HIGH COURT OF AUSTRALIA

Koowarta

Vs.

Bjelke-Petersen

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

11 May 1982

GIBBS C.J.

1. These two matters raise for decision important questions as to as amended ("the Act"). (at p175)

2. In the first matter, an order has been made for the removal into this Court of parts of a cause pending in the Supreme Court of Queensland between John Koowarta, as plaintiff, and the Honourable Johannes Bjelke-Petersen and others, as defendants. The facts alleged in the statement of claim delivered in that action include the following. The plaintiff is an Aboriginal, and is and at all material times has been a member of a group of Aboriginal people known as the Winychanam Group resident at Aurukun and elsewhere in the State of Queensland ("the group"). The Aboriginal Land Fund Commission ("the Commission") is a body corporate constituted by the Aboriginal Land Fund Act 1974 (Cth). (That Act has now been repealed, but that is not material.) At all material times prior to June 1977 John Herbert Broinowski and others were lessees from the Crown in right of the State of Queensland of land in Northern Queensland known as Archer River Pastoral Holding. In the years 1974 to 1976, the plaintiff on behalf of himself and other members of the group requested the Commission to acquire the said lease to enable the land to be used by or for the plaintiff and other members of the group for grazing purposes and otherwise; the Commission acceded to the said request; the plaintiff and the Commission cooperated and combined in making inquiries and taking steps with a view to the acquisition of the said lease and with a view to the use of the land for the said purposes of the plaintiff and other members of the group; and the Commission in February 1976 entered into a written contract with the lessees for the purchase of the said lease and certain cattle and horses thereon. By virtue of cl. 25 of the said contract and of the provisions of the Land Act 1962 (Q.) any sale or transfer of the lease was subject to the approval or permission of the Minister for Lands of the State of Queensland. By letter dated 23 March 1976 the solicitors for the Commission, with the approval of the lessees, sought the consent or permission of the second defendant, who was then Minister for Lands of the State of Queensland, to the transfer of the lease to the Commission. In or about June 1976 the second defendant refused to grant consent or permission to the transfer of the said lease. On or about 8 December 1976 the second defendant, in his capacity as Minister for Lands, stated the reason for refusing to grant approval or permission to such transfer. The statement contained the following passage:

"The question of the proposed acquisition of Archer River Pastoral Holding comes within the ambit of declared Government policy expressed in Cabinet

decision of September 1972, which stated: -

> 'The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.'
> In the light of this policy the recent development whereby the Aboriginal Land Fund Commission sought to acquire by transfer Archer River Pastoral Holding was reported in detail to State Cabinet, whereupon Cabinet said in June 1976 -
> '(1) That Cabinet's policy regarding Aboriginal reserve lands, as approved in Decision No. 17541 of 4 September 1972 remain unchanged.
> (2) That in accordance with such policy and as it is considered that sufficient land in Queensland is already reserved and available for use and benefit of Aborigines, no consent be given to the transfer of Archer River Pastoral Holding No. 4785 to the Aboriginal Land Fund Commission.'"

The Cabinet policy referred to in this statement was the reason, or the dominant reason, why the Cabinet decided that no consent should be given to the transfer of the lease to the Commission and why the second defendant refused to grant consent or permission for such transfer. In these circumstances (so it is alleged) the Cabinet, and the second-named defendant, acted contrary to the provisions of the Act, and unlawfully, in refusing to consent to the transfer of the lease to the Commission by reason of the Aboriginal race, colour or ethnic origin of the plaintiff or of the plaintiff and other members of the group as associate or associates of the Commission. In consequence of these matters the plaintiff has suffered loss, and loss of dignity, injury to feelings and humiliation. The plaintiff claims declarations, an injunction and damages. (at p177)

3. The defendants delivered a defence and demurrer. By their defence the defendants, besides putting in issue some of the plaintiff's allegations of fact, raised certain questions of law; they alleged that the Act is not a law of the kind mentioned in s. 51(xxvi) of the Constitution and is outside the legislative power of the Commonwealth and invalid. The demurrer was based on the ground that the Act is invalid, and also on the ground that the plaintiff is not, within the meaning of the Act, a person aggrieved by the matters alleged in the statement of claim and does not otherwise have locus standi to bring the action. The paragraphs of the defence that raise those questions of law, and the demurrer, are the parts of the cause that have been removed into this Court. The provisions of the Act which it was claimed rendered unlawful the actions of the Minister and the Cabinet were ss. 9 and 12. Although the defendants, by their defence and demurrer, claim that the Act is entirely invalid, it is apparent that for the purposes of this action it is unnecessary to decide upon the validity of any section of the Act other than s. 9 or s. 12. (at p177)

4. The second matter now before the Court is an action brought in this Court by the State of Queensland against the Commonwealth claiming a declaration that the Act is ultra vires and invalid. The statement of claim contains no allegations that the Act, if valid, would be inconsistent with any legislation of the State of Queensland, or that it would inhibit any administrative action, actual or contemplated, of the State, and Counsel for the State were unable to suggest that the Act, if valid, would at present adversely affect any interest of the State, except in the manner alleged in the action brought by Mr. Koowarta. There is no doubt that the State of Queensland has standing to invoke the provisions of the Constitution to challenge the validity of Commonwealth legislation which extends to, and operates within, the State: see Victoria v. The Commonwealth and Hayden [1975] HCA 52; (1975) 134 CLR 338, at pp 381, 401 and authorities there cited. Clearly the State has the necessary standing to bring this action against the Commonwealth. However, the power of a court to make a declaration is discretionary (Forster v. Jododex Aust. Pty. Ltd. [1972] HCA 61; (1972) 127 CLR 421, at pp 435-438 ; and Attorney-General (Q.) v. Attorney-General (Cth) [1915] HCA 39 [1915]

HCA 39; ; (1915) 20 CLR 148, at p 165), and in the present case it appeared convenient, in the exercise of the Court's discretion, to confine the argument on validity to those sections of the Act which have been shown to have present practical consequences if they are valid, viz., ss. 9 and 12. There are some other provisions which are also of present importance, but they are ancillary or procedural, and stand or fall with ss. 9 and 12. The argument was accordingly limited to the validity of those sections as to which the contest is not merely abstract or hypothetical. However, the decision in the case will determine the main issues on which the validity or invalidity of the Act depends, i.e. whether its principal provisions are validly enacted under par. (xxvi) or par. (xxix) of s. 51 of the Constitution. It will leave outstanding further questions - in particular whether the provisions of s. 5 of the Act, which are intended to give certain other sections an additional operation in relation to a person who has been an immigrant, are validly enacted under s. 51(xxvii), and whether, assuming that s. 10 of the Act is otherwise valid, the definitions of "Aboriginal" and "Torres Strait Islander" in s. 3(1) of the Act give to s. 10 a wider operation than is consistent with constitutional validity. Present circumstances do not call for a decision on those questions. (at p178)

5. The Act was passed, as its preamble shows, to give effect to an international convention entitled the "International Convention on the Elimination of All Forms of Racial Discrimination" (the Convention) to which Australia is a party. The Commonwealth signed the Convention on 13 October 1966 and ratified it on 30 September 1975. By s. 7 of the Act, approval is given to the ratification. A copy of the text of the Convention is set out in the schedule to the Act. The preamble to the Convention refers, inter alia, to the Charter of the United Nations, the Universal Declaration of Human Rights and the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and recites (inter alia) that the States Parties to the Convention, "Reaffirming 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, ... Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination, ... Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end", have agreed as follows. Article 1(1) provides:

"In this Convention, the term 'racial discrimination' shall mean any 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 human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Article 2(1) provides (inter alia) as follows:

"States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all

> races, and, to this end:
>
> . . .
>
> (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;
>
> . . . "

Article 5 commences with the following words:
"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:".
The article then sets out the rights to which it refers, including the following:

"(d) Other civil rights, in particular:
. . .
(v) The right to own property alone as well as in association with others;
. . .
(ix) The right to freedom of peaceful assembly and association;
. . .
(e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
. . .
(iii) The right to housing;
. . . " (at p180)

6. The Act contains, in s. 3(1), a number of definitions. Those relevant to the present case are the following:
"'dispose' includes sell, assign, lease, let, sub-lease, sub-let, license or mortgage, and also includes agree to dispose and grant consent to the

> disposal of;"
> "'relative', in relation to a person, means a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person".

Sub-sections (3) and (4) of s. 3 provide as follows:
"(3) For the purposes of this Act, refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure. (4) A reference in this Act to the doing of an act by a person includes a reference to the doing of an act by a person in association with other persons."
The provisions designed to prohibit racial discrimination are found in Pt II of the Act. That part contains in s. 9 a general provision rendering any racial discrimination unlawful and in a number of sections, including s. 12, specific provisions which are intended to make particular forms of racial discrimination unlawful. The provisions of s. 9 and 12, so far as they are material, are as follows:
"9.(1) 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.
(2) 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.

. . .
(4) The succeeding provisions of this Part do not limit the generality of sub-section (1)."
"12.(1) It is unlawful for a person, whether as a principal or agent -
(a) to refuse or fail to dispose of any estate or interest in land, or any residential or business accommodation, to a second person;
(b) to dispose of such an estate or interest or such accommodation to a second person on less favourable terms and conditions than those which are or would otherwise be offered;
(c) to treat a second person who is seeking to acquire or has acquired such an estate or interest or such accommodation less favourably than other persons in the same circumstances;
(d) to refuse to permit a second person to occupy any land or any residential or business accommodation; or
(e) to terminate any estate or interest in land of a second person or the right of 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 18 provides as follows:
"A reference in this Part to the doing of an act by reason of the race, colour or national or ethnic origin of a person includes a reference to the doing of an act for two or more reasons that include the first-mentioned reason, provided that reason is the dominant reason for the doing of the act."
Part III of the Act deals inter alia with civil proceedings that may be brought under the Act. Section 24(1) provides as follows:
"A person aggrieved by an act that he considers to have been unlawful by reason of a provision of Part II may subject to this section institute a proceeding in relation to the act by way of civil action in a court of competent jurisdiction for any one or more of the remedies specified in section 25."
The remedies specified in s. 25 include an injunction, an order directing the defendant to do a specified act and -

"(d) damages against the defendant in respect of -
(i) loss suffered by a person aggrieved by the relevant act, including loss of any benefit that that person might reasonably have been expected to obtain if the relevant act had not been done; and
(ii) loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act . . . . "

Sections 9 and 12 of the Racial Discrimination Act. (at p181)

