEALTH

Question:

1. Is Section 69 of the National Parks and Wildlife Conservation Act 1975

valid in so far as it enables:

(a) the making of Regulations for and in relation to giving effect to the World Heritage Convention;

(b) the making of the World Heritage (Western Tasmania Wilderness) Regulations?

Answer:

1. (a) Yes

(b) No.

Question:

2. Does the decision of the validity or invalidity of the World Heritage

(Western Tasmania Wilderness) Regulations or any of them depend upon the judicial determination of the disputed allegations or any of them contained in the annexed Statement of Facts and Allegations?

Answer:No.

Question:

3. If no to question 2, are the said Regulations or any of them invalid?

Answer: Yes, they are all invalid.

Question:

4. If yes to question 2, which of the disputed allegations are necessary to

be determined in order to enable a decision as to the validity or invalidity of the said Regulations to be made?

Answer: Unnecessary to answer.

Question:

5. If no to question 3, is the Gordon River Hydro-Electric Power Development

Act 1982 (Tas.) valid?

Answer: Unnecessary to answer in these proceedings.

Question:

6. If no to question 5, must the second defendant pursuant to section 15B of

the Hydro-Electric Commission Act (Tas.) direct the third defendant in writing to cease to construct the development specified in Schedule 1 to the Gordon River Hydro-Electric Power Development Act 1982 (Tas.)?

Answer: Not answered.

ACTION NO. C12 OF 1983 (COMMONWEALTH v. TASMANIA) Question:

1. Are any of the provisions of

(a) sections 6 and 9

(b) sections 7 and 10

(c) sections 8 and 11

(d) section 17

of the World Heritage Properties Conservation Act valid?

Answer:

1. (a) (i) Subsections (1), (2)(b) and (3) of s. 6 are valid. It is unnecessary to determine the validity of the other paragraphs of s. 6(2).

(ii) Section 9(1)(h) is valid. The remainder of s. 9(1) and s. 9(2) are invalid. It is unnecessary to determine the validity of subsections (3) and (4) of s. 9. 1. (b) (i) Section 7 is valid.

(ii) Subsections (1) and (4) of s. 10 are valid. It is unnecessary to determine the validity of subsections (2) and (3) of s. 10, independently of their application for the purposes of s. 10(4).

1. (c) Sections 8 and 11 are invalid.

1. (d) Not answered.

Question:

2. Does the decision of the validity or invalidity of the Act, the Regulations or Proclamations made under the Act, or any of them depend upon the judicial determination of the disputed allegations or any of them contained in the Statement of Facts and Allegations?

Answer:No.

Question:

3. If no to question 2, are:

(a) the Regulations

(b) the Proclamations

or any of them invalid and if so which?

Answer: The Regulations are invalid to the extent to which they are made pursuant to ss. 8 and 11. The Proclamations made pursuant to s. 8 are invalid. Otherwise, No.

Question:

4. If yes to question 2, which of the allegations are necessary to be determined in order to enable a decision as to the

validity or invalidity of the said Act, Regulations or Proclamations to be made?

Answer:Does not arise.

Question:

5. Do the agreed facts

(a) compel

(b) permit

the conclusion that the HEC is a trading corporation within the meaning of the Heritage Act?

Answer:

5. (a) Yes.

(b) Yes.

Question:

6. If yes to (a) (b) or (c) of question 1 and no to question 3, is the Gordon River Hydro-Electric Power Development Act 1982 (Tas.) valid?

Answer: Valid, but ineffective unless the Commonwealth Minister consents.

Question:

7. If no to question 6 must the second defendant pursuant to section 15B of the Hydro-Electric Commission Act (Tas.) direct the third defendant in writing to cease to construct the development specified in Schedule 1 to the Gordon River Hydro-Electric Power Development Act 1982 (Tas.)?

Answer: Not answered.

Question:

8. If the Hydro-Electric Commission is a trading corporation and if section 10(4) is valid, is the Commission carrying out any of the acts set forth in subsections (2) or (3) for the purposes of its trading activities?

Answer: Yes.