I — International Law in General

Status of the Aboriginal people of Australia. Proposed "treaty" or Makarrata between Aboriginal people and the Commonwealth of Australia. Government views on the proposal. Report of Parliamentary Committee.

In the Senate on 25 March 1981 the Minister for Aboriginal Affairs, Senator Peter Baume, was asked what the Federal Government's position was concerning the proposed makarrata or Aboriginal treaty. The Minister replied in part (Sen Deb 1981, Vol 88, 712–713):

> Makarrata is an Aboriginal word meaning, in general terms, a resumption of normal relationships at the end of a period of disagreement. The word is being used in relation to a move to develop an understanding between Aboriginal people and other Australians. I will answer the last part of the question first. The discussions to develop a makarrata will involve both the Commonwealth Government, which will deal with national Aboriginal bodies, and also State governments which will deal with those areas which relate to their own activities. The meeting last week between State and Commonwealth Ministers responsible for Aboriginal affairs was attended by representatives of the National Aboriginal Conference who asked the States whether they would open up discussions on the question of a makarrata. So, the direct approach has come from the elected representatives of the Aboriginal people to the States regarding the makarrata. I must say to the honourable senator that I do not use the word treaty for reasons which have to do with the precise legal meaning of the word. The approach came from Aboriginal people and was taken up by most of the States and the Northern Territory. At this stage no State has indicated that it will not discuss the matter.
>
> The Government proposes, with the help of the National Aboriginal Conference, to pursue the concept of a makarrata and also to provide assistance to the NAC to research and develop the proposal. In doing so, the Government is prepared to acknowledge prior occupation of Australia by Aboriginals. We are not prepared to act unilaterally in those areas where the States have an interest. I have indicated to the NAC in a number of particular matters that the Government cannot negotiate a treaty which implies an internationally recognised agreement between two nations . . .

Later in 1981 the Senate referred the matter to its Standing Committee on Constitutional and Legal Affairs for inquiry and report. In January 1982 the Attorney-General, Senator Peter Durack, wrote to the Committee in part:[1]

> *A 'Makarrata'*
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> 4. I understand that the word "Makarrata" has been proposed in the light of objections to earlier proposals that there be a "treaty". In my view the

1 Text provided by the Senate Committee.

word 'treaty' would clearly be inappropriate since it ordinarily refers to an agreement between sovereign states that creates rights and obligations under international law, whereas the Commonwealth would be making the arrangements with the Aboriginals as a segment of *one Australian nation*.

5. If the status or operative effect of the compact was likely to be affected by the use of the term ''Makarrata'', it would be highly desirable for the document to contain a definition of that term so as to make it clear beyond any doubt that it was not an agreement with Aboriginals as a separate ''nation''. An appropriate definition could only be formulated after the contents of the 'Makarrata' had been determined.

The Parties

6. One party would be the ''Commonwealth of Australia''. The Agreement could, if so desired, be executed on behalf of the Commonwealth by the Governor-General by whom, as the Queen's representative, the executive power of the Commonwealth is exercisable (see s.61 of the Constitution). Depending upon the contents of the ''Makarrata'', an enabling Act, or even alterations to the Constitution, might be necessary.

7. The expression ''compact or Makarrata'' in the Committee's terms of reference seems to imply that the other parties would be the Aboriginal people of Australia or their representative(s). The Government has expressed its willingness to discuss the ''Makarratta'' concept with the National Aboriginal Conference (''NAC''). Although the NAC is a representative body its charter does not purport to empower it to enter into agreements with the Commonwealth on behalf of Aboriginals. Legislation could, however, be passed conferring on the NAC or some other body capacity to enter into such an agreement with the Commonwealth.

...

''Self-determination''

18. The 'Makarrata' demands released by the NAC in September 1981 included a demand for a right in Aboriginals ''to freely determine their political status and freely pursue their economic, social and cultural development''.

19. However, Aboriginals, as part of the Australian people, already enjoy full self-determination both in regard to ''political status'' and to ''economic, social and cultural development''.

20. If the demand is intended to imply (incorrectly) that Aboriginals are a people separate from the Australian people, it is difficult to see how the demand could be met short of the establishment of a special Aboriginal territory with its own political institutions. I do not propose to comment further on this aspect.

In August 1982 the Department of Foreign Affairs submitted some observations to the Committee on the matter, some of which are as follows:[2]

The main concern of this Department is in relation to the well-known proposal which has been made in recent times by a number of private

Australian citizens that an international treaty can, or should, be concluded between the Commonwealth and the Australian Aboriginal people to regulate their mutual relations.

In respect of this particular proposal, it is the view of the Department that, since the Australian Aboriginal people are not a separate entity in international law, they have no capacity to conclude an international legal agreement with the Commonwealth. The Commonwealth is likewise precluded for legal reasons from making such an agreement with them. Ever since the recognition of Australia as a sovereign and independent State, the international community has dealt with Australia as a single nation.

The Department believes that any conferment of international legal personality upon the Aboriginal people would be a major and far-reaching step. It could create substantial problems, such as those concerning the legal competence generally of such a personality, the location of sovereignty in Australia, the right of foreign powers to interpose themselves in the internal affairs of Australia, and international responsibility for the acts of bodies in Australia exercising governmental powers.

The Department believes that, from the legal point of view, the choice of the term to cover any agreement between the Commonwealth and the Australian Aboriginals has a significance which should not be overlooked. It is important that it should be clear from the document itself that any such agreement is governed by Australian domestic law. Nonetheless, the Department believes that, to avoid any confusion on this latter point, the adoption of such terms as ''makarrata'' or any other term not having a special or exclusive association with international law should be considered as being greatly preferable to the adoption of such terms as ''treaty'', which are rarely used nowadays in connection with domestic legal instruments and which are normally applied only to international legal instruments. The avoidance of such terms as ''treaty'' would remove any danger of confusion or misunderstanding over the legal nature of such document and the status of the parties.

The Committee reported to the Senate on 13 September 1983 (PP No 107/1983). In presenting the report, Senator Tate said on behalf of the Committee, in part (Sen Deb 1983, Vol 99, 598):

Introduction

Proposals for some form of treaty or compact or, to use the word favoured by the National Aboriginal Conference, a ''Makarrata'', have had currency for several years. The idea behind such proposals is that at this stage of Australia's history there is a need for a reappraisal of traditional perceptions of the historical relationship between Aboriginal and non-Aboriginal people from the time of European settlement in this country. Proponents of the concept have argued that the best means of effecting a reconciliation between the Aboriginal and non-Aboriginal communities is the negotiation of a comprehensive agreement setting to rights, insofar as that is possible some two hundred years later, the dispossession and ill-treatment suffered by the original inhabitants of this continent and their descendants at the time of European settlement and subsequently.

It is important to emphasise that the Committee's terms of reference did

not require it to come to a conclusion as to the desirability or usefulness of the Makarrata concept. That central issue must be decided elsewhere and by other persons, the appropriate representatives of the Aboriginal and non-Aboriginal communities. Clearly such an agreement would only succeed if it were understood and supported throughout the whole Australian community. As regards the Aboriginal community there must be a comprehensive consultative process throughout Australia, an understanding and systematic consideration of the legal issues involved and of the various legal options for implementation. As well, there must be clear accord as to the objectives which are sought to be procured by the agreement, the establishment of proper representational processes and of a timetable for implementation. The relevance to the narrower question of legal feasibility of these issues which must be dealt with if a decision is made to pursue a compact became apparent during the course of the inquiry and the Committee's report attempts to assist in consideration of them.

Legal feasibility

Within the area of legal feasibility, issues which the report considers include whether the Aboriginal people's claim to sovereignty can be upheld, whether a compact with constitutional backing is desirable and, if so, whether the full text or just a broad enabling power should be included within the Constitution. Other alternatives to be considered are whether the compact should be supported by legislation based on the Commonwealth's existing constitutional authority or should take the form of a simple agreement or contract.

The claim made by some Aboriginals to sovereignty is given serious and detailed consideration in the report. The Committee looked closely at the rules of international law regarding sovereignty and at the consistent application by the courts in Australia of the "settled colony" principle which in turn was based on the "terra nullius" doctrine by which it was held that at the time of European settlement Australia was land belonging to no one. The effect of the application of this principle was that the Aboriginal inhabitants of the colony of Australia became immediately subject to the laws of the colonising nation which refused to acknowledge that they had a recognisable system of law and disregarding their relationship to their land.

However regrettable and ill-founded the views which led to the application of the settled colony principle with its historical consequences for the Aboriginal people, the Committee has concluded that sovereignty does not now inhere in the Aboriginal people. The Committee's conclusion is expressed in the following terms:

> It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying power could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at that time. However, the Committee concludes that, as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except insofar as they share in the common sovereignty of all peoples of the

> Commonwealth of Australia. In particular, they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth. Nevertheless, the Committee is of the view that if it is recognised that sovereignty did adhere in the Aboriginal people in a way not comprehended by those who applied the *terra nullius* doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians.

Following its consideration of the legal options available to implement a compact, the Committee concludes that the option to be preferred is the insertion within the Constitution of a provision similar to existing section 105A of the Constitution and recommends that the Government, in consultation with the Aboriginal people, should give consideration to this option if a compact is pursued. Under this option, a new provision in the Constitution would confer a broad power on the Commonwealth enabling it to enter into a compact with representatives of the Aboriginal people. The provision would contain a non-exclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with.

An important aspect of this approach is the symbolically important opportunity it would provide for the Australian people, by way of the necessary referendum to amend the Constitution, to show their commitment to the concept of a compact as a means of reconciliation between the Aboriginal and non-Aboriginal communities and as a means whereby the history of injustice and deprivation against Aboriginal people can in some measure be redressed. Inclusion of a special enabling power within the Constitution would also enhance the status of the ultimate agreement . . .

Following are extracts from Chapter 3 of the Report headed "Agreement in the form of an international treaty and the issue of sovereignty" (pp 31–50):

> 3.1 In April 1979, the National Aboriginal Conference (NAC) passed a resolution requesting that a "Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government".[1] By this request, the NAC sought formal recognition of, and redress for, the deprivations suffered by the Aboriginal people since European colonisation and settlement of the continent in 1788. At about the same time the Aboriginal Treaty Committee, comprising white Australians and chaired by Dr H.C. Coombs, was formed with the object of sponsoring the concept of a treaty among Australia's non-Aboriginal community. This Chapter examines the legal feasibility of implementing such a "treaty of commitment" in the form of an international law treaty.
>
> *The meaning and functions of treaties in modern law*
>
> 3.2 The expression "treaty" has been used in international law as a generic term to cover many different forms of international agreement, often referred to by a variety of names.[2] Before 1969, the law governing treaties consisted of the customary rules of international law. To a large extent, these rules were codified and reformulated in the Vienna Convention on the Law of Treaties, concluded in 1969, to which Australia is a party. As a contemporary code on international law treaties, this Convention defines a

treaty as an agreement whereby two or more States establish, or seek to establish, a relationship between themselves governed by international law.[3] In general terms, the object of a treaty is to impose binding obligations on the States who are parties to it.

3.3 In modern international law, for an agreement to constitute a treaty, it should satisfy the following four criteria:[4]

(a) The parties must have the capacity to conclude treaties under international law; that is, they must be sovereign entities possessing international personality;

(b) the parties must intend to act under international law and that any dispute arising under the treaty be arbitrated according to international legal principles and by international legal institutions;

(c) there must be a meeting of minds between the parties to the treaty; and

(d) the parties must have the intention to create legal obligations.

As a fifth criterion, though perhaps not a requirement, it is the usual practice for treaties to be in written form.

3.4 The Committee deals with the difficult issue of parties in Chapter 8 which discusses representation. Assuming that the parties can be satisfactorily identified, it appears to the Committee that all of these criteria, with the exception of the first one, could be satisfied by the Commonwealth and the Aboriginal people. It is the need to satisfy the first requirement — that the parties must have the capacity as entities possessing international personality enabling them to conclude treaties under international law — which the Committee foresees as the major impediment to the conclusion of an international law treaty between the Aboriginal people and the Commonwealth of Australia.