7. We are not directly called on to decide whether the refusal of the Minister to grant consent, approval or permission to the transfer was unlawful by reason of either s. 9 or s. 12. The parts of the first matter removed into this Court raise the question of the validity of those sections, not that of their meaning or application. However, if, as a matter of law, the refusal of the Minister was not unlawful by reason of s. 9 or s. 12, even on the assumption that those sections are valid, it would hardly be necessary, in Mr. Koowarta's action, to examine the question whether those sections are valid. It does therefore seem desirable to consider whether either section is applicable to the facts alleged. There can of course be no doubt that a reason for the refusal of the Minister to consent to the transfer of the lease was the race, colour or ethnic origin of the Aborigines who, it was intended, would use the land the subject of the lease. The refusal to grant consent to the transfer of the lease was a refusal to dispose of an estate or interest in land within s. 12: see the definition of "dispose" in s. 3(1). However, the transfer to which consent was sought was a transfer to the Commission, and

the question arises whether a refusal to dispose of an interest in land to a body corporate can constitute a breach of s. 12. By s. 22(a) of the Acts Interpretation Act 1901 (Cth), as amended, in every Act, unless the contrary intention appears, "person" shall include a body corporate as well as an individual. Does a contrary intention appear in s. 12? The provisions of that section reveal that the "second person" there mentioned must be capable either of having race, colour or national or ethnic origin, or of having a relative or associate. A corporation is of course incapable of possessing race, colour or ethnic origin, but it can in my opinion be said to have a national origin - which would be the place where the corporation was incorporated: see Janson v. Driefontein Consolidated Mines Ltd (1902) AC 484, at pp 497, 501, 505 . Further, although obviously a corporation cannot have a "relative" within the meaning given to that expression by s. 3(1) of the Act, it is possible, without undue straining of language, to say that a person can be an associate of a corporation. According to the Shorter Oxford English Dictionary, "associate", when used as a substantive, means, "One who is united to another by community of interest, etc.; a partner, comrade, companion". Although obviously a corporation cannot have an associate in the sense of a comrade or companion, it seems to me possible to say that a person who is in business in partnership with a corporation, or who has some other community of interest uniting him with the corporation, is associated with it. Provisions such as those of s. 12, which are intended to preserve and maintain freedom from discrimination, should be construed beneficially. For that reason I would conclude that the provisions of s. 12 do not reveal an intention contrary to that indicated by s. 22(a) of the Acts Interpretation Act, and that a "second person" within the meaning of s. 12 may include a corporation. Whether Mr. Koowarta was an associate of the Commission would of course be a question of fact. If he was, the case would appear to fall within s. 12(1) of the Act. (at p182)

8. However, it is doubtful whether s. 9 has any application to the facts alleged. That section is very widely drawn and its width produces considerable uncertainty as to its effect. No doubt the refusal to consent to the transfer of the lease was the doing of an act (see s. 3(3)) and it was an act which involved a distinction based on race, colour or ethnic origin, because it was based on the Cabinet policy that drew a distinction between Aborigines and other persons in relation to the acquisition of large areas of additional freehold or leasehold land. The question then is whether that act had the purpose or effect of nullifying or impairing the recognition, enjoyment or the exercise on an equal footing of any human right or fundamental freedom. It was submitted by the learned Solicitor-General for Victoria that it is meaningless to speak of "human right or fundamental freedom", since our law does not classify rights or freedoms in that way. However, I regard it as clear that "any human right" referred to in s. 9 includes rights of the kind specified in Art. 5 of the Convention. Nevertheless the facts pleaded do not in my opinion reveal that the act of the Minister nullified or impaired the recognition, enjoyment or exercise of any of those rights by Mr. Koowarta. It was submitted on behalf of Mr. Koowarta that the refusal to consent to the transfer of the lease impaired his exercise of the rights specified in pars. (d)(v) and (ix) and (e)(i) and (iii) of Art. 5. It is impossible to say that the Minister, by refusing to consent to the transfer of the lease to the Commission, impaired Mr. Koowarta's right to freedom of peaceful assemby and association, his right to work or to the free choice of employment, or his right to housing. A person must use his own rights in such a way that they do not interfere with those of another, and one who has a right to assemble peacefully and to associate with others, or a right to work or to free choice of employment, is not entitled to invade another's property for the purpose of giving effect to that right. It would be to depart altogether from the ordinary sense of the words to say that a refusal to consent to the transfer of a lease of land impairs the enjoyment or exercise of the right to freedom of peaceful assembly and association, or the right to work and to the free choice of employment, of a person who wishes to use the land for the purpose of assembling, or associating with others, or

working, there. A more serious question is whether the refusal to consent to the transfer of the lease impaired the exercise of Mr. Koowarta's right to "own" property. The consent sought was to the transfer of the lease to the Commission, not to Mr. Koowarta. If the Commission had acquired the lease, it had power, under s. 20 of the Aboriginal Land Fund Act 1974 (Cth), either to grant to an Aboriginal corporation an interest in land for the purpose of enabling the members of that corporation to occupy that land, or to grant to an Aboriginal land trust an interest in land for the purpose of enabling Aborigines to occupy that land. It is not alleged in the statement of claim that Mr. Koowarta was a member of an Aboriginal corporation or that it was intended that he should be granted an interest in land by an Aboriginal land trust. Since the attempt by the Commission to acquire the lease was made at the request of Mr. Koowarta, for the purpose of enabling the land to be used by or for himself and other members of the group, it can perhaps be inferred that the Commission would have taken some action under s. 20 which would have had the consequence that Mr. Koowarta would be enabled to used the land. However, it cannot be inferred that the Commission would have granted an interest to an Aboriginal land trust rather than to an Aboriginal corporation. It is not clear that a member of an Aboriginal corporation would have anything more than a licence to use the land. Although the word "own" in Art. 5(d)(v) should no doubt be given a wide meaning, it seems to be going too far to hold that the right to "own" property includes a right to mere possession under a licence to occupy. (at p184)

9. What I have said assumes that the "human right or fundamental freedom" with which we are concerned is that of Mr. Koowarta, rather than that of the Commission. The reference in s. 9 to "human" rights, and in Art. 5 to "the right of everyone", suggest that those provisions are concerned with the rights of natural persons. Indeed most of the rights mentioned in Art. 5 by their very nature could only be enjoyed by natural persons, but some, including the right to "own" property, could be enjoyed by a corporation. The word "person" appears in s. 9(1) only with reference to the doer of the unlawful act; in this respect s. 9 differs from s. 12, and from the legislation considered in Attorney-General v. Antigua Times (1976) AC 16, at pp 24-26 , where the word refers to the person whose right is impaired. The context provided by s. 9 and Art. 5 leads me to conclude that s. 9 is not intended to apply to the rights of artificial persons such as corporations. (at p184)

10. I doubt whether the facts alleged constitute a breach of s. 9 of the Act, but, since others may take a different view, I think it convenient to consider whether the section is valid.

"Person Aggrieved". (at p184)

11. The question that then arises is whether Mr. Koowarta was "aggrieved" by the act of the Minister that he considers to have been unlawful by reason of s. 9 or s. 12. The words "person aggrieved" have appeared in many statutes, English and Australian, and their meaning has been discussed in many cases. In the end of course the meaning of the words must depend on the context of the particular statute. It has often been said that the words connote a person with a legal grievance: see In re Sidebotham (1880) 14 ChD 458, at p 465 ; Buxton v. Minister of Housing and Local Government (1961) 1 QB 278, at p 285 . The cases under the Trade Marks Acts to which we were referred are consistent with that view; they suggest that a person is "aggrieved" by an act which operates in restraint of what would otherwise have been his legal rights: Powell v. Birmingham Vinegar Brewery Co. (1894) AC 8, at pp 10, 12 ; Attorney-General (N.S.W.) v. Brewery Employe's Union of N.S.W. [1908] HCA 94; (1908) 6 CLR 469, at pp 497, 519, 550 ; Continental Liqueurs Pty. Ltd. v. G. F. Heublein and Bro. Inc. [1960] HCA 37; (1960) 103 CLR 422, at p 427 . However, in Attorney-General (Gambia) v. N'Jie (1961) AC 617, at p 634 , Lord Denning, delivering the judgment of the Privy Council, said that the words are of wide import and

should not be subjected to a restrictive interpretation. He added (1961) AC 617, at p 634 : "They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

It may be assumed that Mr. Koowarta had a genuine grievance, because the refusal of consent prejudicially affected his interests. Indeed, assuming that the Commission would have permitted him to use the land, the refusal deprived him of the possibility of obtaining a legal right to go on to the land. It was submitted that only the person directly affected by the refusal, the Commission, could be "aggrieved" by the refusal. However, in determining the meaning of the expression "person aggrieved" in s. 24 of the Act it is necessary to have regard to the remedies which such a person may obtain under s. 25. These include damages in respect of loss suffered by the person aggrieved by the relevant act and loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act. If the refusal of consent proves to have been unlawful, Mr. Koowarta may be able to obtain damages of that kind. In all these circumstances it seems to me that he is a "person aggrieved" and entitled to maintain the proceedings. Section 51 (xxvi) of the Constitution. (at p185)

12. I then turn to the question whether ss. 9 and 12 of the Act are validly enacted, and consider first whether they are laws within s. 51(xxvi) of the Constitution. (at p185)

13. Section 51(xxvi) in its original form enabled the Parliament to make laws with respect to �

"The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws."

The words "other than the aboriginal race in any State" were deleted by constitutional amendment in 1967. It is now competent for the Parliament to make special laws with respect to the people of the Aboriginal race. (at p186)

14. It would be a mistake to suppose that s. 51(xxvi) was included in the Constitution only for the purpose of enabling the Parliament to make laws for the special protection of people of particular races. Quick and Garran, in their Annotated Constitution of the Australian Commonwealth (1901), correctly observed, at p. 623, that by "sub-sec. xxvi the Federal Parliament will have power to pass special and discriminating laws relating to 'the people of any race'." Such laws might validly discriminate against, as well as in favour of, the people of a particular race. As Professor Sawer has pointed out in an article, "The Australian Constitution and the Australian Aborigine", published in the Federal Law Review, vol. 2 (1966) 17, at p 20 - " (xxvi) was intended to enable the Commonwealth to pass the sort of laws which before 1900 had been passed by many States concerning 'the Indian, Afghan and Syrian hawkers; the Chinese miners, laundrymen, market gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia'. Such laws were designed 'to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came'." However, it is clear that under s. 51(xxvi), in its present form, the Parliament has power to make laws prohibiting discrimination against people of the Aboriginal race by reason of their race. (at p186)

15. However ss. 9 and 12 are not directed to the protection of people of the Aboriginal race. They

prohibit discrimination generally on the ground of race; that is, they protect the persons of any race from discriminatory action by reason of their race. On behalf of the Commonwealth it was submitted that the Act is a special law within par. (xxvi) because it selects as its subject the people of any race against whom discrimination on racial grounds is, or may be, practised. This argument cannot be accepted, for it gives insufficient weight to the words "for whom it is deemed necessary to make special laws". It is true that in some contexts the word "any" can be understood as having the effect of "all", but it would be self-contradictory to say that a law which applies to the people of all races is a special law. It is not possible to construe par. (xxvi) as if it read simply "The people of all races". In the context provided by par. (xxvi), the word "any" is used in the sense of "no matter which". The Parliament may deem it necessary to make special laws for the people of a particular race, no matter what the race. If the Parliament does deem that necessary, but not otherwise, it can make laws with respect to the people of that race. The opinion of Parliament that it is necessary to make a special law need not be evidenced by an express declaration to that effect; it may appear from the law itself. However, a law which applies equally to the people of all races is not a special law for the people of any one race. Sections 9 and 12 of the Act deal with discrimination against the people of all races. It is impossible to describe those sections as laws with respect to "the people of any race for whom it is deemed necessary to make special laws". (at p187)

16. Section 10(3) of the Act does specifically refer to certain laws which relate to Aboriginals or Torres Strait Islanders. That provision may well be a law of the kind described in par. (xxvi), if the definition of "Aboriginal" and "Torres Strait Islander" in s. 3(1) of the Act is not so wide as to include persons who are not of either race. I have already indicated that that is a question which does not now fall for decision and I express no views upon it. (at p187)

17. For these reasons I hold that the challenged sections are not valid laws of the kind described in s. 51(xxvi).

Section 51 (xxix) of the Constitution. (at p187)

18. It is then necessary to consider whether ss. 9 and 12 of the Act are laws with respect to external affairs and so within the power conferred on the Parliament by s. 51(xxix) of the Constitution. By s. 4, the Act extends to every external Territory, but we are not concerned with its validity as a law of a Territory. The challenged provisions, so far as we are concerned with them, operate entirely within Australia - indeed, entirely within one State. They deal with a matter which is purely domestic, in that they render unlawful an act done within Australia by one Australian to or in relation to another and taking effect only within Australia. The effect which, if valid, they have in the present case, viz. the invalidation of a refusal to consent to the transfer of a Crown lease, could not be achieved by the Commonwealth Parliament under any other paragraph of s. 51. It was submitted on behalf of the Commonwealth that ss. 9 and 12 are laws with respect to external affairs because they give effect to Australia's obligations under the Convention, which is an external affair within s. 51(xxix). In the alternative, a wider submission was advanced, namely that ss. 9 and 12 give effect to an obligation imposed on Australia by the rules of customary international law and by the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms, that failure to carry out that obligation could have affected Australia's relations with other countries, and that the obligation was an external affair within s. 51(xxix). (at p188)

19. Since the very inception of the Constitution it has been recognized that s. 51(xxix) - that "somewhat dark" power, as Professor Harrison Moore called it (see Law Quarterly Review, vol. 16(1900), at p. 39) - creates grave difficulties of interpretation. Quick and Garran in their Annotated

Constitution of the Australian Commonwealth were not wrong when they said (at p. 631) that it "may hereafter prove to be a great constitutional battle-ground". The expression "external affairs" is imprecise and indeed ambiguous. It might in one sense be understood as referring to matters or things geographically situated outside Australia. The meanings of the words "external" and "affairs", considered separately, are wide enough to support that interpretation. However, if the phrase is considered as a whole, its natural meaning is matters concerning other countries. When the word "affairs" is used in the phrase "foreign affairs" it has the sense of "public business, transactions or matters concerning men or nations collectively" (see Oxford English Dictionary), and the word "foreign" indicates that such business, transactions or matters take place in or with other countries, or concern other countries. In the first case in which the nature of the power was considered at length, R. v. Burgess; Ex parte Henry (1936) 55 CLR 608 , it was held by all members of the Court that the words of s. 51(xxix) are used in that sense. Latham C.J. said (1936) 55 CLR, at p 643 :

"The regulation of relations between Australia and other countries, including other countries within the Empire, is the substantial subject matter of external affairs."
He could see no distinction between "external affairs" and "foreign relations" (1936) 55 CLR, at p 643 . Starke J. said (1936) 55 CLR, at p 658 :
"But what else are external affairs of a State - or, to use the more common expression, the foreign affairs or foreign relations of a State - but matters which concern its relations and intercourse with other Powers or States and the consequent rights and obligations?"
Dixon J. said (1936) 55 CLR, at p 669 :
"I think it is evident that its purpose (i.e. the purpose of s. 51 (xxix)) was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external relations of the Commonwealth."
Evatt and McTiernan JJ. said (1936) 55 CLR, at p 684 :
"Therefore the real question is - what is comprehended by the expression 'external affairs'. It is an expression of wide import. It is frequently used to denote the whole series of relationships which may exist between States in times of peace or war. It may also include measures designed to promote friendly relations with all or any of the nations . . . It would seem that, in sec. 51 of the Constitution, the phrase 'external affairs' was adopted in preference to 'foreign affairs', so as to make it clear that the relationship between the Commonwealth and other parts of the British Empire, as well as the relationship between the Commonwealth and foreign countries, was to be comprehended." (at p189)

20. It has never been doubted that the words of s. 51(xxix) are wide enough to empower the Parliament, in some circumstances at least, to pass a law which carries into effect within Australia the provisions of an international agreement to which Australia is a party. Indeed, Professor Harrison Moore regarded the enactment of laws for the execution of treaties made by or otherwise affecting the Commonwealth as "perhaps the most obvious subject for the operation of the power": The Commonwealth of Australia, 2nd ed., (1910), p. 461. In Roche v. Kronheimer (1921) 29 CLR 329 , Higgins J. considered that a statute passed to provide machinery within Australia for enforcing certain provisions of the Treaty of Peace which affected the property, rights and interests of enemy aliens could be upheld under s. 51(xxix) as well as under s. 51(vi). In R. v. Burgess; Ex parte Henry, the Court upheld the validity under s. 51(xxix) of so much of a section of a Commonwealth statute as authorized the making of regulations for carrying out and giving effect to an international convention for the regulation of aerial navigation (the Paris Convention) to which Australia was a party. The majority of the Court however held that the regulations did not carry out and give effect to the convention, and were invalid. New regulations made to carry out and give effect to the Paris

Convention were upheld in R. v. Poole; Ex parte Henry (No. 2) [1939] HCA 19; (1939) 61 CLR 634 . In Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3[1965] HCA 3; ; (1965) 113 CLR 54 the Court held that certain regulations which gave effect to the Chicago Convention on International Civil Aviation were validly made - according to three members of the Court, under both s. 51(xxix) and the trade and commerce power, and, in the view of one justice, under s. 51(xxix) alone. In New South Wales v. The Commonwealth [1975] HCA 58; ; (1975) 135 CLR 337 , the Court, by a majority, upheld the validity of a law which provided that sovereignty in respect of the territorial sea should be vested in the Crown in right of the Commonwealth and unanimously held valid that part of the law which provided that the sovereign rights of Australia in respect of the continental shelf should be vested in and exercisable by the Crown in right of the Commonwealth. The majority of the Court held that that part of the law which related to the territorial sea was within the power conferred by s. 51(xxix) on the ground that it gave effect to the Convention on the Territorial Sea and the Contiguous Zone. However, three members of the Court, Barwick C.J., Mason and Jacobs JJ., relied on the further ground that the power given by s. 51(xxix) was not limited to authorizing laws with respect to Australia's relationships with foreign countries, but extended to any matter or thing situated or done outside Australia (1975) 135 CLR, at pp 360, 470-471, 497 . It is unnecessary to consider whether the words of par. (xxix) can have this dual operation, i.e. whether the phrase "external affairs" can be used to mean matters outside the Commonwealth as well as matters involving a relationship between Australia and other countries. (at p190)

21. However, it is clear that the external affairs power is not limited to the making of laws with respect to matters geographically external to Australia. Such an interpretation of the paragraph is quite unsupported by any judicial dictum and would be completely at variance with the decisions in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936) 55 CLR 608 ; R. v. Poole; Ex parte Henry (No. 2) [1939] HCA 19; (1939) 61 CLR 634 ; R. v. Sharkey [1949] HCA 46[1949] HCA 46; ; (1949) 79 CLR 121 ; and Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54 . There is nothing in the words by which the power is conferred to suggest that the power should be limited to laws dealing with matters and things occurring outside Australia, for it is a power to make laws with respect to the peace, order and good government of the Commonwealth and that suggests that conduct within Australia may be included within the scope of the power. Laws providing that diplomatic representatives of other countries should be recognized and given diplomatic privileges within Australia, or providing how fugitive offenders from another country should be dealt with in Australia, would clearly be within s. 51(xxix), although they dealt with things done or to be done only within Australia. In those examples, the law, although operating within Australia, operates in respect of persons by reason of their connexion with another country. But, even on the narrowest view of the power, laws which regulate conduct within Australia by Australians may be laws with respect to external affairs. An example of such a law is provided by R. v. Sharkey where it was held that laws making it an offence to publish within Australia words calculated to excite disaffection within Australia against the government of a dominion with which we enjoy friendly relations would be a valid exercise of the power conferred by s. 51(xxix) (1949) 79 CLR, at pp 136-137, 157, 163 . The three cases concerning aerial navigation provide a further example, because the conduct there regulated consisted of flying an aircraft in certain circumstances within the limits of Australia. In all the examples given the law, although operating within Australia, was one with respect to a subject-matter which involved a relationship with other countries. (at p191)

22. Two other matters were settled by the decisions to which I have referred. First, it is clear that s. 51(xxix) contains "a distinct and independent grant of power" (to use the words of Quick and

Garran, op. cit., p. 631); it is not merely ancillary to other powers possessed by the Parliament. Secondly, the power granted by par. (xxix), like all other powers given by s. 51, is subject to the Constitution. It is therefore clear that the power is subject to any restriction which the Constitution expressly imposes (e.g. by such sections as ss. 92 and 116): see R. v. Burgess; Ex parte Henry (1936) 55 CLR, at pp 642-643, 658, 687 ; Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) (1965) 113 CLR, at pp 85, 87, 118, 165 . In R. v. Burgess; Ex parte Henry (1936) 55 CLR, at p 658 , Starke J. said that the power "must be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which restrain generally the exercise of Federal powers", and in Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) (1965) 113 CLR, at p 85 , Barwick C.J. said that the power is "subject only to constitutional prohibitions express or implied". Although other members of the Court have not expressly agreed that the power is subject to implied limitations, it seems to me impossible to draw a distinction between constitutional limitations which are express and those which are implied; if the power is subject to the Constitution, it is subject to what must be implied, as well as to what is expressed. In the light of Melbourne Corporation v. the Commonwealth [1947] HCA 26; (1947) 74 CLR 31 , and the other cases which I discussed in Victoria v. The Commonwealth [1971] HCA 16; (1971) 122 CLR 353, at pp 416-424 , it should I think be held that a law made under s. 51(xxix) would not be valid if it discriminated against States or if it prevented a State from continuing to exist and function as such. It is unnecessary to discuss this matter further in the present case. The Act does not infringe any of the express prohibitions contained in the Constitution. Its provisions do not prevent a State from continuing to exist and function. However, in deciding whether the power given by par. (xxix) extends to enable the Parliament to enact the provisions of ss. 9 and 12 of the Act, it will be necessary, as will be seen, to have regard to the fact that the Constitution is a federal and not a unitary one. (at p192)

23. The crucial question in the case is whether under the power given by s. 51(xxix) the Parliament can enact laws for the execution of any treaty to which it is a party, whatever its subject-matter, and in particular for the execution of a treaty which deals with matters that are purely domestic and in themselves involve no relationship with other countries or their inhabitants. In the most important of the cases (R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936) 55 CLR 608 ; R. v. Poole; Ex parte Henry (No. 2) (1939) 61 CLR 634 ; Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54 ; and New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 CLR 337) in which it has been held that laws to give effect to treaties can validly be made under the external affairs power, the treaties in question had, in themselves, an international element; they affected the relations between Australia and other countries in some direct way. Thus a convention for the control of air navigation deals with a matter which in itself can be described as an external affair, because "(t)he regulation of air navigation may well be regarded as an entire subject no part of which could be considered as necessarily of no concern to other countries": R. v. Burgess; Ex parte Henry (1936) 55 CLR, at p 670 , per Dixon J., since "(n)ot only must all aircraft use the same air and the same aerodromes . . . but all must use the same communication and other aids which modern science has produced and all must obey the same rules if safety, regularity and efficiency are to be maintained in the conduct of inter-State and overseas air operations in Australia": Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) (1965) 113 CLR, at p 166 . A treaty which recognizes rights of external sovereignty in the territorial sea and the continental shelf also deals with matters clearly international in character; its subject-matter can in itself be described as an external affair. Similarly the Treaty of Peace whose provisions were applied within Australia by the law upheld in Roche v. Kronheimer [1921] HCA 25; (1921) 29 CLR 329 also referred to matters of an international character, since it enabled any allied power to deprive German subjects of their property for the satisfaction of obligations of other German subjects, or of Germany, to the

Allies or to subjects of the Allies (1921) 29 CLR, at p 339 . In no case has it been decided whether or not the Parliament has power to give effect to a treaty which deals with a matter that is entirely domestic, and affects only Australians within Australia, and their relations to each other, and does not involve any relationship between Australia or Australians and other countries or their citizens. The question which now falls for decision is therefore an open one. (at p193)