3.5 In a submission to the Committee, Professor D.H.N. Johnson, Professor of International Law at the University of Sydney, argued that a consequence of the Aboriginal people's lack of recognised international personality would be the United Nations' inability to recognise and hence adjudicate upon an agreement between the Commonwealth and Aboriginal people.[5] He noted that the United Nations would be reluctant to register a proposed compact if the request for registration came from a body that is not recognised as a State.[6] Professor Johnson argued that even if a Commonwealth request for registration was granted, the registered status of the agreement, though it may have a "certain political and psychological effect as appearing 'to internationalise' relations between the Australian Government and Aboriginal people, would "strictly be without legal effect".[7]

3.6 In addition to the meaning which it had in international customary law, the term "treaty" was used to describe international commercial agreements. During the 18th and 19th centuries, treaties were made by large trading companies, such as the Dutch East India and Hudson's Bay Companies, acting on their own behalf. These treaties were made with a variety of indigenous chiefs or princes and secured trading agreements and privileges for the companies. Ultimately, the rights obtained by such companies were assumed by the country which had granted the company its charter. Rather than being considered as treaties in the international law

sense, such ''treaties'' have always been considered as commercial contracts.

3.7 The term ''treaty'' has occasionally been used in domestic law in the context of an agreement between individuals, for example, for the sale or purchase of property. Taking advantage of the full range of meanings of the word, the NAC in its submission suggested that

> the word ''treaty'' may be used in a domestic sense (to describe an arrangement between Aboriginals and the Commonwealth) providing of course there are words specifically used to identify this as a domestic treaty bound only by Australian domestic law and not international law.[8]

The Committee foresees difficulties with this approach. Once the term is used, it invariably attracts the meaning ascribed to it in international law as set out in the Vienna Convention of 1969. This is because in domestic law there are a wide variety of instruments to choose from such as contracts, settlements and acknowledgements, whereas the term treaty is today used almost exclusively to describe agreements concluded between States and governed by international law.[9]

3.8 Consideration of an Aboriginal claim to international personality, and a consequent capacity to conclude treaties under international law, requires first that the current legal view as to the sovereign status of the Aboriginal people be ascertained.

Definition of sovereignty

3.9 Definitions of the concept of sovereignty vary according to the context in which the word is placed and, as a consequence, it eludes precise definition. The concept has been variously defined as ''that power in a State to which none other is superior''[10] and ''the supreme authority in an independent political society.''[11] The concept thus signifies autonomy, independence and capacity for self-determination in all matters.

3.10 This broad definition has been gradually restricted in some respects by the obligations of living within the international community. For example, the ratification of a multitude of international treaties (covering such diverse matters as human rights, employment standards, and freedom of association) has imposed restrictions of varying degrees on the independence of a signatory State's domestic legislative, executive and judicial action. For this reason it has been suggested that now, 'it is probably more accurate to say that the sovereignty of a State means the residuum of power which it possesses in the confines laid down by international law.'[12]

3.11 Within these confines, however, the notion of a single sovereign within a nation state remains the constant requirement. Although it is recognised that the degree of sovereignty enjoyed varies from State to State according to each State's power and influence in international affairs, it would appear from the many definitions and the functions of a sovereign government that there is no legal prospect for recognising competing sovereign claims within any one State.

3.12 Thus, as sovereignty is understood in contemporary international

law, it refers to a singular and exclusive power in any one State. For example, the notion that one claim alone may prevail has been authoritatively determined by the House of Lords in *The Arantzazu Mendi,*[13] a case which dealt with conflicting claims to sovereignty of the parties in the Spanish Civil War. It will be readily apparent that much of this case reflected the requirements of international dealings between European nation States and their extended entities following colonisation of other parts of the world. It therefore emerges that sovereignty means an exclusive and indivisible power and capacity for self-government together with international recognition of that power.

The acquisition of sovereignty

3.13 Customary international law recognised certain traditional modes of acquiring territory. Depending on the mode of acquisition, the nation acquiring the territory could obtain either an original and independent title or a derivative title in those instances where the validity of the sovereignty of a pre-existing occupant of the territory needed to be recognised.[14]

3.14 Under the British Constitution, the Crown exercises all sovereign rights within its dominions. During the periods of British colonial expansion, the British Government took the view that sovereignty could be acquired over new-found territories in several ways. One mode of acquisition by the British Crown depended upon the *terra nullius* doctrine (''land belonging to no one'' or ''a piece of territory not under the sovereignty of any state'').[15]

3.15 Though strictly referring to uninhabited land, the *terra nullius* doctrine was extended by the British to cover the acquisition of any territory inhabited by peoples whose civilisation was thought to be less developed, and whose political organisation did not correspond to European norms. Such territories would then vest automatically in the first 'more civilised' power which chanced to occupy them, regardless of the wishes or resistance of the indigenous population.

3.16 On the other hand if the land was occupied by peoples possessing a cohesive and recognisable central political system, it was accepted that sovereignty was already vested in its inhabitants and could therefore only be obtained derivately through conquest of, or agreement and negotiation with, those inhabitants. Such negotiation or conquest led to a cession or occupation of the territory and a legal transfer of sovereignty from the original inhabitants to the British Crown.

3.17 It was thus the practice of the British Government to recognise and uphold the prior ownership of indigenes in all those colonies in which European eyes perceived an organised political structure of authority and, even while acquiring sovereignty in those territories by means of conquest or peaceful negotiation, to grant statutory recognition to the prior indigenous ownership, for example this occured to varying extents in Canada, the United States of America, New Zealand, New Guinea, the Solomon Islands, India and Africa.[16] In the case of Australia however, this did not occur because of the cultural blindspots under which it was assumed Captain Cook and the early administrators of the colonies laboured in their

perception of the exercise of authority within tribes and clans and the nomadic lifestyle under which the Australian Aboriginal people lived. These British policies of acquiring sovereignty either by occupation of uninhabited land or derivatively, with the consent of the inhabitants, are to be found in the instructions under which Captain Cook took possession of Australia in 1788:

> With the consent of the natives, to take possession of convenient situations in the country in the name of the King of Great Britain, or if the country (is) uninhabited take possession for his Majesty by setting up proper marks and inscriptions as first discoverers and possessors.[17]

The disputed question of sovereignty in Australia

3.18 Some would say that sovereignty inhered in the Aboriginal people inhabiting Australia at the time of settlement by Europeans and that this sovereignty still subsists even though not recognised by the occupying power or its legal system. Certainly the question of sovereignty was one frequently raised by Aboriginal witnesses who appeared before us.[18]

3.19 Aboriginal attitudes to, and assertions of, sovereignty are still evolving.[19] The National Aboriginal Conference Makarrata Sub-committee advised the Committee that sovereignty is a matter of central concern to many Aboriginal communities in their quest for self-government.[20] As yet there has not been a clear expression whether self-government is sought for individual Aboriginal communities or for an Aboriginal nation as a whole. However, the general claim to sovereignty by right of history is asserted by representatives of the Aboriginal people.[21]

3.20 Aboriginal assertions of sovereignty in Australia are a conclusion drawn from the historic fact that Aboriginal people were in sole and undisputed occupation of the continent of Australia for some forty thousand years before European discovery. Their claim is that rights of land usage throughout the continent belonged exclusively to them and that they have been dispossessed of the land and their sovereignty without either compensation or even judicial recognition of their prior habitation of the continent.

3.21 A significant justification for the British taking of Aboriginal land was that the Aboriginal people were not using it or cultivating it in a European sense. As a consequence, according to European concepts, they had forfeited any right of possession.[22]

3.22 The facts of the Aboriginal relationship to land are now better known. The relationship comprised an economic element (hunting and gathering) together with a more significant cultural and religious element. The significance of this latter element has only recently been better and more widely understood.

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland ... When we took what we called "land" we took what to them meant hearth, home, the source and locus of life, and everlasting oneness of spirit.[23]

3.23 The significance of the religious aspect of the relationship between Aboriginal people and their land has been judicially recognised. Blackburn

J in *Milirrpum* commented "As I understand it, the fundamental truth about the Aboriginals' relationship to the land is that whatever else it is, it is a religious relationship."[24]

3.24 In a more recent case, *Ex Parte Meneling Station,* in the High Court, Brennan J contrasted the European and Aboriginal relationships to land as follows;

> Owners of land under Anglo-Australian law are understood to be vested with a bundle of rights.[25]

By way of contrast, the only "rights" which Aborigines have according to the tenets of their culture is a right to forage. The significant remaining feature of their relationship with the land is a spiritual one:

> The connection of the Aboriginal group with the land does, not consist in the communal holding of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual responsibility for the site and for the land. Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights.[26]

3.25 It is apparent that the Aboriginal relationship with land is complex, and attempts to define it have perplexed anthropologists.[27] There is no doubt that at the time of the establishment of English law in Australia this Aboriginal relationship with the land was both underestimated and misunderstood, perhaps because it was beyond the comprehension of recognised English legal principles of land tenure. For example, principles such as ownership and sale of land, fundamental to English land law, are meaningless in the context of the traditional Aboriginal relationship with land. When Captain Cook arrived and took possession of the continent under English law, his actions when considered in an Aborignal context could only be a purported taking of possession, since actual possession of land is a concept foreign to Aboriginal culture.

> Alienation of land was not only unthinkable, it was literally impossible. If blacks often did not react to the initial invasion of their country it was because they were not aware that it had taken place. They certainly did not believe that their land had suddenly ceased to belong to them and they to their land. The mere presence of Europeans, no matter how threatening, could not uproot certainties so deeply implanted in Aboriginal custom and consciousness.[28]

Hence in Aboriginal cultural terms if they, who had enjoyed occupational and religious use of the land for approximately 40,000 years, could not alienate the land, still less could the newly-arrived Europeans. It is conceivable that, had the early administrators understood the Aborigines' relationship with their land as it is understood now, they may have come to the different conclusion that some form of sovereignty over the Australian continent did inhere in the Aboriginal people, and that therefore it would have been appropriate to negotiate with the Aboriginal people in relationship to their land.

3.26 In arguing that there was already some system of sovereignty or rights in land in existence in Australia before 1788, and vested in the Aboriginal people, some judicial support has been sought from the *Western Sahara Case.*[29] In that case, the International Court of Justice was asked in 1975 to decide whether the Western Sahara at the time of its colonisation by Spain

in 1884 was *terra nullius*. The Court found that at the appropriate time, the Western Sahara was inhabited by people organised in tribes and as a consequence, the Western Sahara was not *terra nullius*.

> The nomadic peoples of the Shinguitti country should ... be considered as having in the relevant period possessed rights, including some rights relating to the land through which they migrated.[30]

In a separate declaration one judge made an even more explicit statement of the migratory tribes' rights.

> I consider that the independent tribes travelling over the territory, or stopping in certain places, exercised a *de facto* authority which was sufficiently recognised for there to have been no *terra nullius*.[31]

3.27 It is argued on behalf of Aboriginies that the case is authority for an Aboriginal assertion of sovereignty over the Australian continent since they too, as independent tribes travelling through the continent, exercised a *de facto* authority sufficient to refute a claim of *terra nullius*.[32] The Aboriginal Legal Service argued, however, that little if any benefit could be obtained by Aborigines from the *Western Sahara Case* since

> it would not be possible for Aboriginal people to establish standing in the International Court and even if they did, it is submitted that the rule of prescription in international law would operate whereby Australia has remained under the continuous and undisturbed sovereignty of Britain and her successors in title for so long a period that the position has become part of the established international order which could not be upset by a decision of the International Court.[33]

The Service also observed that if a court were to take the contrary stand on this issue, the basis of sovereignty of the majority of countries of the world could be overturned.[34] Nevertheless, in this context the Committee remains very much aware of the significance of the sovereignty issue to the proposal for a compact. Professor Nettheim advised the Committee that

> it is likely that the 1980s will see the emergence of some new human rights convention to provide a basis in international law for protecting the interests of indigenous minorities. There will be pressures on Australian Governments to ratify such a convention and to comply with its terms.[35]

3.28 Linked to their assertion of long and exclusive occupation of the continent as the basis of their sovereignty, Aborigines (as a further indicator of their sovereignty claim) can also point to a history of violent physical resistance to British colonial expansion which belies British claims that the colony was settled peacefully. As was noted in Chapter 2 (paras 2.2-2.9), frontier conflict between the Aboriginal people and the settlers was frequent and violent and extended throughout the continent.[33] Full-scale war was not possible, perhaps because of the nature of Aboriginal social organisation particularly because Aborigines lacked a unified, European-style political organisation. Another factor was the superiority of European weaponry and military tactics. Resistance therefore followed the pattern of guerilla tactics.[37] Aboriginal assertions of sovereignty have continued to the present day: they now take the form of legal proceedings and public protests such as street marches and demonstrations.