24. It should be made clear that no question arises as to the power of Australia to enter into the Convention. The Governor-General, exercising the prerogative power of the Crown, can make treaties on subjects which are not within the legislative power of the Commonwealth. However, the treaties when made are not self-executing; they do not give rights to or impose duties on members of the Australian community unless their provisions are given effect by statute. The power of the Parliament to carry treaties into effect is not necessarily as wide as the executive power to make them. This was made clear by the Judicial Committee in Attorney-General (Canada) v. Attorney-General (Ontario) (1937) AC 326, at p 348 , where their Lordships said: ". . . in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures." That case arose under the Canadian Constitution, but as their Lordships indicated the question is one that arises in all federal States. The question was discussed by Stephen J. in New South Wales v. The Commonwealth where his Honour said (1975) 135 CLR, at p 445 : "Divided legislative competence is a feature of federal government that has, from the inception of modern federal states, been a well recognized difficulty affecting the conduct of their external affairs." After mentioning that as a partial remedy recourse has in some instances been had to the use of special federal nation clauses so as to limit the obligations of such nations with respect to those special matters which fall within the legislative competence of a member State of their federations, Stephen J. continued as follows (1975) 135 CLR, at p 446 : "Whatever limitation the federal character of the Constitution imposes upon the Commonwealth's ability to give full effect in all respects to international obligations which it might undertake, this is no novel international phenomenon. It is no more than a well recognized outcome of the federal system of distribution of powers and in no way detracts from the full recognition of the Commonwealth as an international person in international law." His Honour of course dissented from the result in that case so far as the territorial sea was concerned, but that does not affect the authority of his remarks on this point. With all respect, I cannot agree with the suggestion of Murphy J. in the same case, at p. 503, that if the Parliament were not able to legislate to enable Australia to fulfil its international obligations, Australia would be "an international cripple unable to participate fully in the emerging world order". Their Lordships in Attorney-General (Canada) v. Attorney-General (Ontario) (1937) AC, at pp 353-354 pointed out that their decision in that case that legislation of the Dominion of Canada giving effect to certain conventions was ultra vires did not have the result that Canada was incompetent to legislate in performance of treaty obligations. They said (1937) AC, at p 354 : "In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned,

when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces."
Whether or not the external affairs power has the wide scope that is claimed for it by the Commonwealth in the present case, Australia is fully equipped in totality of legislative powers. Whether international obligations, so far as they concern matters with regard to which the Parliament has no legislative power except that claimed to be conferred by s. 51(xxix), can be effected only by legislation of the States is of course the question that arises in this case. But if that question is answered in the affirmative, the Commonwealth and the States together have plenary power. (at p195)

25. The question which arises in Australia is one which arises in all federal communities, but cases decided under other constitutions, which are materially different from our own, provide little assistance in answering it. The answer to the question, so far as Australia is concerned, depends entirely upon the proper construction of the Australian Constitution. (at p195)

26. The question with which we are now concerned was fully discussed in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936) 55 CLR 608 , but no final answer was given to it. Two members of the Court, Evatt and McTiernan JJ., were clearly of the opinion that the Parliament has power to make laws to give effect to any international agreement to which the Commonwealth is a party. After referring to Geofroy v. Riggs [1890] USSC 41; (1890) 133 US 258, at p267 (33 LawEd 642, at p 645) , where Field J. had said that "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country", their Honours continued (1936) 55 CLR, at pp 680-681 :
"But it is a consequence of the closer connection between the nations of the world (which has been partly brought about by the modern revolutions in communication) and of the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters, that it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement."
They further said (1936) 55 CLR, at p681 :
"In truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement."
Accordingly, they concluded (1936) 55 CLR, at p 687 :
"It would seem clear, therefore, that the legislative power of the Commonwealth over 'external affairs' certainly includes the power to execute within the Commonwealth treaties and conventions entered into with foreign powers."
Indeed, they went further, and said that Parliament may well be competent to legislate for the carrying out of recommendations, draft conventions or requests upon subject-matters of concern to Australia as a member of the family of nations (1936) 55 CLR, at p 687 . They did suggest, however, that if the entry into a convention was a mere device to procure for the Commonwealth an additional domestic jurisdiction the position might be different (1936) 55 CLR, at p 687 . Latham C.J. seems to have been of a similar opinion, although he expressed his views less categorically. He rejected the view that "the power to legislate with regard to external affairs is limited to matters which in se concern external relations or to matters which may properly be the subject matter of international agreement". He said (1936) 55 CLR, at p 640 :
"No criterion has been suggested which can result in designating certain matters as in se concerning external relations and excluding all other matters from such a class. It is very difficult to say that

any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement. It appears to me that no absolute rule can be laid down upon this subject."
He seems to have expressed a view as wide as that of Evatt and McTiernan JJ. when he said (1936) 55 CLR, at p 644 :
"The Commonwealth Parliament was given power to legislate to give effect to international obligations binding the Commonwealth or to protect national rights internationally obtained by the Commonwealth whenever legislation was necessary or deemed to be desirable for this purpose."
On the other hand, Dixon J. was of opinion that the power was subject to some limits. He said (1936) 55 CLR, at p 669 :
"If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs. The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example."
Starke J. expressed, although tentatively, a similar, but not identical, view, saying (1936) 55 CLR, at p 658 :
"The Commonwealth cannot do what the Constitution forbids. But otherwise the power is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States. It is impossible, I think, to define more accurately, at the present time, the precise limits of the power. It may be . . . that the laws will be within power only if the matter is 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement'." (at p197)

27. In Ffrost v. Stevenson [1937] HCA 41; (1937) 58 CLR 528, at p 599 , Evatt J. repeated the views which he had expressed in the joint judgment in R. v. Burgess; Ex parte Henry. He said: "It is obvious that, if Australia has power to give effect to any of the obligations bona fide entered into as an international person, she has power to give effect to them all." In the subsequent cases, only Murphy J. has expressed so wide a view: see New South Wales v. The Commonwealth (1975) 135 CLR, at pp 502-503 . Other judges who have discussed the matter have either rejected the theory that the Parliament has power to give effect within Australia to the provisions of any international agreement to which Australia is a party, whatever its subject-matter, or have cautiously left the matter open. In Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2), Barwick C.J. said (1965) 113 CLR, at p85 :
"I find no need in this case for any general discussion of the external affairs power . . . Suffice it now to say that in my opinion the Chicago Convention, having regard to its subject matter, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes upon the parties to it unquestionably is,

> or, at any rate, brings into existence, an external affair of Australia.
> In thus enumerating matters which in this case point to the Convention being or creating an external affair of Australia, I would not wish to be thought to say that all these features must in every case be present if a treaty or a convention is to attract the external affairs power, but I would wish to be understood as indicating that in my

> opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament."

In the same case Menzies J. said (1965) 113 CLR, at p 136 : "Under the Constitution, s. 51(xxix.) 'External affairs', the Commonwealth has power to make laws to carry out its international obligations under a convention with other nations concerning external affairs." Windeyer J. (1965) 113 CLR, at p 153 said in that case that he wished "to avoid entering upon the controversial question of whether the mere making of a treaty between the Commonwealth and some foreign country upon any subject can enlarge the constitutional powers of the Commonwealth Parliament." Mason J. also left the matter open in New South Wales v. The Commonwealth when he said (1975) 135 CLR, at p470 :
"There is abundant authority for the proposition that the subject matter extends to Australia's relationships with other countries and in particular to carrying into effect treaties and conventions entered into with other countries, provided at any rate that they are truly international in character." (at p198)

28. There are strong arguments which support the conclusion that s. 51(xxix) does not empower the Parliament to give effect in Australia to every international agreement, whatever its character, to which Australia is a party. If the Parliament is empowered to make laws to carry into effect within Australia any treaty which the Governor-General may make, the result will be that the executive can, by its own act, determine the scope of Commonwealth power. Moreover, the power might be attracted not only by a formal agreement, such as a treaty, but also by an informal agreement: see R. v. Burgess; Ex parte Henry (1936) 55 CLR, at p 687 . If the view of Evatt and McTiernan JJ. is correct, the executive could, by making an agreement, formal or informal, with another country, arrogate to the Parliament power to make laws on any subject whatsoever. It could, for example, by making an appropriate treaty, obtain for the Parliament powers to control education, to regulate the use of land, to fix the conditions of trading and employment, to censor the press, or to determine the basis of criminal responsibility - it is impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became a party to an appropriate international agreement. In other words, if s. 51(xxix) empowers the Parliament to legislate to give effect to every international agreement which the executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed. (at p198)

29. Of course it has been established, since the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 , that it is an error to read s. 107 of the Constitution, which continues the powers of the Parliaments of the States, "as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated" (1920) 28 CLR, at p 154 . However, in determining the meaning and scope of a power conferred by s. 51 it is necessary to have regard to the federal nature of the Constitution. "Accordingly, no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament": Bank of N.S.W. v. The Commonwealth (1948) 76 CLR 1, at pp 184-185 , per Latham C.J. This principle has been applied by the Court in cases involving the defence power, which resembles the external affairs power in the vagueness with

which the power is described, and in its potentially expansive nature. In R. v. Foster [1949] HCA 16; (1949) 79 CLR 43 , in the joint judgment of Latham C.J. and Rich, Dixon, McTiernan, Williams and Webb JJ. the following appears (1949) 79 CLR, at p 83 : "If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject. Nearly all the limitations imposed upon Commonwealth power by the carefully framed Constitution would disappear and a unitary system of government, under which general powers of law-making would belong to the Commonwealth Parliament, would be brought into existence notwithstanding the deliberate acceptance by the people of a Federal system of government upon the basis of the division of powers set forth in the Constitution. We proceed to state reasons why the Court should not ascribe an operation so far-reaching and, indeed, revolutionary, to the defence power." Similarly in Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, at p 203 , Dixon J. said: "The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up." There is much less reason to allow the external affairs power to obscure the federal nature of the Constitution than there is in the case of the defence power. And, as Kitto J. said in Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) (1965) 113 CLR, at p 115 : "The Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications." (at p200)

30. No effective safeguard against the destruction of the federal character of the Constitution would be provided by accepting the suggestion of Evatt and McTiernan JJ. in R. v. Burgess; Ex parte Henry (1936) 55 CLR, at p 687 , that the power given by s. 51 (xxix) might not be attracted if "the entry into the convention was merely a device to procure for the Commonwealth an additional domestic jurisdiction". It would be unlikely that an international agreement would be entered into as a mere device. It would not be enough to establish bad faith to show that the executive, when it made a treaty, was fully aware that the Parliament had no legislative power to deal with the subject-matter of the treaty except that which would arise under s. 51 (xxix) once the treaty was concluded. Suppose, for example, that the executive genuinely believed that working hours should be reduced (or increased), that Australia ought to joint in an international agreement to that effect, and that it would be beneficial if, by entering into an agreement, the Parliament acquired a legislative competence it otherwise lacked. The entry into the agreement in those circumstances could hardly be described as a mere device, or as done in bad faith. The doctrine of bona fides would at best be a frail shield, and available in rare cases. (at p200)