3.29 Despite this forceful opposition to British occupation, ''Australian

historians have paid little attention to the Aboriginal groups' resistance to white settlement."[38] Rather than treat the hostilities as war, the British government of the day, because it had declared sovereignty over the continent, regarded the opposition by Aborigines as either a criminal activity or open rebellion; it was never construed as an assertion of sovereignty in opposition to the British claims.[39]

3.30 It is true that the opposition to British assertions of sovereignty was not couched in the formalities required by contemporary international law, yet the physical resistance was evidence of a fundamental repudiation of British claims to sovereignty. Nevertheless, successive British governments and their Australian successors have judicially ignored this fact of opposition and resistance when considering the relative sovereign status of the Commonwealth and Aborigines. Australian courts have continually refused to find that the Aboriginal people held any sovereign or proprietary rights in the continent and have been consistent in asserting that the continent was settled peacefully and colonised without conquest.

3.31 The Commonwealth's claim to sovereignty in Australia derives from its position as successor to the title which the British Crown derived from Captain Cook's purported taking of possession of the "whole Eastern Coast" of the continent in the name of the British Crown in 1770, and the gradual expansion of the settlement which followed. As has been seen the claim evolved from the assumption that the continent was *terra nullius* at the time of Cook's discoveries[40] and the principle that, since Australia was colonised by gradual and peaceful expansion, as a settled colony, no recognition was given to the pre-colonial land and social systems of the Australian Aborigines. The "settlement" of a colony is used to distinguish the manner of its occupation from that of conquest. The legal consequence is that, whereas the inhabitants of a conquered colony retain their lands and their rights until these are specifically changed by their conqueror, the inhabitants of a settled colony are immediately subject to the laws of the colonising nation.[41] The colonising nation refuses to recognise that the original inhabitants have a recognisable system of law and disregards their relationship to their land.

3.32 This principle "that the Australian Colonies became British possessions by settlement and not by conquest" has been described as "fundamental" to the accepted legal view of the foundation of Australia.[42] The consequences of this principle for the Aboriginal people have been threefold. They were and are subject to the colonial and now State and Commonwealth courts; their status in law was defined by English common law; and their pre-colonial land ownership and social systems have not been recognised.[43] In 1889, judicial recognition was given to the principle that the Australian colonies were "settled" rather than "conquered". In that year, the Privy Council in *Cooper* v *Stuart* stated its opinion that the colony of NSW was settled because at the time of its peaceful annexation it "consisted of a tract of territory practically unoccupied".[44] The Court also described New South Wales as belonging to that class of colonies "without settled inhabitants or settled law", which was "peacefully annexed to the British Dominions".[45] The Privy Council sought support for this analysis from Sir William Blackstone's *Commentaries on the Laws of England.*[46]

3.33 Principles applied to the acquisition of colonial territory were also discussed in the case *Milirrpum* v *Nabalco Pty Ltd and the Commonwealth of Australia.*[47] This was the first case brought by Australian Aborigines seeking legal recognition of their customary land rights. The plaintiffs were unsuccessful in obtaining this recognition. The primary finding of the Court was that the plaintiffs were unable to prove their assertion that their predecessors in 1788 had the same links to the same areas of land as they were claiming 180 years later. In the case, Justice Blackburn provided a further judicial statement of Australia's status as a settled colony and concluded that therefore a doctrine of ''communal native title'' (by which his Honor categorized the Aborigines' complex combination of individual and joint proprietary interests in land) to land ''does not form, and never has formed, part of the law of any part of Australia".[48] Once again reliance was placed on Blackstone's *Commentaries* and Justice Blackburn argued that Blackstone's words ''desert and uncultivated ... have always been taken to include territory in which live uncivilised inhabitants in a primitive state of society''.[49]

3.34 His Honor cited American authority for his view that the attribution of a colony to a particular class is a matter of law ''which becomes settled and is not to be questioned upon a reconsideration of the historical facts'',[50] and concluded that in his opinion "there is no doubt that Australia came into the category of a settled or occupied colony''.[51]

3.35 The view expressed by Justice Blackburn is an example of the application of a principle of international law known as *inter-temporal* law. Accoring to this principle, an assessment of the legal validity of a claim to land title or sovereignty is to be appreciated in the light of the law prevailing at the time of the original claim and not in terms of the law in force at the time when a dispute regarding the original claim arises.[52]

3.36 Having regard to international legal principles prevailing at the time of the British acquisition of the Australian continent, there is no doubt that Britain did acquire sovereignty over Australia, a sovereignty which no other nation has ever challenged. Therefore, however repugnant that acquisition of sovereignty may appear to contemporary morality, it stands beyond challenge under the *inter-temporal* law.

3.37 Closely allied to the *inter-temporal* law in its effect of supporting the Commonwealth's claim to sovereignty over the Australian continent is the rule of prescription as it applies to territorial acquisition. A prescriptive title to sovereignty arises in circumstances where no clear title to sovereignty can be shown by way of occupation, conquest or cession, but the territory in question has remained under the continuous and undisputed sovereignty of the claimant for so long that the position has become part of the established international order of nations. The conclusion to be drawn from the application of this rule to the Commonwealth's position, is that if there were any defect in Australia's title, the rule of prescription would apply to overturn the defect and to vest sovereign title in the Commonwealth Government.[53]

3.38 The settled colony principle was the subject of litigation in 1979. In that year, in the case of *Coe v. The Commonwealth of Australia,* the plaintiff, an Aboriginal, claimed to sue on behalf of the Aboriginal

community and nation of Australia on the basis that Captain Cook had wrongfully proclaimed sovereignty over the territory of the east coast of Australia in 1770 and that Captain Phillip had wrongfully asserted possession and occupation of the eastern part of Australia for King George III in 1788.[54] The ''wrongs'' arose from a failure to recognise the existing sovereignty of the Aboriginal people. In addition, it was claimed that Australia had been acquired by conquest.

3.39 The High Court dealt with the matter in a way which did not give rise to decisions on the sovereignty issues. Even though the sovereignty issues were not fully argued, two members of the Court took the view that the Aborinal people had no legislative, executive or judicial organs by which sovereignty might be exercised and that the claim of a continuing sovereignty in the Aboriginal people could not be sustained because it was inconsistent with the accepted legal foundations of Australia.[55] Gibbs J also stated the principle that, as a fundamental basis to the legal system, sovereignty over Australia was gained by settlement and not by conquest.[56] Although not actually conceding sovereignty to the Aboriginal people, Murphy J did go further than other judges when he stated that the Aboriginal plaintiff was

> entitled to argue that the sovereignty acquired (over Australia) by the British Crown did not extinguish ''ownership rights'' in the Aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation.[57]

3.40 Aborigines have asserted to the Committee their rejection of the settled colony principle; so too have other witnesses. Dr Coombs, in arguing that the general practice of the British occupation as presented in historical records of Australia was ''grossly in error'' said that ''it is important to undermine the respectability of the view that this country was peacefully settled''.[58] Mr Peter Bayne, Member and Legal Adviser, Aboriginal Treaty Committee and lecturer in law, Canberra College of Advanced Education, noted that the assertion of the settled colony principle is grossly offensive to the Aboriginal people: ''that it really proceeds on the assumption that they were not there, or, if they were, their institutions should not be recognised as being civilised''.[59]

3.41 The Commonwealth has conceded that it is prepared to acknowledge Aboriginal occupation of Australia before British settlement, though no mention was made of the relevance of this concession to the matter of sovereignty.[60] The Commonwealth has also restated its commitment to the principle of recognising the ''past dispossession and dispersal of the Aboriginal people, and the community's resulting obligation to the Aboriginal people''.[61] More recently still, the Commonwealth has given an indication that the settled colony principle itself may require reappraisal. The Minister for Aboriginal Affairs, the Hon. A.C. Holding MP, said at a recent seminar on Aboriginal customary law:

> We must not dwell on the past, but we have to be prepared to face up to the past and what has happened in order to apply effective solutions to the future. We have to face the fact that Australia as a country was conquered, not settled. If you take the view that Australia was settled,

then you see it as a colony which was uninhabited and had no system of law. But in the Gove case, although the plaintiffs were unsuccessful in their main claim, Mr Justice Blackburn distinctively held that Aboriginal customary law was recognisably a system of law.[62]

Conclusion

3.46 It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying powers, could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at that time. However, the Committee concludes that, as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except insofar as they share in the common sovereignty of all peoples of the Commonwealth of Australia. In particular, they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth. Nevertheless, the Committee is of the view that if it is recognised that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the *terra nullius* doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians.

Domestic treaties of other nations as a model for Australia

3.47 During its consideration of the feasibility of implementing a treaty, which would be recognised at international law, the Committee's attention was drawn to the treaties concluded by colonising powers with indigenous peoples, such as those in New Zealand, United States of America, and Canada. Some witnesses have sought to draw analogies between the situations in such countries and that in Australia at the time of colonisation, suggesting that they provide useful precedents to support the need for a treaty in Australia. With this in mind, it will assist in a consideration of the issues if the position in New Zealand, the United States and Canada is briefly examined.

The committee examined the practice in these three countries and concluded:

Conclusion concerning domestic treaties

3.64 The Commonwealth Attorney-General's Department as a basis for its opinion that the Commonwealth lacks the power to enter into a ''treaty'' with Australian Aboriginies notes that the social organisation of Aboriginal tribes and other communities in Australia is different in significant respects from that of other indigenous communities (for example, Cherokee Indians in the United States).[86]

3.65 In the Department's opinion, there is scope for ''an Australian Aboriginal 'community' to develop to the point where, if the United States' models are followed, it might conceivably become appropriate to speak of an arrangement between that organised community and the Commonwealth as a 'treaty'.''[87] The Department hastened to negate the use of the term, however, because of its international legal implications, and reiterated recent advice by the Attorney-General to the Prime Minister that any such arrangement would require the insertion of

> ... any provisions needed to make it clear that Aborigines were not being treated as if they were a community separate from the Australian community, and provisions to ensure that the arrangement was not conceived as being analogous to a treaty between separate nation States.[88]

Such a precaution was necessary to preclude all possibility of an Aboriginal self-determination claim. For the same reasons the Commonwealth should avoid against [sic] the use of the term "Aboriginal Nation".[89]

3.66 It can be seen that not a great deal is to be achieved in attempting to use these past treaties as precedents for a compact between Aborigines and the Commonwealth. They were concluded at a time when the term "treaty" did not possess so fixed a meaning in international law as it does today. Thus these treaties have no status as instruments of international law. In addition the purpose and effect of the treaties must be considered. It is significant for the contemporary debate that they were, for the most part, treaties imposed by a powerful colonising nation on an indigenous population with no choice other than to agree to the terms. (Neither party in the current Makarrata negotiations would brook this form of agreement today.) While the language of the treaties may indicate an intent and concern to safeguard indigenous rights, their principal purpose was to sanction the colonising powers' alienation of land from the indigenes. It can be seen from the Canadian, United States and New Zealand examples that, for the most part, what rights the indigenes now possess arose not out of the treaties, but out of the domestic law applying to everyone, colonist and indigene alike, within the territorial boundaries of the nation.