31. If the "extreme view" is adopted, and the broadest possible interpretation is given to the words of s. 51 (xxix), that paragraph would mean that the power of the Commonwealth Parliament could be expanded by simple executive action, and expanded in such a way as to render meaningless that "limitation and division of sovereign legislative authority" which is "of the essence of federalism": Spratt v. Hermes [1965] HCA 66; (1965) 114 CLR 226, at p 274 . It is apparent that a narrower interpretation of par. (xxix) would at once be more consistent with the federal principle upon which the Constitution is based, and more calculated to carry out the true object and purpose of the power

which, after all, is expressed to relate, not to internal or domestic affairs, but to external affairs. I conclude, therefore, that the view of Evatt and McTiernan JJ. must be rejected, and that a law which gives effect within Australia to an international agreement will only be a valid law under s. 51 (xxix) if the agreement is with respect to a matter which itself can be described as an external affair. I consider that a law which carries into effect the provisions of an international agreement will only have the character of a law with respect to external affairs if the provisions to which it gives effect answer that description. An analogy suggested by the learned Solicitor-General for Victoria is a useful one; just as an interstate contract does not necessarily give rise to interstate trade or commerce, so an agreement made between a number of nations does not necessarily contain provisions which are international in character. It seems to me immaterial that the agreement resulted from much international discussion and negotiation, that many nations are parties to it, and that there is international interest in it. Since the law whose validity is to be tested is one that gives legal effect within Australia to the provisions of the agreement, the test must be whether the provisions given effect have themselves the character of an external affair, for some reason other than that the executive has entered into an undertaking with some other country with regard to them. The words used by Starke J. in R. v. Burgess; Ex parte Henry (1936) 55 CLR, at p 658 are not free from ambiguity. If by "international significance" he meant simply "international concern" there would be little practical difference between his approach and that of Evatt and McTiernan JJ., since under modern conditions there are few matters which are not regarded as fit subjects for international agreement. It is, I think, more likely that Starke J. was speaking of the character of the subject-matter of the agreement, and that he meant to refer to the international character of the matter to which the agreement referred. It is difficult to suggest any more precise test than that indicated by Dixon J. in the same case (1936) 55 CLR, at p 669 - was the treaty made in reference to some matter international in character? The addition by Dixon J. of the adverb "indisputably" was, I think, intended to do no more than emphasize that a treaty on such a subject would, beyond doubt, be within the power. It is clear, however, that Dixon J. did not consider that an agreement was international in character merely because it was made between the executive Government of Australia and some other country or countries. (at p201)

32. What I have said is not intended to suggest that there is a limited class of matters which, by their nature, constitute external affairs, and that only such matters are subject to the power conferred by s. 51 (xxix). Any subject-matter may constitute an external afair, provided that the manner in which it is treated in some way involves a relationship with other countries or with persons or things outside Australia. A law which regulates transactions between Australia and other countries, or between residents of Australia and residents of other countries, would be a law with respect to external affairs, whatever its subject-matter. However, for the reasons I have given I consider that a matter does not become an external affair simply because Australia has entered into an agreement with other nations with regard to it. (at p202)

33. In the course of argument it was submitted that if s. 51 (xxix) was understood to have the effect which I have suggested, the Commonwealth Parliament would lack the power to give effect to treaties which, for example, were vital to the preservation of peace or the maintenance of trade. However, it is hardly necessary to point out that there are other powers conferred by s. 51 which would support legislation carrying international agreements into effect within Australia. The widest of such powers are probably those conferred by pars. (i) and (vi) of s. 51, but there are many others. In the present case no power conferred by any other paragraph of s. 51 would support the Act, although, as I have said, s. 51(xxvi) would have supported a special law for the prevention of discrimination against people of the Aboriginal race. In the circumstances, it is unnecessary to consider the manner in which the power given by par. (xxix) interacts with those given by other

paragraphs of s. 51. (at p202)

34. In support of the argument that the Act is within the power conferred by s. 51(xxix), the learned Solicitor-General for the Commonwealth naturally placed considerable reliance on the circumstance that the protection of human rights against racial discrimination had, by the time that the Act was passed, become a topic which was the subject of much international debate. There is no doubt that many countries of the world have, or profess, a deep concern that human rights and fundamental freedoms should be observed, and that racial discrimination should be eliminated, throughout the world. There is no need for me to refer to the international conventions and declarations in which that concern has been expressed. The fact that many nations are concerned that other nations should eliminate racial discrimination within their own boundaries does not mean that the domestic or internal affairs of any one country thereby become converted into international affairs. There may be legitimate international concern as to the domestic affairs of a nation. An Australian law which is designed to forbid racial discrimination by Australians against Australians within the territory of Australia does not become international in character, or a law with respect to external affairs, simply because other nations are interested in Australia's policies and practices with regard to racial discrimination. It follows that I respectfully disagree with the suggestion by Murphy J. in Dowal v. Murray (1978) 143 CLR 410, at pp 429-430 that the power given by s. 51(xxix) enables the Parliament to legislate with respect to any subject of international concern. The examples given by Murphy J. show that the acceptance of such a view would render the detailed specification of Commonwealth powers in s. 51 almost completely irrelevant. (at p203)

35. Similarly, the argument for the Commonwealth is not advanced by pointing to the fact that, under Art. 9 of the Convention, Australia was obliged to report to the Committee set up by the Convention on the measures taken to give effect to the Convention. The provisions of the Act with which we are concerned (ss. 9 and 12) say nothing as to that obligation, and the facts that Australia is bound to make a report to an international body on domestic affairs, and that its relations with other countries may be affected by the manner in which it conducts those domestic affairs, do not cause a domestic affair to become an external affair. (at p203)

36. For these reasons ss. 9 and 12 of the Act were not within the legislative power conferred by s. 51(xxix) and are invalid. As I take this view, I need not consider whether those sections of the Act carried out and gave effect to the provisions of the Convention. Section 9 does appear faithfully to pursue the purposes of the Convention. Section 12, as I have already indicated, goes further than s. 9, but may nevertheless be regarded as an appropriate means adopted for the enforcement of the Convention, and thus as satisfying the test suggested by Starke J. in R. v. Burgess; Ex parte Henry (1936) 55 CLR, at pp 659-660 . On this aspect of the matter, Starke J. took a broader view than the other justices in that case (see per Menzies J. in Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) (1965) 113 CLR, at p 141) but it is unnecessary for me to choose between the competing views for the purposes of the present case. (at p203)

37. 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. The King (1948) 77 CLR 449, at pp 462, 477 and more recently in England in Trendtex Trading Corporation v. Central Bank of Nigeria (1977) QB

529, at pp 553-554 , 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. The Commonwealth (1945) 70 CLR 60, at pp 68-69, 74, 75-76, 77, 79, 80-81 . The provisions of s. 286 of the Land Act 1962 (Q.) 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. (at p204)

38. 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 Art. 1(3), Art. 13, Art. 55(c), Art. 56, and Art. 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", American Journal of International Law, vol. 66 (1972), at p. 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), p. 248) and Judge de Arechaga (in Recueil des Cours, vol. 159 (1978), pp. 174-177) 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 , the Namibia (S.W. Africa) (Advisory Opinion) (1971) ICJR 16 , and the 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 (1966) ICJR, at p 289) and that "(r)acial 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 (1966) ICJR, at p 464). In the second case the International Court said 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" (1971) ICJR, at p 57 . In the Barcelona Traction Case (1970) ICJR, at p 32 , it was said 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 basic 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), pp. 596-597, 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 Covention 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." (at p205)

39. 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" (Recueil des Cours, vol. 124 (1968), at p. 436, and see Lauterpacht, International Law and Human Rights (1950), pp. 177-178) or if there are "gross violations or consistent patterns of violations" (Recueil des Cours, vol. 124 (1968), at p. 436, and see Recueil des Cours, vol. 159 (1978), at p. 175, and Sohn, "The Human Rights Law of the Charter", Texas International Law Journal, vol. 12 (1977), p. 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. In any case, it follows from what I have already said that the external affairs power does not enable the Parliament to enact a law whose purpose is to give effect within Australia to an international obligation, unless the subject-matter of that obligation is an external affair. If Australia has an obligation under international law it can only be given effect within Australia in the manner for which the Constitution provides, i.e., if the subject-matter is not within Commonwealth power, by a law of a State.

Conclusions. (at p206)

40. The question for decision in this case is not whether the Minister was right or wrong in refusing his consent to the transfer of the Crown lease; it is whether, under the Constitution as it stands, the power of the Commonwealth Parliament extends to the enactment of ss. 9 and 12 of the Act. That depends on whether those sections can be described as a law with respect to the people of any race for whom it is deemed necessary to make special laws, or as a law with respect to external affairs. They do not answer the former description, because they are not a special law with respect to the people of a particular race, but apply generally to people of all races. They do not answer the latter description, because their operation is entirely internal, within Australia, and involves no relationship with any person, thing or country outside Australia. Since, at the present time, racial equality is generally accepted as a desirable aim, this case tends to prove the prediction made by Professor Sawer (in International Law in Australia, ed. O'Connell (1965), p. 45) that wide claims for the scope of the power conferred by s. 51 (xxix) are most likely to be made when the nature of the case is such as to make a broad interpretation probable. However, I have endeavoured to explain the reasons for the interpretation which in my opinion the Constitution requires. To understand the

power as becoming available merely because Australia enters into an international agreement, or merely because a subject-matter excites international concern, would be to ignore the federal nature of the Constitution. It would be to allow the Commonwealth, under a power expressed to be with respect to external affairs, to enact a bill of rights entirely domestic in its effect - a bill of rights to which State legislation and administrative actions would be subject, but which would of course not necessarily have the same effect on Commonwealth legislation or administrative action. My rejection of so wide an interpretation does not mean either that Australia is unable to fulfil her international obligations - that can be done by co-operative action between the Commonwealth and the States - or that the Parliament is unable, if such co-operation is not forthcoming, to protect the people of the Aboriginal race from discrimination - that can be done under the power conferred by s. 51 (xxvi). (at p207)

41. In Koowarta v. Bjelke-Petersen, I would allow the demurrer. (at p207)

42. In Queensland v. The Commonwealth, I would declare that ss. 9 and 12 of the Racial Discrimination Act 1975 (Cth), as amended, in so far as those sections apply within the State of Queensland, are outside the powers of the Parliament of the Commonwealth and are invalid. (at p207)

STEPHEN J. The Constitution confers upon the Parliament of the Commonwealth power to make laws for the peace, order and good government of the Commonwealth with respect to "The people of any race for whom it is deemed necessary to make special laws" (s. 51 (xxvi) and with respect to "External affairs", s. 51 (xxix)). These actions raise for decision the content of these two grants of legislative power. They do so by reference to challenges to the validity of Commonwealth legislation, the Racial Discrimination Act 1975. (at p207)

2. In Koowarta v. Bjelke-Petersen the plaintiff alleges breaches of the Racial Discrimination Act, claiming to be a person aggrieved under that Act and accordingly entitled to seek in his action the several remedies claimed in his statement of claim. The defendants by their defence and demurrer challenge the validity of the Act as well as denying that the plaintiff is a person aggrieved or has any locus standi to sue. In Queensland v. The Commonwealth the plaintiff State challenges the validity of many provisions of the Racial Discrimination Act and seeks a declaration of the invalidity of the Act as a whole or of certain of its provisions. (at p208)

3. Since I have concluded that in Mr. Koowarta's action he does have standing to sue, I turn immediately to the constitutional questions, deferring for the moment my reasons for according him locus standi. An appreciation of the constitutional questions is aided by some indication of the circumstances in which Mr. Koowarta's action arises. It is common ground that in 1975 the Aboriginal Land Fund Commission, a body corporate under Commonwealth legislation, contracted to buy a Crown leasehold pastoral property in northern Queensland; that it was a term of the contract and a consequence of the Land Act 1962 (Q.) that transfer of the Crown lease would require the permission of the State's Minister for Lands; that consent to that transfer was sought from but was refused by the Minister; and that a reason for his refusal was that the settled policy of the Queensland Government was to view unfavourably proposals to acquire "large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation". (at p208)

4. The Minister's refusal to consent to the transfer of this Crown leasehold led to Mr. Koowarta's action, in which he alleges that that refusal constituted a breach of provisions of the Racial

Discrimination Act. Although the proposed transferee was the Commission, not Mr. Koowarta, it seems that it was he who was active in procuring the Commission to arrange for its purchase and that he did so so that, together with other Aborigines, he might have the use of the property for pastoral purposes once it was acquired by the Commission. This aspect will require closer examination when Mr. Koowarta's standing to sue comes to be examined. (at p208)

5. The Parliament, in enacting the Racial Discrimination Act, prefaced the terms of the enactment itself by the following recitals:
"Whereas a Convention entitled the 'International Convention on the Elimination of all Forms of Racial Discrimination' (being the Convention a copy of the English text of which is set out in the Schedule) was opened

> for signature on 21 December 1965:
> And whereas the Convention entered into force on 2 January 1969:
> And whereas it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention:".

It is, then, primarily, upon the grants of legislative power expressly referred to in the third recital, those contained in pars. (xxvi), (xxvii) and (xxix) of s. 51 of the Constitution, that the Act relies. However those provisions of the Act which are supported by s. 51 (xxvii), the immigration and emigration power, are not presently in issue; it is exclusively with pars. (xxvi) and (xxix) of s. 51 that this judgment will deal. (at p209)

6. I turn first to par. (xxvi) of s. 51. The terms in which this grant of power is expressed are unusual. The content of the laws which may be made under it are left very much at large; they may be benevolent or repressive; they may be directed to any aspect of human activity; so long as they are with respect to the people of a race such as is described in par. (xxvi) they will be within power. Most grants of power in s. 51 are defined in terms either of some class of activity, as with "trade and commerce with other countries" and "astronomical and meteorological observations", some common governmental power or function, as with "taxation", and "census and statistics", or some class of physical object, such as "lighthouses, lightships, beacons and buoys". In all such cases the subject-matter of the grant of power is more or less apparent and identifiable on its face. However, a grant of legislative power defined only by reference to a particular class of persons for whom laws may be made under it is inherently less precise as to its permitted subject-matter; and when, as in par. (xxvi), the class is no more specific than "the people of any race", the class depending for further identification upon the legislature deeming it to be necessary to make special laws for its members, the content of the power is determined by one sole criterion, that laws which may be made under it must be special laws deemed necessary for the people of any race. (at p209)

7. Because the reference to "The people of any race" is qualified by the requirement that they should be such that it is deemed necessary to make special laws for them, they must possess some quality which calls for laws special to themselves. This requirement is more than a mere qualification of the power; it also predicates a character which laws made under par. (xxvi) must possess: they must be special laws, in the sense of having some special connexion with people of any race. It is true that the grant of power is not in terms confined to the making of special laws, but from the description

of the laws which may be made under it - laws for those people of any race deemed in need of special laws, it follows that it is special laws and only special laws which fall within par. (xxvi). It cannot be that the grant becomes plenary and unrestricted once a need for special laws is deemed to exist; that need will not open the door to the enactment of other than special laws. (at p210)

8. Although it is people of "any" race that are referred to, I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises; without this particular necessity as the occasion for the law, it will not be a special law such as s. 51 (xxvi) speaks of. No doubt it may happen that two or more races will share particular problems within the Australian community and that this will make necessary the enactment of one law applying equally to those several races; such a law will not necessarily forfeit the character of a law under par. (xxvi) because it legislates for several races. A law will, however, not possess that character if it legislates for all peoples of the Commonwealth, regardless of race, who happen to be confronted with or to present particular problems deemed to call for legislative action. Nor will a law attain that character merely because the problem with which it deals is one of discrimination on the ground of race; it will not be enough that the law is one about race, the coincidence that its subject-matter happens to match one of the words in par. (xxvi) will not of itself bring it within power. (at p210)

9. To be within power under par. (xxvi) a law must be special in the sense that it is the particular race, or races, for whom it legislates that gives rise to the occasion for its enactment. The Racial Discrimination Act is not such a law. True, it legislates about race and proscribes discrimination upon the basis of race. But it is a perfectly general law, addressed to all persons regardless of their race and requiring that the members of all races shall be free from discrimination on account of race. It protects no particular race or races. As its recitals attest, its purpose is to give effect to the International Convention, a copy of which is scheduled to the Act. That Convention, in its opening recitals, stresses the promotion of universal respect for human rights and fundamental freedoms for all without distinction; universality of application lies very much at its heart. The Act takes from the Convention this quality, thereby denying to it the character of a special law to which par. (xxvi) refers. (at p210)

10. The fact that in current Australian conditions the dominant Anglo-Saxon and Celtic races (if indeed to employ such description conveys any sufficiently certain meaning) are in fact very much less likely to require protection against racial discrimination than are other races does not, in my view, suffice to make the Act one special to all those other races. Were it possible to say that in this community only Aborigines faced the possibility of racial discrimination, an anti-discrimination law expressed in general terms might perhaps be seen to be no less a special law within par. (xxvi) than would a law expressly confined to the prohibition of discrimination against Aborigines. The necessary special quality might perhaps be sufficiently attracted by facts dehors the legislation. Be that as it may, such an argument does not seem to me to be open in the present case. (at p211)

11. It is for these reasons that I regard the Racial Discrimination Act as beyond the subject-matter of the grant of power in s. 51(xxvi). (at p211)

12. The second relevant grant of power, the "External affairs" power conferred by s. 51(xxix), on its face suggests no particular obscurity of meaning. Because the composite phrase "External affairs" occurs as a grant of legislative power in a constitution for a nation, the meaning to be given to "affairs" must be one apt to apply to a national government. One of the meanings of "affairs"

supplied by the Oxford English Dictionary, "public business, transactions or matters concerning men or nations collectively", conveys that sense. The word "External" must in this constitutional context qualify "affairs" so as to restrict its meaning to such of the public business of the national government as relates to other nations or other things or circumstances outside Australia. It is legislation for the peace, order and good government of the Commonwealth with respect to such a subject-matter that the words of par. (xxix) appear to envisage. (at p211)

13. This is just such a grant of legislative power as might be anticipated in the constitution of a modern nation state. Even a nation occupying an entire island continent cannot be "an Island entire of it self", it will perforce have relations with foreign nations overseas, its foreign affairs; because newly formed from self-governing colonies it will also have relations with the old imperial power and with that power's other colonies, relations which, while scarcely answering the description of "foreign affairs", will certainly be "external affairs", a phrase which, because it also extends to Australia's truly foreign affairs, conveniently subsumes both categories of the nation's overseas affairs. Accordingly it is natural enough to find such a power, expressed in these terms, among the enumerated powers in s. 51. Indeed it would be anomalous had such a legislative power been omitted from s. 51 when at the same time there existed a quite distinct treaty-making power. That latter power was for some years after Federation regarded as possessed by the Imperial Crown but has subsequently been treated as exercisable by the Governor-General pursuant to s. 61 of the Constitution: see generally Zines, Commentaries on the Australian Constitution (1977), ch. 1. Its exercise generally speaking leaves unaffected the state of Australian municipal law. Early drafts of covering cl. 5 of the Constitution Act, apparently taking Art. VI of the United States Constitution as their model, contemplated that treaties made by the Commonwealth should become law of the land (see Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901), pp. 345-346) but the Constitution as finally adopted attempted no such departure from settled common law doctrine; the exercise of treaty-making power was not to create municipal law. For that legislative action would be required. The existence of par. (xxix) avoids the anomaly which would otherwise exist had the presence of this bare treaty-making power been left without any matching legislative power to enact municipal law giving domestic effect to treaty rights and obligations. (at p212)

14. What I have described as the natural contextual meaning of par. (xxix) includes, although it extends rather further than, what may be called the highest common factor to be deduced from the judgments in this Court concerning the meaning of the paragraph: namely, a power to implement by legislation within Australia such treaties, on matters international in character and hence legitimately the subject of agreement between nations, as Australia may become party to. This minimal meaning, upon which all would agree, may be deduced from the following passages from four of the leading authorities in this Court: R. v. Burgess; Ex parte Henry [1936] HCA 52 [1936] HCA 52; ; (1936) 55 CLR 608, at pp 644, 658, 669, 687 ; Ffrost v. Stevenson [1937] HCA 41; (1937) 58 CLR 528, at pp 596-597 ; Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54, at pp 85, 126, 136, 152 ; New South Wales v. The Commonwealth [1975] HCA 58[1975] HCA 58; ; (1975) 135 CLR 337, at pp 360, 377-378, 390, 450, 470, 503 . (at p212)

15. A number of these judgments adopt a considerably wider view of par. (xxix). With much of this debatable additional width of operation the instant cases have no concern. The real issue in these cases is confined to the question whether this power to implement treaty obligations is subject to any and if so what overriding qualifications derived from the federal nature of our Constitution. It is such qualifications which, in my statement of a highest common factor, have led to the introduction

of the phrases "matters international in character" and "legitimately the subject of agreement between nations". (at p213)

16. The need for such qualifications is said to arise in this way. Whereas, read in isolation, par. (xxix) would seem to authorize legislation to give effect municipally to each and every international obligation which Australia may incur, yet Australia is a federation possessing a constitution which assigns carefully limited legislative power to the federal legislature, leaving the undefined residue of legislative competence to the States. The power of the federal Executive to conclude treaties upon any subject-matter it sees fit is undoubted. If it can thereby at will create such "external affairs" as it wishes and if par. (xxix) then confers power upon the federal legislature to legislate with respect to whatever external affair has thus been brought into being, this may place in jeopardy the federal character of our polity, the residuary legislative competence of the States being under threat of erosion and final extinction as a result of federal exercise of the power which par. (xxix) confers. (at p213)

17. The authorities have made quite clear two things about the limits of the "External affairs" power. First, the few express restrictions upon legislative power which appear in the Constitution restrict the ambit of the power conferred by par. (xxix); like all other paragraphs of s. 51, par. (xxix) is expressed to be "subject to this Constitution" and its grant of power must be read as subject to the restraints upon legislative power imposed, for example, by ss. 92, 99, 114, 116 and 117 of the Constitution. Secondly, the grant of power conferred by par. (xxix) is plenary in the sense that it is not to be restricted by reference to the limited legislative competence conferred by the other paragraphs of s. 51. What however remains unclear is the extent to which the federal nature of the Constitution requires that limits be imposed upon the broad power to implement international obligations seemingly conferred by par. (xxix), thus ensuring that exercise of that power will not destroy the federal character of the polity. (at p213)