ENDNOTES

1. Evidence, p.901.
2. For example, "Convention, Protocol, Agreement, Arrangement, Process Verbal, Statute, Declaration, Modus Vivendi, Exchange of Notes (or of Letters), Final Act and General Act." J.G. Starke, Q.C., *An Introduction to International Law,* London 1977, p. 462.
3. According to Article 2, paragraph 1(a) of this Convention, "for the purpose of the present Convention, 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Evidence, p. 852.
4. "An international person is an entity having the power of independent action on the international plane." D.W. Greig, *International Law,* London, 1976, p. 92.
5. Evidence, p. 854.
6. Evidence, p. 854.
7. Evidence, p. 854.
8. Submission by the National Aboriginal Conference, Evidence, p. 627.
9. Starke, op. cit. p. 458.
10. *Jowitts Dictionary of English Law,* London, 1977, p. 1678.
11. P.G. Osborn, *A Concise Law Dictionary,* London 1964, p. 297.
12. Saunders, *Words and Phrases Legally Defined,* 2nd Ed, 1970 Vol. 5, p. 92.
13. *The Arantzazu Mendi* [1939] A.C. 256, per Lord Atkin, at pp. 263-265, cited in Evidence, p. 716 by B.A. Keon-Cohen.
14. See generally Greig, op cit., p. 157.

15. '79 ... The expression was a legal term of art employed in connection with "occupation" as one of the accepted legal methods of acquiring sovereignty over territory. "Occupation" being legally means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius* — a territory belonging to no one — at the time of the act alleged to constitute the "occupation" ... a determination that Western Sahara was a *terra nullius* at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no one in the sense that it was then open to acquisition through the legal process of "occupation".
    80 ... The state practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effective unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used iin a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.
    81 ... At the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them. "... In colonising Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over *terrae nulius*." *Western Sahara*, ICJ Reports, 1975, 6 at p. 39. Evidence, pp. 970, 971.
    See also Greig, op. cit. p. 161.
16. There is abundant authority for British recognition of prior native ownership of land. Some relevant cases on the point are as follows: Canada, *St Cathrines Milling and Lumber Co. v. R* (1888) L.R. 14 App Cas 46, *Attorney-General for Quebec v. Attorney-General for Canada* [1921] 1 A.C. 401; United States of America, *Fletcher* v. *Peck* (1810) 6 Cranch 87, *Johnson* v. *McIntosh* (1983) 8 Wheat. 543, *Worchester v. Georgia* (1832) 6 Pet. 515; New Zealand, Treaty of Waitangi, *Hoani Teheuheu Tukino* v. *Aotea District Maori Land Board* [1941] A.C. 308; New Guinea, *The Administrator of Territory of Papua New Guinea v. Guba Doriga,* Unreported, 12 Dec 1973, (1973-4) 2 ALR xxiii The Solomon Islands; *Hana siki v. O.J. Symes* (1951) Solomon Islands, unreported judgement of Charles J, cited in B. Hocking, *Native Land Rights,* unpublished master's thesis, Monash University, Melbourne, 1970, Appendix 2; India *Vayjesingji Joravarsingji v. The Secretary of State for India* (1924) L.R. 51 I.A. 357; Africa, *Amodo Tijani* v. *Secretary Southern Nigeria [1921] 2 A.C. 399.*
17. Cited in research paper, Interim Analysis of a Survey of Aboriginal Demands, prepared by Michael Anderson for the NAC Makarrata Sub-committee.
18. Evidence, p. 652.
19. Evidence, p. 652.
20. Evidence, p. 652.
21. Evidence, pp. 626, 652. "Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to deport our people and destroy our law and culture and seize without compensation, our land. We have never conceded defeat ... The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The Settler state has never recognised the prior ownership of this land belonging to that of the Aboriginal nation. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their right to be there." Evidence, p. 248.
22. "They bestowed no labour upon the land and that — and that only — it is which gives a right of property to it." *Herald,* Sydney, 1838, cited in *First Report from the Select Committee of the Legislative Assembly upon Aborigines,* Sydney, 13 August 1980, p. 33.
23. Professor W.E.H. Stanner, *White Man Got No Dreaming,* Canberra, 1979, p. 230.
24. *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth* (1970) 17 FLR 141.
25. *Ex Parte Meneling Station* (1982) 57 ALJR 59, (1982) 44 ALR 63.
26. ibid.
27. R.M. & C.H. Berndt, *The World of the First Australians,* Sydney 1977, provides a good anthropological study of this subject.

28. H. Reynolds, *The Other Side of the Frontier,* Townsville, 1981, p. 53.
29. Evidence, pp. 970, 904.
30 *Western Sahara Case,* cited by Professor Johnson in Evidence, p. 861.
31. ibid.
32. P. Bayne, The Makarrata, *Legal Service Bulletin,* October 1981, p. 234. "In pursuing the Makarrata (Treaty) we assert our basic rights as sovereign Aboriginal nations who are equal in political status with the Commonwealth of Australia in accordance with the principal espoused by the International Court of Justice in the Western Sahara Case that sovereignty has always resided in the Aboriginal people". Evidence, p. 626.
33. Evidence, pp. 904-5.
34. Evidence, p. 905. This rule regards a prescriptive title to sovereignty as arising in circumstances where no clear title to sovereignty can be shown by way of occupation, conquest or cession, but the territory in question has remained under the continuous and undisputed sovereignty of the claimant for so long a period that the position has become part of the established international order of nations.
35. Evidence, p. 772.
36. See for example H. Reynolds, *Aborigines and Settlers,* Melbourne, 1972 and H. Reynolds, *The Other Side of the Frontier,* Townsville, 1981.
37. C.D. Rowley, *The Destruction of Aboriginal Society,* Canberra, 1970, Vol. I, p. 5.
38. ibid.
39. Official British attitudes did not however have unanimous support among contemporary opinion. For example, "our brave and conscientious Britons whilst taking possession of their territory, have been most careful and anxious to make it universally known, that Australia is not a conquered country ... and ... have repeatedly commanded that it must never be forgotten 'that our possession of this territory is based on a right of occupancy'. 'A Right of occupancy!' Amiable sophistry! Why not say readily at once, the right of power? We have seized upon the country, and shot down the inhabitants, until the survivors have found it expedient to submit to our rule. We have acted exactly as Julius Caesar did when he took possession of Britain. But Caesar was not so hypocritical as to pretend and moral right to possession ... We have a right to our Australian possessions; but it is the right of conquest, and we hold them with the grasp of power." E.W. Landor, *The Bushman, Or Life in a New Country,* London, 1847, pp. 187-9, cited in H. Reynolds, *Aborigines and Settlers,* Melbourne, 1972, p. 102.
40. "There was no land law or tenure existing in the Colony (of New South Wales) at the time of its annexation to the Crown; ..." *Cooper v. Stuart* (1889) 14 App. Cas. 286 at 292.
41. "Aboriginals within the boundaries of the Colony are subject to the laws of the Colony ..." *R v. Jack Congo Murrell* (1836) Legge 72.
42. *Coe v. The Commonwealth* (1979) 53 ALJR 403 per Gibbs J. at 408.
43. Evidence, p. 549, and see *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia* (1970) 17 FLR 141.
44. *Cooper v. Stuart* (1889) 14 App. Cas. 286, 291.
45. (1889) 14 App. Cas. 291.
46. ibid, p. 291, see also W. Blackstone, *Commentaries on the Laws of England,* Oxford, 1766. It has been suggested that such an analysis is an "unwarranted extension of Blackstone", Evidence, p. 549. Blackstone wrote of territory which can be acquired by occupation as being "desert and uncultivated", or "uninhabited". (Cited in Evidence, p. 549.) However, he did not extend the category to include "practically unoccupied" land. Indeed he firmly stated that the right of acquisition of lands by occupation existed "provided he (i.e. the occupier) found them unoccupied by anyone else. ibid Vol. II, p. 9.
47. (1970) 17 FLR 141.
48. (1970) 17 FLR 141 at 245.
49. (1970) 17 FLR 141 at 201.
50. (1970) 17 FLR 141 at 203.
51. (1970) 17 FLR 141 at 242.
52. Greig, op. cit., p. 183.
53. G.J.L. Coles, The International Significance of a Treaty, *Identity,* Vol. 4(2), January 1981, p. 32.
54. (1979) 53 ALJR 403.
55. Gibbs J, with whom Aickin J agreed. (1979) 53 ALJR 403 at 408.
56. (1979) 53 ALJR 403 at 408.
57. (1979) 53 ALJR 403 at 412.

58. Evidence, p. 1114.
59. Evidence, p. 588.
60. Letter from Senator the Hon. P Baume, Minister for Aboriginal Affairs to Mr W. F. Bird, National Chairman, National Aboriginal Conference, 3 March 1981. See also speech by Senator the Hon. P. Baume, Senate Hansard, Page 713, 25 March 1981.
61. Letter from Secretary, Attorney-General's Department to Secretary, Department of Aboriginal Affairs, 28 July 1980.
62. Hon. A.C. Holding MP, Australian Law Reform Commission Australian Institute of Aboriginal Studies Workshop on the Aboriginal Customary Law Reference, Law School, University of New South Wales, Sydney, 7 May 1983, cited in Professor C. Tatz, *Aborigines and the Age of Atonement,* paper for the Third International Conference on Hunter-Gatherers, Bad Homburg, Federal Republic of Germany, 13-16 June 1983, p. 5, Submission No. 35.
86. Letter from Secretary, Attorney-General's Department to Secretary, Department of Aboriginal Affairs, 28 July 1980.
87. ibid.
88. ibid.
89. ibid.

An extract from the letter referred to in footnote 86 is as follows:[3]

> *Does the Commonwealth have ''power to enter into a 'treaty' with Australian Aboriginals''?*
>
> 5. Although the word *''treaty''* is occasionally used in domestic contexts (e.g. a sale of land by private ''treaty''), the word ''treaty'' is ordinarily used to refer to a kind of *international* agreement. In that sense it is clearly inapplicable to any form of agreement between the Commonwealth and Aborigines since the latter are not a ''nation'' *(Coe v. The Commonwealth* (1978) 52 A.L.J.R. 334, at pp. 335-336 per Mason J; (1979) 53 A.L.J.R. 403, at p. 408 per Gibbs J. with whom Aickin J. agreed at p. 412).
>
> 6. In some English-speaking countries the word ''treaty'' has been used to describe agreements between a government and a community that has long existed within the same nation (e.g. the ''Treaties'' with the ''Cherokee Nation of Indians'' in the United States). However, the material available to me suggests that the social organisation of Aboriginal tribes and other communities in Australia is different in significant respects from that of those other communities — see, for example, the description of the Cherokee in *The Cherokee Nation v. State of Georgia* (1831) 5 Pet. 1. It may be that, with the development of the National Aboriginal Conference — albeit a development based on Australian law — an Australian Aboriginal ''community'' is developing and will develop to the point where, if the United States models are followed, it might conceivably become appropriate to speak of an arrangement between that organised community and the Commonwealth as a ''treaty''. However, the Attorney-General recently advised the Prime Minister, in a letter dated 15 July 1980, that having regard to the connotations of the word ''treaty'' in international contexts, it would be very desirable to avoid the term ''treaty'' in relation to the agreement, and that instead a term such as ''Makarrata'' might be used if, upon full examination, it was found appropriate. He went on to say that it

3 Text provided by the Department of Aboriginal Affairs.

would be possible to include in the arrangement "any provisions needed to make it clear that Aborigines were not being treated as if they were a community separate from the Australian community, and provisions to ensure that the arrangement was not conceived as being analogous to a treaty between separate nation States". In considering whether such provisions should be included, account should be taken of any risks that, in the absence of sufficiently *explicit* provisions to the contrary, a claim might be made that the agreement accorded a status on which Aborigines could base a right of "self-determination" as a "people" (see, e.g., the United Nations Charter, Article 1, and the Declaration on the Granting of Independence to Colonial Countries and Peoples).

7. My next point concerns your reference to the agreement as being one made between the Commonwealth and *"Australian Aborigines"*. Under existing law there would be difficulties in having a binding agreement with all *individual* Aborigines, inasmuch as only individual Aborigines who were parties, personally or through authorized agents, at the time the agreement was made, would be bound or could claim benefits under it vis-a-vis the Commonwealth. On the other hand, an agreement could be made between the Commonwealth and an appropriate body corporate. It would be possible to enact Commonwealth legislation to confer corporate status on some appropriate Aboriginal body (e.g. the National Aboriginal Conference, if that were considered suitable for the purpose).

8. I note that the resolution by the National Aboriginal Conference requests a treaty of commitment between the Australian Government and the *"Aboriginal nation"*. For the reasons mentioned above (paragraphs 5-6) the use of that word should be avoided by the Commonwealth.

...

Would "the inclusion of the words 'dispossession' and 'dispersal' in legislation ... imply prior Aboriginal ownership, in terms of possessory or proprietary rights"?

12. Use of the word *"dispossession"* would imply that the relationship of the Aborigines to the land in question was one of "possession". This word has a non-technical usage, but it is also a concept of English law (inherited by Australian law) and is not appropriate to describe the relationship of the Aborigines to the land before British colonization. Whether it is appropriate to describe any particular circumstances, *after* that colonization, in relation to the Aborigines and the land is not a matter on which I am in a position to comment. It seems, however, that many of the actions intended to be referred to by the term "dispossession" in the present context would not have been interferences with "possession" in a legal sense.

13. The word *"dispersal"* would not, I think, imply any particular kind of legal relationships between the Aborogines and the land at any time. It could simply refer to the facts of the colonial actions in dispersing Aboriginal communities from their places of communal living, whatever might have been their relationship to the land under Aboriginal customs or Colonial law.

On 22 November 1983 the Minister for Aboriginal Affairs, Mr Holding, issued a

statement in response to reports in the Queensland press, part of which statement read as follows (Comm Rec 1983, 2013):

> Replying to an accusation by the Queensland Minister for Aboriginal Affairs, Mr Bob Katter, that the Federal Government had raised unreal expectations among Aborigines at Edward River by floating the idea of a ''State within a State'', Mr Holding said:
> Nothing could be further from the truth. The Federal Government has no such intentions. I have made that absolutely clear on several occasions and again at a conference at the Australian National University last night. I shall send Mr Katter a transcript of what I said so that there will be no room for doubt, even in Queensland, about the position of the Federal Government. I have repeatedly made it very clear that Aboriginal ''sovereignty'' is just not on and that we are all Australians; we have to live together, both black and white.
> Aborigines want to own their own land. As Mr Katter himself has said recently, all Australians deserve to own their own homes — why shouldn't Aboriginal people have at least that much in their own country?

Mr Holding informed a conference at the Australian National University entitled ''Aborigines and International Law'' on 21 November 1983 in part as follows;[5]

> I appreciate the feelings which underly the Aboriginal requests that Aboriginal sovereignty be recognised. However, the question of sovereignty is one that will attract only minimal support from any Parliament of Australia. Aboriginal groups have been told on a number of occasions that the issue of sovereignty is not an issue with any prospect of political success.
> Those who support the Aboriginal cause in relation to this matter do so for the very best reasons and I respect the dedication of their advocacy. But they are more likely to help win the struggle for justice for the Aboriginal people by working for the achievement of Aboriginal land rights across Australia. There is a very real risk that the pursuit of separate sovereignty for the Aboriginal community will only give aid and support to those in and out of government who oppose any real progress of the Aboriginal people ...
> That is not to say that the Parliament of this country on behalf of the citizens of this country cannot recognise the prior ownership by the Aboriginal people of the continent. Nor should the conquest of this continent by non-Aboriginal forces be ignored or disguised as peaceful settlement — quite the contrary. The white occupation of this country was one of the most brutal and genocidal acts in human history. Until that is recognised, not only by the whole community, but by the Parliament, there will not be an effective historical base upon which to redress some of the real wrongs that are the result, not just of that conquest, but of its very nature ...

5 Text provided by the Office of the Minister for Aboriginal Affairs.

International law in municipal courts. International Convention on the Elimination of All Forms of Racial Discrimination. Australian implementing legislation. Power of federal states to implement treaties.

Koowarta v *Bjelke-Petersen,* High Court of Australia, 11 May 1982 (39 ALR 417)

In 1975 the Aboriginal Land Fund Commission contracted to buy a pastoral property in Queensland. The Queensland Government refused to consent to the transfer, however, on the basis that sufficient land in Queensland was already reserved and available for the use and benefit of Aborigines. Koowarta, an Aborigine, had requested the Aboriginal Land Fund Commission to acquire the property on behalf of himself and other members of the Winychanam Group. He sued the Queensland Premier and others alleging that their refusal was an act of racial discrimination contrary to sections 9 and 12 of the Racial Discrimination Act 1975 (the text of which is set out in the extract from the judgment of Mr Justice Brennan below). A question which arose for decision was whether the Racial Discrimination Act was a valid exercise by the Commonwealth Parliament of its power to make laws with respect to, among other things, ''external affairs''. The majority of the Court (Stephen, Mason, Murphy, and Brennan JJ; Gibbs CJ, Aickin and Wilson JJ dissenting) held that the Act was valid. Extracts from the judgment are as follows. Stephen J (at 451-456):

> This concern about the ambit of the power to implement treaties municipally and the differences of view to which the subject has given rise in this court are not unique either to this court or to this Constitution; the fear lest the central government in a federation, by the exercise of its treaty powers, destroy the realities of the federal policy is widespread. Oliver, speaking generally of federations in ''The Enforcement of Treaties by a Federal State'' (1974) 144 *Recueil des Cours* 333, expresses it in this way (at 350): ''A constitution would cease to be federal if the central government, without consultation with the states, could enter into any treaty and by so doing increase the legislative powers of the central government at the expense of the state legislatures. If the treaty power can cut across all reserved powers and interdict the powers of the member states, then there are no real powers reserved to the internal sovereignties'', and see J A Thomson, ''A United States Guide to Constitutional Limitations upon Treaties as a Source of Australian Municipal Law'', Pt 2 (1977) 13 *UWAL Rev* 153 at 177 and 189. Whenever in any federation the division of legislative power between central and regional governments encounters the customary treaty-making competence of the central government such problems are likely to arise.
>
> Features of our Constitution's unique blend of Westminster system and federalism give to the Australian problem an added dimension. Following British precedent the federal executive, through the Crown's representative, possesses exclusive and unfettered treaty-making power and the Senate, notionally at least the States' House, plays no part in the process, as it might have been expected to do had principles of federalism prevailed in this area. Yet, unless s 51(29)[4] be given a wide interpretation, domestic enforcement

4 Of the Australian Constitution.

of treaty obligations may rest at least in part with the State legislatures. Again, although the federal executive will, consistently with principles of reasonable government, be in effective control of the legislative process in the House of Representatives, it may lack a majority in the Senate, so that even on a wide view of the power conferred by s 51(29), the federal executive, although armed with the treaty-making power, cannot always ensure implementation of treaty obligations.

In *Foreign Affairs and Constitutions* (1972) Louis Henkin describes, in terms which in many respects recalls arguments familiar in Australian constitutional debate, the long American history of constitutional conflict regarding the treaty power and its ultimate resolution. He says (at 140-1) that: "From our constitutional beginnings . . . there have been assertions that the Treaty Power was limited by implications in the character of treaties and of the Treaty Power, in other provisions of the Constitution, in the Constitution as as whole, in the philosophy that permeates it and the institutions it established — notably in . . . the division of authority between that government (the federal government) and the States." The curious Canadian constitutional experience in this area, as well as the experience of West Germany, Switzerland and India, is recounted by Wildhaber, *Treaty-Making Power and Constitution* (1971); by Bernier, *International Legal Aspects of Federalism* (1973), and in Oliver's article mentioned above. K C Wheare in *Federal Government* (4th ed, 1963) has remarked that "federalism and a spirited foreign policy go ill together" and these authors' accounts of the conflict between a federal division of legislative competence and the assumption by the central government of international rights and obligations go far to explain why this should be so.

So long as treaties departed little from their early nature as compacts between princes, having no concern with domestic affairs, the conflict was muted; but in this century international conventions have come to assume a more extensive role. They prescribe standards of conduct for both governments and individuals having wide application domestically in areas of primarily regional concern, the very areas which, in federations, have tended to be entrusted to the legislative competence of the regional units of governments. This has necessarily exacerbated the problem which federations encounter in the implementation of international treaties while emphasizing the need for regional units in federations to recognize the legitimacy of national governments' increased concern regarding domestic observance of internationally agreed norms of conduct.

I have already referred to one clear limitation upon the ambit of the Commonwealth's external affairs power, that which arises from the words "subject to this Constitution" in the opening words of s 51. There no doubt also exist limitations to be implied from the federal nature of the Constitution and which will serve to protect the structural integrity of the State components of the federal framework, State legislatures and State executives: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. It is when one ventures into further possible reaches of implied restrictions that real controversy exists. Henkin, in *Foreign Affairs and the Constitution,* rehearses the various arguments in support of other limitations which,

over time, have been sought, largely unsuccessfully, to be placed upon the treaty power in the United States. Two of these recur in some judgments in this court: that to fall within power, treaties must be bona fide agreements between states and not instances of a foreign government lending itself as an accommodation party so as to bring a particular subject-matter within the other party's treaty power; and that to fall within power a treaty must deal with a matter of international rather than merely domestic concern.

Limitations such as these accord better with the terms of our Constitution than with that of the United States, where the power is with respect not to "external affairs" but to treaties. For courts to deny legitimacy, under a power to make foreign treaties, to what is in form a treaty and no sham presents very real difficulties. But where the grant of power is with respect to "external affairs" an examination of subject-matter, circumstances 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 special concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny.

The great post-war expansion of the areas properly the subject-matter of international agreement has, as Henkin points out and as J A Thomson emphasizes in this article (at 164-6), made it difficult indeed to identify subject-matters which are of their nature not of international but of only domestic concern: see also Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) at 445-6. But this does no more than reflect the increasing awareness of the nations of the world that the state of society in other countries is very relevant to the state of their own society. 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.

It is here that an analogy may be drawn between the defence power and the external affairs power. In cases on the defence power this court has determined the validity of legislative measures by reference to their capacity to assist the purpose of defence: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 273, per Kitto J. For this purpose "The existence and character of hostilities . . . against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it 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'': per Dixon J in *Andrews v Howell* (1941) 65 CLR 255 at 278. 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 and with the external affairs of the nation. Turning back to the specific cases before the court, I have already mentioned in passing the remarkable post-war growth in consensual international law. As Julius Stone expressed it as early as 1954 in his *Legal Controls of International Conflict:* ''One modern year's 'international legislation', that is, State-agreed regulation of new problems by multilateral instruments, exceeds that of a whole century of old'' (at p 23). The present relevance of this is its effect upon the content of the external affairs power. It is like the defence power; it is ''a fixed concept with a changing content'': Dixon J in *Australian Textiles Pty Ltd v Commonwealth* (1945) 71 CLR 161 at 178. Its content will be determined not by the mere will of the executive but by what is generally regarded at any particular time as a part of the external affairs of the nation, a concept the content of which lies very much in the hands of the community of nations of which Australia forms a part. Hence the analogy of the defence power: Howard, *supra,* at 444; Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) at 301-2.

That prohibition of racial discrimination, the subject-matter of the Racial Discrimination Act, now falls squarely within that concept I regard as undoubted. That a consequence would seem to be an intrusion by the Commonwealth into areas previously the exclusive concern of the States does not mean that there has been some alteration of the original federal pattern of distribution of legislative power. What has occurred is, rather, a growth in the content of ''external affairs''. The growth reflects the new global concern for human rights and the international acknowledgment of the need for universally recognized norms of conduct, particularly in relation to the suppression of racial discrimination.