18. Suggestions that there are some such limits to the power recur in the cases, although their precise nature is not very clearly defined. In Burgess (1936) 55 CLR, at p 658 Starke J. suggests that the external affair may have to be "of sufficient international significance to make it a legitimate subject for international co-operation and agreement", citing United States writings for that proposition. Dixon J. (1936) 55 CLR, at p 669 would apparently confine the power to the implementing of treaties which relate to "some matter indisputably international in character". On the other hand, in that case Latham C.J. (1936) 55 CLR, at p 644 , and Evatt and McTiernan JJ. (1936) 55 CLR, at p 687 recognized no such qualification. In Ffrost v. Stevenson (1937) 58 CLR 528 Evatt J. was emphatic that par. (xxix) conferred "a great and independent power" (1937) 58 CLR, at p 601 , extending to any obligations which Australia might have "bona fide entered into as an international person" (1937) 58 CLR, at p 599 . However in the Airlines Case (1965) 113 CLR, at p 85 Barwick C.J. said that "the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament" (but cf. Windeyer J. (1965) 113 CLR, at p 152). Again in New South Wales v. The Commonwealth [1975] HCA 58[1975] HCA 58; ; (1975) 135 CLR 337 Barwick C.J. may be thought to have adhered to his earlier qualification of the power (1975) 135 CLR, at p 360 and Gibbs J. (1975) 135 CLR, at p 390 repeated the phrase of Dixon J. in Burgess, confining the power to matters "indisputably international in character", a qualification also noticed by Mason J. (1975) 135 CLR, at p 470 , although in slightly altered language. On the other hand, McTiernan J. (1975) 135 CLR, at pp 377-378 and Murphy J. (1975) 135 CLR, at p 503 appear to favour an unqualified view of the power. (at p214)

19. 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 polity is widespread. Oliver, speaking generally of federations in "The Enforcement of Treaties by a Federal State", Recueil des Cours, vol. 141 (1974), p. 333, expresses it in this way, at p. 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", University of Western Australia Law Review, vol. 13 (1977) 153, at pp. 177, 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. (at p215)

20. Features of the 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(xxix) be given a wide interpretation, domestic enforcement of treaty obligations may rest at least in part with the State legislatures. Again, although the federal executive will, consistently with principles of responsible 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(xxix), the federal executive, although armed with the treaty-making power, cannot always ensure implementation of treaty obligations. (at p215)

21. In Foreign Affairs and the Constitution (1972), Louis Henkin describes, in terms which in many respects recall arguments familiar in Australian constitutional debate, the long American history of constitutional conflict regarding the treaty power and its ultimate resolution. He says at pp. 140-141 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 a 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 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. (at p215)

22. 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 prescribed standards of conduct for both

governments and individuals having wide application domestically in areas of primarily regional concern, the very areas which, in federation, 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. (at p216)

23. 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. The 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. (at p216)

24. 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, circumstance and parties will be relevant whenever a purported exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny. (at p217)

25. 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 his article, at pp. 164-166, 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), pp. 445-446. 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. (at p217)

26. It is there 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. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, at p 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] HCA 20; (1941) 65 CLR 255, at p 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. (at p217)

27. 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" (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. The Commonwealth [1945] HCA 35 [1945] HCA 35; ; (1945) 71 CLR 161, at p 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, p. 444; Wynes, Legislative, Executive and Judicial Powers in Australia, 5th ed. (1976), pp. 301-302. (at p218)

28. That prohibition of racial discrimination, the subject-matter of the Racial Discrimination Act, now falls squarely within the 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 powers. What has occurred is, rather, a growth in the content of "External affairs". This growth reflects the new global concern for human rights and the international acknowledgement of the need for universally recognized norms of conduct, particularly in relation to the suppression of racial discrimination. (at p218)

29. 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. (at p219)

30. 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, Recueil des Cours, vol. 178 (1978), at p. 177. Sir Humphrey Waldock, also a judge of the International Court of Justice, had earlier noted this development in Recueil des Cours, vol. 106 (1962), p. 200. To the same effect are Lauterpacht's comments in International Law and Human Rights (1950), pp. 177- 178 and those in Oppenheim's International Law, 8th ed. (1958), vol. 1, p. 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", American Journal of Internal Law, vol. 66 (1972), 337, at pp. 338-341. He concludes, at p. 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) ICJR, at p 51 . See also the statement of Judge Tanaka in his dissenting opinion in the South West Africa Case (1966) ICJR 4, at p 284 , the majority opinion of the International Court in the Barcelona Traction Case (1970) ICJR 3, at p 33 , and McDougal, Laswell and Chen, Human Rights and World Public Order (1980), pp. 599-560. (at p219)

31. 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 1958, 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. (at p219)

32. 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 the International and Comparative Law Quarterly, vol. 15 (1966), 996, at pp. 997-1000. The learned author's conclusion, at p. 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, dominated 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 organisations since 1945. (at p220)

33. 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 eighty nations of the world. (at p220)

34. 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(xxix). (at p220)

35. 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 (xxix). 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. The Commonwealth (1975) 135 CLR, at p 450 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 (1949) 79 CLR 121 which provide instances of such non-consensual matters forming a part of Australia's external affairs. (at p221)

36. In the present cases 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 (xxix). 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. (at p221)

37. There remains the question of the standing of Mr. Koowarta to bring his action. He will only have standing if he is a "person aggrieved" in terms of s. 24(1). Mr. Koowarta contends that the refusal of the Queensland Minister for Lands to approve of the transfer of the Crown leasehold, which he and other members of his group of Aboriginal people proposed to use for grazing and other purposes, makes him a person aggrieved. That refusal was, he says, such an act as s. 24(1) of the Act refers to, namely "an act that he (the person aggrieved) considers to have been unlawful by reason of a provision of Part II" of the Act. The effect of one provision of Pt II of the Act, s. 12(1)(d), is to make it unlawful for a person "to refuse to permit a second person to occupy any land . . . by reason of the race . . . of that second person . . . ". While it is not certain that when he refused approval of the transfer the Minister knew of the existence of Mr. Koowarta, he clearly knew that the property was to be occupied by Aborigines. That was the very ground for his refusal. In my view Mr. Koowarta's position as one of the Aborigines whose occupation of the land was prevented by the Minister's decision sufficiently establishes his standing to sue: he was a "second person" in the terms of s. 12(1)(d) of the Act. It is not, I think, to the point that, as a matter of form, what the Minister withheld was approval of a transfer to the Aboriginal Land Fund Commission. The Minister's reasons for refusal disclose that he regarded approval as involving use of the property by Aborigines and refusal of approval as preventing that use. Sections 20 and 21 of the Aboriginal Land Fund Act 1974 confined the power of the Commission to acquire interests in land to cases in which, having acquired such an interest, it in turn granted an interest in it either to an Aboriginal corporation or to an Aboriginal land trust, which was in turn obliged to permit Aborigines to occupy the land (see now ss. 27, 28, 29 and 51 of the Aboriginal Development Commission Act 1980). Accordingly the Minister was quite right in the view he took of the consequence were he to grant his approval. His withholding of approval, once explained by reference to the settled policy of his Governement, amounted to a refusal to permit that to occur and accordingly constituted a refusal to permit persons, then possibly unknown to him but who in fact included Mr. Koowarta, to occupy land by reason of their race. (at p222)

38. Other bases were advanced for according standing to sue but for my part I am content to rest upon the above; it in my view establishes locus standi. (at p222)

39. In Mr. Koowarta's case I would overrule the defendant's demurrer. I would dismiss the action in which the State of Queensland is plaintiff. (at p222)

MASON J. As I have reached the conclusion that the objection to the plaintiff's locus standi in the first action is without substance it is convenient at the outset to examine the extent of the legislative power with respect to external affairs (s. 51(xxix)) and the validity of the relevant provisions of the Racial Discrimination Act 1975 (Cth) ("the Act") before discussing the question of locus standi. Because in my view the validity of the relevant provisions should be sustained as an exercise of the external affairs power I have no need to embark on an examination of the scope of the legislative power conferred by s. 51(xxvi).

The External Affairs Power. (at p222)

2. It is not easy to express the head of power in terms of a synonym which is a precise equivalent. Probably the one which comes closest is "matters or concerns external to Australia". The principal problem is to reflect adequately and accurately the wide-ranging content of the word "affairs". We obtain some assistance from the traditional expression "foreign affairs". We know that a power with respect to "foreign affairs" was inappropriate to Australia's condition in 1900 for Australia was not then a fully fledged member of the community of nations. The conduct of its foreign affairs was to some extent at least left in the hands of the United Kingdom and the power was intended to embrace, amongst other things, our relationships with the United Kingdom and other members of the British Empire, relationships which could scarcely have been described then as "foreign affairs". (at p223)

3. "External affairs" was therefore a head of power aptly expressed to equip the federal Parliament and the federal Executive with power to take appropriate action on behalf of Australia, whether as a self-governing Dominion or as a sovereign nation state, in the world of international affairs. So from the very beginning it has been accepted that the exercise of the power extends to matters affecting Australia's relationships with other nations and communities, including the making of treaties. In more recent times, as a result of the growth of international and regional co-operation, Australia's relationships with other nations have increasingly involved its participation in, and association with, international and regional institutions and organs which have an important part to play in advancing the political, economic and social interests of the peoples of the world and its regions. No one doubts that these activities on the part of Australia properly fall within the scope of "external affairs", notwithstanding that international and regional co-operation of this kind and on this scale was unknown in 1900 and only began with the Treaty of Versailles and the Covenant of the League of Nations. (at p223)

4. However, it is not to be thought that the content of the power is limited to matters affecting our relationships with other nations and communities. As we have seen, "external affairs" covers any matters or concerns external to Australia. So in New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") [1975] HCA 58; (1975) 135 CLR 337 , a majority of this Court decided that the power extends to matters and things, and I would say, persons, outside Australia. That decision established, quite apart from the provisions of the Statute of Westminster, that the so-called principle denying an extra-territorial operation to the legislation of a colony had no application to laws enacted by the Commonwealth Parliament. There was, accordingly, no reason

why the power should not apply to any matter or concern external to Australia. This aspect of the power has no significance for the present case. (at p223)

5. Of course, it is of paramount importance that the power is expressed as a legislative power and that, like the other grants of power in s. 51, it is plenary with respect to the subject-matter. In accordance with the received canon of constitutional construction it is to be construed liberally, not narrowly and pedantically (Reg. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. [1964] HCA 15; (1964) 113 CLR 207, at pp 225-226 ; the Seas and Submerged Lands Case (1975) 135 CLR, at pp 470-471 ; James v. The Commonwealth (1936) 55 CLR 1, at p 43). (at p224)

6. The power applies to a treaty to which Australia is a party, for it is not in question that such a treaty is an external affair or a matter of external affairs, subject only to the qualification, if it be a qualification, that the treaty is a genuine treaty - a matter to be mentioned later. It would seem to follow inevitably from the plenary nature of the power that it would enable the Parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty. It is very difficult to see why such a law would not be a law with respect to an external affair, once it is accepted that the treaty is an external affair. (at p224)

7. At this point it is argued that a restrictive interpretation should be placed upon the power, an interpretation which is based fundamentally on implications sought to be derived from (a) the nature of the power, and (b) the federal nature of the Constitution and the distribution of powers which it effects between the Commonwealth and the States. This interpretation is said to be supported by some statements in the judgments of this Court. As statements in the earlier judgments expressed differing views and, accordingly, are not decisive, it is preferable in the first instance to examine the question as one of principle. (at p224)

8. It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia (Chow Hung Ching v. The King [1948] HCA 37; (1948) 77 CLR 449, at p 478 ; Bradley v. The Commonwealth [1973] HCA 34; (1973) 128 CLR 557, at p 582). In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress (Foster v. Neilson [1829] USSC 16; (1829) 2 Pet 253, at p 314 (27 US 164, at p 202[1829] USSC 16; ; 7 Law Ed 415 at p 436)). As Barwick C.J. and Gibbs J. observed in Bradley (1973) 128 CLR, at pp 582-583 , the approval by the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by Commonwealth or State statute. Section 51 (xxix) arms the Commonwealth Parliament with a necessary power to bring this about. So much was unanimously decided by this Court in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936) 55 CLR 608 . There the power enabled the Commonwealth Parliament to legislate so as to incorporate into our law the provisions of the Paris Convention for the regulation of aerial navigation. (at p225)