The post-war history of this new concern is illuminating. The present international regime for the protection of human rights finds its origin in the Charter of the United Nations. Prominent in the opening recitals of the Charter is a re-affirmation of ''faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women''. One of the purposes of the United Nations expressed in its Charter is the achieving of international co-operation in promoting and encouraging ''respect for human rights and for fundamental freedoms for all without distinction as to race . . .'': Ch I, Art 1:3; see too Ch IX, Art 55(c). By Ch IX, Art 56 all member nations pledge themselves to take action with the organization to achieve its purposes. The emphasis which the Charter thus places upon international recognition of human rights and fundamental freedoms is in striking contrast to the terms of the Covenant of the League of Nations, which was silent on these subjects.

The effect of these provisions has in international law been seen as restricting the right of member States of the United Nations to treat due

observance of human rights as an exclusively domestic matter. Instead the human rights obligations of member states have become a "legitimate subject of international concern": Judge de Arechaga (1978) 159 *Recueil des Cours* (at 177). Sir Humphrey Waldock, also a judge of the International Court of Justice, had earlier noted this development in (1962) 106 *Recueil des Cours* (at 200). To the same effect are Lauterpacht's comments in *International Law and Human Rights* (1950) (at 177-8) and those in Oppenheim's *International Law* (8th ed), vol 1 (at 740). The views of other distinguished publicists are summarized by Schwelb in "The International Court of Justice and the Human Rights Clauses of the Charter" (1972) 66 *Am Jo of Int Law* 337 at 338-341. He concludes (at 350) that the views of Lauterpacht and others on the effect of the human rights provisions of the Charter were affirmed by the Advisory Opinion of the International Court in the *Namibia* case: (1971) ICJ Rep at 51: see also the statement of Judge Tanaka in his dissenting opinion in the *South West Africa* case (1966) ICJ Rep 4 at 284, the majority opinion of the International Court in the *Barcelona Traction* case (1970) ICJ Rep 6 at 33 and McDougal, Laswell and Chen, *Human Rights and World Public Order* (1980) at 599-60.

These matters having, by virtue of the Charter of the United Nations, become at international law a proper subject for international action, there followed, in [1948], the Universal Declaration of Human Rights and thereafter many General Assembly resolutions on human rights and racial discrimination. A full catalogue of the various international instruments in this area can be found in a United Nations publication: *Human Rights; A Compilation of International Instruments* (1978). There have also been various regional agreements on human rights, perhaps the leading example being the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

It was in 1965 that the Assembly unanimously adopted the International Convention on the Elimination of All Forms of Racial Discrimination. Its origins in 1959 and its subsequent history are traced by Schwelb in an article in (1966) 15 *Int and Comp Law Q* 996 at 997-1000. The learned author's conclusion (at 1057) is of particular relevance. It is that the provisions of the convention "represent the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races. With ever-increasing clarity this idea has emerged as *the one which, more than any other, dominates the thoughts and actions of the post-World War II world.* In our time, the idea of racial equality has acquired far greater force than its eighteenth century companions of (personal) liberty and fraternity. The aim of racial equality has permeated the law-making, the standard-setting and the standard-applying activities of the United Nations family of organizations since 1945. The . . . Convention of 1965 (is) the core of the International conventional law on the subject" (emphasis added). The Convention was opened for signature on 21 December 1965 and entered into force on 2 January 1969. Australia ratified the Convention on 31 October 1975, by which time it had been ratified by over 80 nations of the world.

This brief account of the international post-war developments in the area of racial discrimination is enough to show that the topic has become for Australia, in common with other nations, very much a part of its external affairs and hence a matter within the scope of s 51(29).

Even were Australia not a party to the Convention, this would not necessarily exclude the topic as a part of its external affairs. It was contended on behalf of the Commonwealth that, quite apart from the Convention, Australia has an international obligation to suppress all forms of racial discrimination because respect for human dignity and fundamental rights, and thus the norm of non-discrimination on the grounds of race, is now part of customary international law, as both created and evidenced by state practice and as expounded by jurists and eminent publicists. There is, in my view, much to be said for this submission and for the conclusion that, the Convention apart, the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs, so that legislation much in the present form of the Racial Discrimination Act would be supported by power conferred by s 51(29). As with slavery and genocide, the failure of a nation to take steps to suppress racial discrimination has become of immediate relevance to its relations within the international community. In *New South Wales v Commonwealth* (135 CLR) at 450; (8 ALR) at 75, I said that included in external affairs were "matters which are not consensual in character; conduct on the part of a nation, or of its nationals, which affects other nations and its relations with them". I then cited particular passages from the judgments in *R v Sharkey* (1947) 79 CLR 121 which provide instances of such non-consensual matters forming a part of Australia's external affairs.

In the present case it is not necessary to rely upon this aspect of the external affairs power since there exists a quite precise treaty obligation, on a subject of major importance in international relationships, which calls for domestic implementation within Australia. This in itself, without more, suffices to bring the Racial Discrimination Act within the terms of s 51 (29). I mention in passing that in these cases it is common ground that the provisions of the Racial Discrimination Act now under challenge do give effect to those terms of the International Convention on the Elimination of All Forms of Racial Discrimination which Australia, as a party to the Convention, is bound to implement municipally.

Mr Justice Mason said in part (39 ALR 417, at 467-468):

Application of the External Affairs Power to the Convention

On the broad view which I take of the power it extends to the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. It is an international treaty to which Australia is a party which binds Australia in common with other nations to enact domestic legislation in pursuit of the common objective of the elimination of all forms of racial discrimination.

But I would go further and say that, even on the more cautious expression of the scope of the power by Dixon J in *Burgess,* it would extend to the implementation of this convention. The recitals to the Convention reveal in

an illuminating way the various elements which have led the parties to the Convention to co-operate in an endeavour to eliminate racial discrimination. They show that racial discrimination is considered to be inconsistent with the ideals on which the Charter of the United Nations is based and with the principles enshrined in the Universal Declaration of Human Rights and that it is the target of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination. They contain a reaffirmation: ". . . that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State . . ." The recitals go on to express concern that racial discrimination is still in evidence in some areas of the world and that governmental policies are in some instances based on racial superiority or hatred, eg apartheid, segregation or separation. They acknowledge that the parties, having resolved to adopt all necessary measures to eliminate racial discrimination and to prevent and combat racist doctrines and practices, desired to implement the principles in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination. The point of all this, so it seems to me, is that the community of nations, or at least a very large number of them, are vigorously opposed to racial discrimination, not only on idealistic and humanitarian grounds, but also because racial discrimination is generally considered to be inimical to friendly and peaceful relations among nations and is a threat to peace and security among peoples.

In addition to the materials referred to in the recitals to the Convention there are the developments in international law to which Stephen J has referred in his judgment, commencing with the provisions of the Charter of the United Nations. These developments, taken together with the materials already referred to, establish beyond any doubt that there are solid and substantial grounds for the widespread international opposition to all forms of racial discrimination and that its elimination is a desirable, if not an essential, step for the maintenance of international peace and security.

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.

Mr Justice Murphy said in part (39 ALR 417, at 469-471, and 473):

External affairs

When the people of Australia joined together on 1 January 1901 as the Commonwealth of Australia this nation became a new international personality in the community of nations. Australia's external affairs are primarily its relations with other members of the international community

directly and through international organs. The relations are conducted in a variety of ways sometimes crystallized in arrangements, the most formal of which are treaties (often described as conventions or covenants). More broadly, there is an external affair whenever Australia is involved with any affair (that is any entity, circumstance or event) outside Australia (whether or not this involves any affair in Australia).

The Australian States have no international personality; unlike the Commonwealth, they are not nation-states. Any purported treaty or agreement between any or all the Australian States and a foreign country is a nullity. States have entered into arrangements with other countries either in the belief they could do so or because of the neglect of the Commonwealth to make arrangements which were thought to be practically necessary (for example overseas enforcement of maintenance for deserted wives and children, interchange of information about criminals). All such arrangements are within the exclusive authority of the Commonwealth.

The executive, the legislative and the judicial branches of government are all concerned with Australia's external affairs.

The executive power with respect to external affairs

Constitutionally, the executive power over Australia's external affairs comes within Ch III — Executive Government. It is part of the executive power of the Commonwealth nominally vested in the Queen exercisable by the Governor-General (s 61). The power is exercised on the advice of the Federal Executive Council (s 62) and administered (pursuant to s 64) by the Minister in charge of the Department now known as the Department of Foreign Affairs.

The executive power over external affairs is not unlimited. It is subject to constitutional limitations, whether expressed, as in s 116 (freedom of religion), or implied (for example separation of powers). Otherwise the executive power in relation to external affairs, unless confined by Parliament, is unconfined.

For some few years after 1901 the Executive Government mostly failed to exercise directly its authority in Australia's external affairs, perhaps because of distraction in more pressing tasks of administering the domestic affairs of the new Commonwealth or because of lack of expertise and the geographical remoteness from the areas of presumed importance or because of persistence of colonial mentality. It allowed Australia's external affairs to be largely conducted through the United Kingdom Government. By the end of World War I, however, Prime Minister Hughes was vigorously asserting Australia's independence in external affairs (see Booker: *The Great Professional,* 1980). Whatever the explanation for the early failure to exercise the power directly, this does not affect the constitutional position that the conduct of Australia's external affairs was from 1901 vested in Australia's Executive Government.

The subjects coming within the scope of external affairs as contemplated in 1901 included all aspects of the relations between Australia and other countries. The Constitution itself evidences that these extended to treaty-making and the exchange of consuls and other representatives. By s 75, the

High Court was given original jurisdiction in all matters (i) arising under any treaty, and (ii) affecting consuls or other representatives of other countries. The position of these aspects of external affairs as the first two subject matters of the court's original jurisdiction underlines the importance of external affairs in the constitutional scheme. The treaties referred to in s 75 must include treaties entered into by Australia.

During this century we have witnessed the greatest recognition of and also the greatest denial of human rights in all history. Genocide, forced labour, arbitrary arrest and imprisonment, deprivation of civil and political rights, racial and religious discrimination, or other crimes against humanity, have occurred on an enormous scale. In response, we have had the greatest progress in the elaboration and acceptance of universal standards of human rights by the international community. World War II and the events leading to it focused attention on the need to secure human rights on an international scale. The history of the fascist regimes showed that the denial of basic rights to the citizens of a country was often instrumental in the advance to or maintenance of power by those who would endanger world peace. Concerted international action was necessary to ensure that peace would not be endangered through denial of rights in any country. Also, there was an increasing consciousness, voiced by Wendell Wilkie and many others, that people had responsibility for the well being of others everywhere, irrespective of national barriers which were unnaturally dividing humanity. The United Nations Charter, 1945, proclaims that one of its purposes is to achieve international co-operation in providing and encouraging respect for human rights and fundamental freedoms for all without restriction. The member nations pledged themselves to take action in co-operation with the organization for the promotion of universal respect for and observance of these rights and to take action both separately and jointly, that is, by individual national action, as well as by international co-operation. The Commission on Human Rights (established in 1946 by the United Nations) initiated work on an International Bill of Rights to consist of a Declaration of Human Rights, a covenant on human rights to transform the principles of the declaration into legal declarations, and international machinery to secure effective observations of the obligations. In 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. The other stages of the International Bill were reached in 1966 with the adoption by the General Assembly of the International Covenant on Civil and Political Rights with its optional protocol. Throughout these instruments and in thousands of resolutions by the various organs of the United Nations and of numerous other international bodies concern has been expressed about the persistence of racial discrimination in various forms.

For years, almost daily, Australian Governments, by Ministers in Parliament and elsewhere, and by other representatives in the United Nations and other international agencies, have condemned violations of human rights in other countries. Likewise, complaints are made by others of Australia's violations of human rights, especially of discrimination against Aborigines. A considerable literature exists on the subject of racial discrimination against Aborigines (see references in Appendix — at 474-5,

infra). Australia's history since the British entry in 1788 to a land peopled by Aborigines has been one of racism and racial discrimination which persists strongly. The subsequent entry of non-British migrants in great numbers has meant that the racism and discrimination extends well beyond the Aborigines. The Executive Government's concern with racial discrimination in Australia is related, perhaps inextricably, to its concern with racial discrimination elsewhere. In the practical realm of international politics it would be futile for Australia to criticize racial discrimination or other human rights' violations in other countries if it were to tolerate such discrimination within Australia. The Australian people can reasonably expect other peoples to take measures to eliminate racial discrimination in their countries only if Australia does likewise. The Convention on the Elimination of All Forms of Racial Discrimination, 1966, to which Australia has become a party is a multilateral treaty imposing obligations on the parties including the obligation to take legislative measures to eliminate racial discrimination within their borders. The entry into this treaty was clearly within the executive power of Australia's Executive Government . . .

It was conceded by Queensland, rightly in my opinion, that the challenged sections of the Act conform to the Convention. The legislation thus falls easily within the external affairs power as an implementation of this treaty. Further the Act relates to matters of international concern, the observance in Australia of international standards of human rights, which is part of Australia's external affairs, so that the Act's operative provisions would be valid even in the absence of the Convention. Thus it is immaterial whether the Act precisely conforms to the terms of the Convention.

Mr Justice Brennan said in part (39 ALR 417, at 488 and 491-492):

The treaty in performance of which the Racial Discrimination Act 1975 (Cth)(the Act) was enacted is the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention). Its origins, the extent of international participation in it and the long and profound international concern as to its subject matter, are recounted in the judgment of my brother Stephen J. To his summary I would add nothing except to say that I should think that the implementing of that Convention by Australia must be of the first importance to the conduct of Australia's relations with its neighbours, if not indeed to Australia's credibility as a member of the community of nations.

It remains to inquire whether ss 9 and 12 of the Act, which are the only provisions upon which Mr Koowarta's claim for relief might depend, were enacted in performance of Australia's obligation under the Convention. It was rightly conceded that ss 9 and 12 were enacted in implementation of the Convention . . .

Section 9(1) of the Act reads as follows:—

"It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of

any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.''

Section 12(1)(d) of the Act provides:—

''It is unlawful for a person, whether as a principal or agent—

(d) to refuse to permit a second person to occupy any land or any residential or business accommodation; . . .

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.''

Section 9(1) has enacted as municipal law important provisions of the Convention in conformity with the obligation in Art 5 to prohibit racial discrimination in all its forms. In particular s 9(1) has made unlawful the doing of any act which involves racial discrimination within the meaning of that term in the Convention as defined by Art 1, cl 1. That definition of racial discrimination is reproduced precisely by the words of the sub-section. The Act thus makes part of Australia's municipal law, enforceable by curial process, a key provision of the Convention. When Parliament chooses to implement a treaty by a statute which uses the same words as the treaty, it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty (cf *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 32 ALR 609 at 618; *R v Chief Immigration Officer; Ex parte Bibi* [1976] 1 WLR 979 at 984). A statutory provision corresponding with a provision in a treaty which the statute is enacted to implement should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law (*Quazi v Quazi* [1980] AC 744 at 808, 822). Indeed, to attribute a different meaning to the statute from the meaning which international law attributes to the treaty might be to invalidate the statute in part or in whole, and such a construction of the statute should be avoided (*Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 267).

The method of construction of such a statute is therefore the method applicable to the construction of the corresponding words in the treaty. The leading general rule of interpretation of treaties is expressed by Art 31 of the Vienna Convention on the Law of Treaties:—

''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.''

That is the general rule for the construction of s 9(1) of the Act. Clearly the sub-section is not to be construed, as the learned Solicitor-General for Victoria submitted, as meaningless.

The recognition, enjoyment and exercise of human rights and fundamental freedoms by all persons on an equal footing irrespective of race, colour, descent or national or ethnic origin is the purpose of the Convention to which Art 1, cl 1, in conjunction with other Articles (especially Arts 2 and 5), gives effect. The denial or impairment of such recognition, enjoyment or exercise of human rights and fundamental freedoms is proscribed (''distinction, exclusion, restriction or preference''). The question which was argued under s 9(1) was whether the benefit of using the Archer River Pastoral

Holding which the plaintiff had sought for himself and the other members of the Winychanam Group was a human right or fundamental freedom within the meaning of that term in the sub-section. Section 9(2) provides that:—

"The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention."

The enjoyment of a licence to use property is undoubtedly a "civil right' within the meaning of that term in para (d) of Art 5. From the facts alleged, it is implied that the plaintiff might reasonably have expected to be granted and to be able to enjoy such a licence in respect of the Archer River Pastoral Holding if permission to transfer the lease to the Commission had not been refused.

In his dissenting judgment Chief Justice Gibbs (with whom Mr Justice Aickin and Mr Justice Wilson agreed) said in part (39 ALR 417 at 442-444):

The alternative argument of the Commonwealth was that Australia is obliged, by the rules of customary international law, and the Charter of the United Nations, to promote the observance of human rights and fundamental freedoms, and to prevent discrimination in Australia on the grounds of race, and that a law may validly be made under s 51(xxix) for the purposes of carrying out that obligation. It is not submitted that this suggested rule of international law has become part of the domestic law of Australia, and it is therefore unnecessary to discuss the question, which has been considered by this court in *Chow Hung Ching v R* (1948) 77 CLR 449 at 462, 477 and more recently in England in *Trendtex Trading v Bank of Nigeria* [1977] QB 529 at 553-4, whether international law is incorporated into and forms part of the law of Australia, or whether it becomes part of Australian law only when it has been accepted and adopted by the law of Australia. On either view it is clear that the provisions of a Commonwealth or State statute must be applied and enforced even if they are in contravention of accepted principles of international law, although, where possible, statutes will be interpreted so as not to be inconsistent with the established rules of international law: *Polites v Commonwealth* (1945) 70 CLR 60 at 68–9, 74, 75-6, 77, 79, 80-1. The provisions of s 286 of the Land Act 1962 (Qld) unambiguously provide that it is in the absolute discretion of the Minister whether he will grant or refuse the permission without which a lease under that Act may not be transferred. Even if there were in force in Australia a principle of international law which forbids racial discrimination, the provisions of the Queensland statute would prevail over it. However, the argument is that the external affairs power enables the Commonwealth Parliament to carry into effect within Australia rules of international law that have become binding on Australia as a member of the international community.

The Charter of the United Nations reveals the importance which the members of that body attach to respect for and observance of human rights and fundamental freedoms, without distinction as to race, language or religion. The members of the United Nations pledge themselves to take joint and separate action to achieve that purpose amongst others: see especially

Articles 1(3), 13, 55(c), 56, and 62 of the Charter. "Since 1946 scholarly opinion has been divided on the question whether the human rights provisions of the United Nations Charter impose legal obligations": Egon Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter" (1972) 66 *American Journal of International Law,* at 338. The preponderance of opinion appears to favour the view that the obligation upon members of the United Nations to protect human rights and fundamental freedoms is of a legal character, although the machinery for enforcement is imperfect and the rights and freedoms protected are not clearly defined. Support for this view may be found in articles by Judge Tanaka (in *Transnational Law in a Changing Society* (1972), at 248) and Judge de Aréchaga (in (1978) 159 *Recueil des Cours,* at 174-7) as well as in the writings to which Egon Schwelb refers. And further support for the view that a denial of human rights by reason of racial discrimination may constitute a breach of international law is provided by three cases in the International Court of Justice — the *South West Africa* cases (1966) ICJR 4; *Namibia (SW Africa) (Advisory Opinion)* (1971) ICJR 16, and *Barcelona Traction, Light and Power Co Ltd (Judgment)* (1970) ICJR 3. In the first of those cases, the judgments of the dissenting judges expressed the view that it can be inferred from the provisions of the Charter that "the legal obligation to respect human rights and fundamental freedoms is imposed on member States" (per Judge Tanaka, at 289) and that "racial discrimination as a matter of official government policy is a violation of a norm or rule or standard of the international community" (per Judge Nervo, at 464). In the second case the International Court said (at 57) that to establish and enforce "distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter". In the *Barcelona Traction* case, it was said (at 32) that certain obligations of a State are owed to the international community as a whole, and that these include those which "derive . . . from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the rights of the human person, including protection from slavery and racial discrimination". After referring to these cases Professor Brownlie, in *Principles of Public International Law* (3rd ed, 1979) at 596-7, stated the position as follows: "There is indeed a considerable support for the view that there is in international law today a legal principle of non-discrimination which at the least applies in matters of race. This principle is based, in part, upon the United Nations Charter, especially Articles 55 and 56, the practice of organs of the United Nations, in particular resolutions of the General Assembly condemning *apartheid,* the Universal Declaration of Human Rights, the International Covenants on Human Rights and the European Convention on Human Rights. An alternative view is that there is no legal principle of racial non-discrimination as such but the international practice supports instead such a standard or criterion as an aid to interpretation of treaties, including the Mandate agreement in issue in the *South West Africa* cases."

The acceptance of the view first mentioned by Professor Brownlie does not mean that at international law a member of the United Nations is under a legal duty to prevent any act of racial discrimination, however trivial it may be, and whether or not it was done mistakenly or even with good intentions (as, for example, in the case of what is called reverse discrimination). It can readily be understood that international law should treat a violation of human rights as not merely a matter of domestic jurisdiction, but as a breach of international obligation, if the violation "threatens the international peace and security" ((1968) 124 *Recueil des Cours,* at 436, and see Lauterpacht: *International Law and Human Rights* (1950), at 177-8) or if there are "gross violations or consistent patterns of violations" ((1968) 124 *Recueil des Cours,* at 175, and Sohn: "The Human Rights Law of the Charter" (1977) 12 *Texas International Law Journal,* at 132). Genocide, torture, imprisonment without trial, and wholesale deprivations of the right to vote, to work or to be educated provide examples of violations of that kind. The act of discrimination alleged in the present case — the exercise, in a discriminatory way, of a discretionary power to refuse consent to the transfer of a Crown lease — stands on an entirely different plane. It could not, in my opinion, be said that the refusal of the Minister to grant his consent was a gross violation of a human right or fundamental freedom.

International law in municipal courts. International Covenant on Civil and Political Rights. Relevance in the review of a deportation decision.

Tabag v. *Minister for Immigration and Ethnic Affairs,* Federal Court of Australia (Woodward, Keely and Jenkinson JJ), 23 December 1982. 45 ALR 705.

In an appeal from a decision to deport which threatened to break up the family of the appellant, one of the grounds of the appeal was as follows:

"12. The power to deport was exercised without due regard to the Human Rights Commission Act 1981 (No 24) and the International Covenant on Civil and Political Rights and/or in breach of the said Act and the said Covenant and by reason of the said Act and the said Covenant and on the evidence before it, it was not open in law for the Tribunal to affirm the deportation."

Woodward J. dealt with this point as follows (at 709-710):

In developing this argument, counsel referred to the Human Rights Commission Act 1981, which came into force after the Tribunal began hearing the present case but before the hearing finished. It was not drawn to the attention of the Tribunal.

The International Covenant on Civil and Political Rights is set out in a Schedule to the Act, to be used as a yardstick for domestic laws and practices, but it is not made part of the laws of this country.

The most relevant Articles of the Covenant for present purposes are Arts 13, 23(1) and 24(1).

Article 13 reads: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented

for the purpose before, the competent authority or a person or persons especially designated by the competent authority.''

This requirement is clearly met by the provision for review of the Minister's decision by the Administrative Appeals Tribunal.

Article 23(1) states that: ''The family is the natural and fundamental group unit of society and is entitled to protection by society and the State''.

Article 24(1) reads: ''Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State''.

Such provisions would act as a reminder, if one were needed, of the importance of the family and of the protection of children in our society.

However, I do not believe that such reminders are needed . . .

Keely J did not deal with the point, and Jenkinson J said (at 732):

The material before this court does not justify a conclusion that the Tribunal failed to have ''due regard'' to the Act or to the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in a Schedule to the Act. Nothing in the proceedings before the Tribunal or in its decision or its reasons for the decision was in contravention of any provision of the Act or of the Covenant, in my opinion.

The appeal against the decision of the Minister to deport was dismissed.

International law in municipal courts. Extradition Treaty. Judicial effect given to obligations in the treaty. Writ of habeas corpus.

Puharka v *Webb and Others,* Supreme Court of New South Wales, (Rogers J), 9 August 1983. 49 ALR 485.

The District Court of Sweden applied for the extradition of the plaintiff to face charges for dishonesty to creditors and suppression of documents. He was arrested and, after a committal hearing, was placed in custody awaiting extradition. Although he had a right to appeal against the order for extradition, he did not do so within the 15 day period specified in the Extradition (Foreign States) Act 1966. He subsequently sought relief in the nature of habeas corpus, and Rogers J dealt with this point as follows (48 ALR 485, at 488-489):

In relation to the extradition of persons to Sweden, particular provision has been made by a treaty between Australia and Sweden, signed on 20 March 1973 and incorporated into regulations made pursuant to the Act, and entitled Extradition (Sweden) Regulations. The treaty attends to the details of the procedure to be followed for obtaining extradition of a person to Sweden, or indeed from Sweden. In particular, art 13 provides that Australia is not required to extradite a person before the expiration of 15 days after the date on which he has been held judicially liable to extradition or, if proceedings for a writ of habeas corpus have been brought, the final decision of a competent court. In this regard, the treaty obviously extends to persons sought to be extradited to Sweden the protection conferred upon them by s 18 of the Act.

It is the submission of senior counsel for the Attorney-General that, the relevant 15 days having expired in the present case, there is no residual jurisdiction in this court to grant relief to Mr Puharka of the kind he seeks.

This is a point of the utmost importance to Australia in the regulation of its international relations with other countries. It cannot be over-emphasised that when Australia enters into a treaty obligation with another country, it will, not only through the executive Government, but also through the judicial arm of the State and Federal Governments, adhere to and have proper and respectful regard for the obligations which Australia has assumed. I have no doubt that every judicial officer will endeavour to act so as to give effect and substance to the obligations which inure to this country by virtue of international treaties.

In the result, therefore, in my view, if there is a subsisting international treaty which, when properly followed, requires the extradition of a person to another country it is the duty of the court to ensure that that is done. But there is another duty of equal importance which rests upon any judge who sits in a court of superior jurisdiction. The remedy of habeas corpus is one of the most treasured and long-standing heritages that this country has taken from the United Kingdom. To surrender it in any case would be to cast way a treasured possession. It should not be done without the most clear cut and measured terms of legislation. In my view, on its proper interpretation, whilst the provisions of the Extradition (Foreign States) Act 1966 (Cth) confirm a statutory right to a review of an order for detention, the legislation does not detract from the common law right of any person, whether a citizen or a visitor to this country, to whom the protection of the laws of this country extends, to approach the court and seek relief from unlawful detention at any time while so ever that person is within the confines or within the jurisdiction of the appropriate court. For that reason, it seems to me that the common law provisions which exist for the protection of the subject and of persons within the jurisdiction must always subsist so as to ensure that a citizen or otherwise a person present within the jurisdiction will enjoy the protection which the courts can afford to him or her.

For that reason, I think that the preliminary submissions should fail.

International law before municipal courts. Convention for the Protection of the World Cultural and Natural Heritage. Whether the Convention imposes an international obligation. Whether Australian Parliament has power to give effect to Convention within Australia. Effect of federal clause.

Commonwealth of Australia v *State of Tasmania,* High Court of Australia, 1 July 1983. 46 ALR 625

For the purpose of generating hydroelectricity on the Gordon River in Southwestern Tasmania, Tasmania authorized the construction of a dam. The Commonwealth sought to prevent the construction of the dam in order to protect the natural and cultural heritage in the area. It did so by prohibitions contained in the National Parks and Wildlife Conservation Act 1975 and the World Heritage Properties Conservation Act 1983 and regulations made thereunder which had the effect of preventing any construction without the consent of a Commonwealth Minister. On 22 August 1974 Australia had ratified the UNESCO Convention for the Protection of the World Cultural and Natural Heritage which entered into force on 17 December 1975 (Aust TS 1975 No 47). In December

1982 the World Heritage Committee established under the Convention entered the parks covering the area where the dam construction was to take place on the World Heritage List.

Of the questions before the Court were whether the Convention imposed an obligation upon the Commonwealth to preserve the area, whether the federal clause in the Convention had any effect on the Commonwealth's responsibilities and powers, and whether the legislation was a valid exercise by the Commonwealth Parliament of its power to make laws with respect to external affairs. A majority of the Court (Mason, Murphy, Brennan and Deane JJ) held that the Commonwealth had validly prohibited construction of the dam under the World Heritage Properties Conservation Act 1983. Extracts from the majority judgments are as follows:

per Mason J at 696-701:

> 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 had 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

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 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.

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.

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 saying 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 expresed 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 para (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".

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 para (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.

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 para (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) 112 CLR 597 at 604–5, 613, 614–5). And it is only natural that in framing a command to States to take measures of the kind described in para (d) in relation to their heritage the command will be expressed in terms of endeavour, subject to the qualifications mentioned.

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 co-operate" 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 obligations. 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.

Another circumstance of significance is that on 16 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.

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.

Part III of the Convention deals with the "Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage". It establishes 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.

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 purposes of such requests may be to secure the protection, conservation, presentation or rehabilitation of such property (art 13.1).

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).

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).

The Convention, to which 74 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 in formulation of the Convention, its adoption by so many nations resulting in co-operative 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 the World Heritage List.

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 para (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

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.

per Murphy J at 728, 730, 732, 734–736:

External Affairs Power (Constitution (s 51(29))

The power to make laws for the peace, order and good government of the Commonwealth with respect to external affairs authorizes 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 *R v Burgess, supra; New South Wales v Commonwealth* (1975) 135 CLR 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. . . .

The world's cultural and national 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. . . .

The co-operation of Australia with other national 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 co-operate 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. . . .

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 widespread 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'', *American Journal of International Law,* vol 60 (1966) p 782; Vignes: ''Will the Third Conference on the Law of the Sea Work Acording to the Consensus Rule?'', *American Journal of International Law,* vol 69 (1975) p 119; Buzan: ''Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea'' *American Journal of International Law,* vol 75 (1981) p 324.

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,* ATS (1974) No 2 (reprinted: *American Journal of International Law,* vol 63 (1969) 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 . . .''

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] AC 149; *Duff* v *Lake George Mines Ltd* [1960]; SR (NSW) 83; *Wellington* v *Lake George Mines Ltd* [1962] SR (NSW) 326; *Australian Oil Refining Pty Ltd v Bourne* (1980) 28 ALR 529; 54 ALJR 192 at 194–5. Taking into account the imprecise standards of obligation under international law, for the purposes of the external affairs power, the Convention, in particular Article 5, imposes a real obligation.

Federal Clause: The federal clause (Art 34) in the Convention is not material. It seemed to be common ground that Article 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", *British Yearbook of International Law,* vol 32 (1955–56) p 162; Liang: "Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments", *American Journal of International Law,* vol 45 (1951) p 108.

Section 69 of the National Parks and Wildlife Conservation Act 1975 authorizes 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 authorized 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.*

per Brennan J at 771–772, 774–779:

For my part, I would adhere to the view that I expressed in *Koowarta* . . . : 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.

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 inquiry 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 inquiry 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) 55 CLR 608 at 670. Applying the test proposed by Stephen J, the subject of an obligation binding upon Australia under the Convention enlivens the Commonwealth power.

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* . . .), it would be necessary to determine whether the subject affects or is likely to affect Australia's relations with other international persons, an inquiry 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" . . . That inquiry need not be pursued if the Convention imposes an obligation on Australia . . . 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.

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 Co Ltd,* ICJ Reports 1970, p 3 at 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",

ICLQ, vol 19 (1970), at 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 unreasonable."

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,'* ICJ Reports 1948, p 56 at 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.

The first sentence of Article 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 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; . . .".

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 State 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,* vol 30 (1953), 381 at 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.*"

Mr Fawcett's view stands in contrast with that of the late Sir Hersch Lauterpacht who wrote *International Law* vol 4 (1978) (E Lauterpacht (ed), at pp 111–2): "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 Article 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."

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 Judge Dillard observed in his opinion in the *Appeal Relating to the Jurisdiction of the ICAO Council* (ICJ 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.

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 Commonwealth* (1969) 121 CLR 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 356): ''. . . wherever words which 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.''

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) 56 ALJR 813; 42 ALR 463, where it was held that a contract did not fail for uncertainty when a ''subject to satifactory finance'' clause was construed as requiring the purchaser to act honestly and reasonably. Mason J said (ALJR) at 820; (ALR) at 476: ''There is in the 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.* 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] AC 520 at 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) 112 CLR 597 at 605).
>
> 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.
>
> 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.
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> 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''.
>
> 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.

per Deane J at 807–809:

> 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), p 299). It is, therefore, not surprising that, in a Convention to which

more than 70 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 Commonwealth* (1969) 121 CLR 353 to which the court was referred.

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 co-operate" 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 70 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.

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 ''come 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, Art 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.

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.

Condification of International Law. Vienna Convention on the Succession of States in respect of State Property, Archives and Debts.

The Convention was adopted in Vienna on 7 April 1983 by a vote of 54 in favour, 11 against and 11 abstentions. For the text of the Convention, see United Nations Document A/CONF.117/14. Australia's explanation of abstention was reported as follows (A/CONF.117/SR.10, 14-15):

> *MR BROWN* (Australia) said that, because of his country's long history of commitment to the process of codification and progressive development of international law, it was with great regret that his delegation had felt unable to support the adoption of the text of the draft convention.
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> Although the Conference had been convened to codify the law on succession of States in matters other than treaties, it had gone considerably beyond that. It was, of course, not always possible or even desirable to limit such conferences strictly to the codification of the rules of international law. Australia's concern was not that there had been a progressive development of international law in the convention but that some of its provisions went well beyond State practice, precedent and doctrine. As a result the Conference had adopted some articles which had made it impossible for Australia to support the adoption of the convention.
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> In particular, his delegation considered that the principles reflected in paragraph 4 of article 14, paragraph 7 of article 26, paragraph 3 of article 28 and paragraph 4 of article 29 were not part of customary international law and certainly not recognised by the international community as constituting peremptory norms of general international law from which no derogation was permitted. The votes recorded on those draft articles during the Conference supplied ample justification for that view. His delegation was also concerned about a number of other provisions which contained vague or incomplete terminology, such as article 36. The same comment applied also to article 31, which his delegation felt did not adequately cover an important area of State debts, namely the class of private debts chargeable to a State.
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> The negotiation of an international instrument, particularly one on such a complex subject as that before the Conference, and reflecting such a wide diversity of interests, should in his delegation's view be characterized by a willingness by each participant to consider the points of view of other delegations and to reach a mutually acceptable compromise.
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> Australia had sought to work hard to find common ground which would be acceptable to all delegations, and it was a matter of special regret to his delegation that there had been inadequate evidence of a spirit of compromise during the Conference. Indeed the adoption of articles without serious consideration having been given to possible improvements denied the process of negotiation itself. The inevitable result was reflected in the vote on the convention as a whole, namely, the probability that a convention had been adopted with a limited chance that it would receive sufficient ratifications required to make it a meaningful international instrument.

Should that probability be realized, his delegation wished to record its view that many of the articles in the convention did not reflect either existing rules of customary international law or any degree of wide agreement as to what those rules should be. As a result, their incorporation into the convention could not itself be used as evidence of the rules of contemporary international law on the subject.