9. Burgess has been regarded as a landmark decision, notwithstanding that the outcome seems to have been so inevitable. Any other result would have been plainly unacceptable, not only because it would have entailed a failure to acknowledge the plenary nature of the power and the important purpose which it served, but also because the consequence of the failure would have been to leave

the decision on whether Australia should comply with its international obligations in the hands of the individual States as well as the Commonwealth, for the Commonwealth would then lack sufficient legislative power to fully implement the treaty. The ramifications of such a fragmentation of the decision-making process as it affects the assumption and implementation by Australia of its international obligations are altogether too disturbing to contemplate. Such a division of responsibility between the Commonwealth and each of the States would have been a certain receipe for indecision and confusion, seriously weakening Australia's stance and standing in international affairs. Fortunately, the approach in Burgess has since been confirmed by R. v. Poole; Ex parte Henry (No. 2) [1939] HCA 19; (1939) 61 CLR 634 ; Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54 , and the Seas and Submerged Lands Case. (at p225)

10. The exercise of the power is of course subject to the express and to the implied prohibitions to be found in the Constitution. The Commonwealth could not, in legislating to give effect to a treaty, evade the constitutional prohibitions contained in ss. 92, 113 and 116. Nor, to take an example posed in argument, could it amend the Constitution otherwise than by the means provided for in s. 128; it certainly could not do so by the expedient of assuming a treaty obligation to amend the Constitution and then attempting to legislate directly without resort to s.128 so as to give effect to that treaty obligation. Likewise the exercise of the power is subject to the implied general limitation affecting all the legislative powers conferred by s. 51 that the Commonwealth cannot legislate so as to discriminate against the States or inhibit or impair their continued existence or their capacity to function (Victoria v. The Commonwealth [1971] HCA 16; (1971) 122 CLR 353, at pp 372, 374-375, 388-391, 403, 411-412, 424). (at p226)

11. But the States which challenge the validity of the Act go further and say that the external affairs power is necessarily subject to the special limitation that it will not support legislation which is exclusively domestic in its operation. First, it is emphasized that the subject of the power is external affairs. This, it is said, means that the Constitution distinguishes between internal and external affairs. Suggested conclusion: internal affairs lie outside the scope of the power. Invoked in support of this argument were the comments of Dixon C.J. in Wragg v. New South Wales (1953) 88 CLR 353, at pp 385-386 , where he spoke of the distinction "between inter-State trade and the domestic trade of a State for the purpose of the power conferred upon the Parliament by s. 51(i)" and described it as "a distinction adopted by the Constitution". It is not a distinction explicitly made by the Constitution and his Honour did not mean to imply by this comment that the Commonwealth could not legislate so as to affect intra-State trade. Earlier in Burgess itself he had rightly acknowledged that "the domestic commerce of a State can be affected" though "only to the extent necessary to make effectual its exercise" (i.e. of the power) "in relation to commerce among the States" (1936) 55 CLR, at p 671 . (at p226)

12. The Constitution does not draw any distinction between external affairs and internal affairs so as to give power over the former but deny all power over the latter. The true position, in accordance with received doctrine, is that a law, which according to its correct characterization is on a permitted topic, does not cease to be valid because it also happens to operate on a topic which stands outside power. The critical question is whether in the present case the law is with respect to external affairs, not whether it is with respect to internal affairs. (at p226)

13. The fallacy in the argument is compounded by the assumption on which it proceeds - that affairs are either internal or external in the sense that the two categories are mutually exclusive. The assumption is false. An affair will very often have characteristics which endow it with both internal

and external qualities. Burgess provides us with an instructive example. Australia's entry into the Paris Convention, an act affecting our relationships with other countries, was an external affair. But the question whether Australia should enter the Convention, a matter of domestic concern and consequence, was also an external affair. Likewise, the implementation of the Convention by legislation was both an external and an internal affair - external because it related to the treaty and carried it into effect, internal because the legislation was domestic, operating substantially, though not entirely, within Australia. So it was that the law was with respect to external affairs, even though the operation of many of its provisions was inside, rather than outside, Australia. Again in R. v. Sharkey [1949] HCA 46; (1949) 79 CLR 121 the validity of pars. (c) and (e) of s. 24A (1) of the Crimes Act 1914-1946 (Cth) was upheld as an exercise of power under s. 51(xxix), notwithstanding that their operation was within Australia. (at p227)

14. The same restriction on the power, it is argued, is dictated by the nature of the federal compact and the distribution of powers effected by the Constitution. To concede to the Commonwealth a capacity to enter into treaties by which it undertakes to enact domestic legislation of its own choosing and a legislative power to give effect to that undertaking would enable the Commonwealth by this means to legislate on any topic, no matter that it stands outside the specific powers conferred on the Commonwealth by the Constitution. The argument has several flaws. It is perhaps going too far to say that it rests on the underlying assumption that various fields of legislative activity, racial discrimination being the relevant example, inalienably belong to the States for the reason that specific power over the topic is not given to the Commonwealth. After all the doctrine of reserved powers was decisively rejected in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. ("the Engineers' Case") [1920] HCA 54; (1920) 28 CLR 129 , though in recent cases it seems to have re-emerged in different guises. The rejection of the doctrine was a fundamental and decisive event in the evolution of this Court's interpretation of the Constitution and in the later cases the correctness of the rejection has never been doubted. The consequence is that it is quite illegitimate to approach any question of interpretation of Commonwealth power on the footing that an expansive construction should be rejected because it will effectively deprive the States of a power which has hitherto been exercised or could be exercised by them. (at p227)

15. Indeed, the converse approach is the correct one. As we have seen, the legislative powers granted to the Commonwealth should be construed liberally, not pedantically. Indeed, O'Connor J. in Jumbunna Coal Mine N.L. v. Victorian Coal Miners' Association [1908] HCA 87; (1908) 6 CLR 309, at p 368 said: ". . . where the question is whether the Constitution has used an expression in the wider or the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose." This passage was quoted with approval by Dixon J. in Bank of N.S.W. v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at p 332 . (at p228)

16. The suggestion is that exercise of the power according to its broad interpretation could ultimately lead to a situation in which the Commonwealth, by virtue of its being a party to many treaties calling for the enactment of domestic legislation on a variety of topics, would occupy many fields of legislative activity hitherto considered to be the preserve of the States, fields not specifically committed to the Commonwealth. This, it is urged, would disturb the balance of powers achieved by the Constitution. However, a realistic and objective view of the balance of powers between the Commonwealth and the States must recognize that one very important element in that balance is the committal of the external affairs power to the Commonwealth. The inclusion of "external affairs" in s. 51 reflected a policy decision that a wide and general power over the subject

should be reposed in the federal legislature and executive, in preference to leaving any part of the responsibility for the subject with the States. (at p228)

17. Doubtless the framers of the Constitution did not foresee accurately the extent of the expansion in international and regional co-operation which has occurred since 1900. Extradition and the repatriation of fugitive offenders and customs and tariff agreements probably represented the type of treaties which were then thought to call for domestic legislation by way of implementation. It is that expansion, rather than any change in the meaning of "external affairs" as a concept, that promises to give the Commonwealth an entree into new legislative fields. This circumstance provides no ground for giving s. 51(xxix) a restrictive construction. On the contrary, it is a reason for insisting on a liberal construction. As Dixon J. observed in Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41; (1945) 71 CLR 29, at p 81 : ". . . it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances". (at p228)

18. There is no reason at all for thinking that the legislative power conferred by s. 51(xxix) was intended to be less than appropriate and adequate to enable the Commonwealth to discharge Australia's responsibilities in international and regional affairs. It is unrealistic to suggest in the light of our knowledge and experience of Commonwealth-State co-operation and of co-operation between the States that the discharge of Australia's international obligations by legislation can be safely and sensibly left to the States acting uniformly in co-operation. As the object of conferring the power was to equip the Commonwealth with comprehensive capacity to legislate with respect to external affairs, it is not to the point to say that such is the scope of external affairs in today's world that the content of the power given to the Commonwealth is greater than it was thought to be in 1900. (at p229)

19. The consequence of the expansion in external affairs is that in some instances the Commonwealth now legislates on matters not formerly within the scope of its specific powers, to the detriment of the exercise of State powers. But in the light of current experience there is little, if anything, to indicate that there is a likelihood of a substantial disturbance of the balance of powers as distributed by the Constitution. To the extent that there is such a disturbance, then it is a necessary disturbance, one essential to Australia's participation in world affairs. (at p229)

20. It might be argued that, if the external affairs power was relevantly limited to the implementation of treaties from which Australia stands to derive a discernible benefit, the balance of powers would receive some protection without inhibiting Australia's capacity to participate in world affairs. This solution would require the Court to review the judgment of the Executive and the Parliament that entry into a treaty and its implementation was for Australia's benefit, a course bristling with problems for the Court. And I do not accept the suggestion that Australia's capacity to participate in world affairs would not be seriously inhibited. Increasing emphasis is given in the United Nations and in regional organizations to the pursuit by international treaties of idealistic and humanitarian goals. It is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken. (at p229)

21. Nor is there a solid foundation for implying a restriction that the treaty must relate to a matter which is international in character or of international concern, if the suggested restriction is intended to convey more than that the treaty is a genuine treaty. It is difficult to perceive why a genuine

treaty, especially when it is multi-lateral and brought into existence under the auspices of the United Nations or an international agency, does not in itself relate to a matter of international concern and is not in itself an external affair. It is scarcely sensible to say that when Australia and other nations enter into a treaty the subject-matter of the treaty is not a matter of international concern - obviously it is a matter of concern to all the parties. Take, for example, the vexed question of human rights. Though it is a matter to be accorded or denied by each nation domestically, it has become increasingly a matter of international concern and agreement by means of international and regional conventions. To say of an international Human Rights Convention that it is not international in character is to say that it relates to domestic conduct within each nation and that one nation does not benefit from the observance by others within their boundaries of their obligations under the Convention - a matter which I should have thought was very much open to debate. If this be the basis of the distinction in the subject-matter of treaties between that which is international in character and that which is not, it is somewhat elusive and by no means convincing. (at p230)

22. One knows or can readily imagine treaties on topics of international concern by which the parties agree to enact domestic legislation to attain a common object, whether it be to suppress a noxious traffic or trade, to eliminate an infectious or contagious disease, or to limit production of a commodity or of goods in order to stabilize and share markets. The subject-matter of such treaties is, despite the argument of the Solicitor-General for Victoria to the contrary, international in character - there is agreement by the parties to take common action in pursuit of a common international objective, each party standing to gain a benefit from its attainment. What then of a treaty by which the parties agree to take domestic action to prohibit practices now recognized universally or generally to be abhorrent, e.g. slavery, piracy, racial oppression and racial discrimination? It may be said that, with the noxious traffic or trade and infectious or contagious disease, its existence in one nation presents an obvious risk of its introduction into another, and that this risk gives an international character to a treaty providing for the suppression of the traffic or trade and the elimination of the disease. But it is otherwise with the treaty which requires the parties to limit domestic production or to eliminate some forms of past abhorrent human conduct, e.g. slavery. However, there are strong grounds for thinking that the practice of racial oppression and racial discrimination in one nation often leads to similar conduct by way of reaction or to reprisal in another nation or to countervailing violence, revolution and insurgency constituting a disturbance of international peace and security. Accordingly, every nation stands to benefit from the elimination of activity which may contribute to the disturbance of international peace and security. (at p230)

23. The differences in these situations do not seem to me to be important in deciding whether the external affairs power enables the Commonwealth Parliament to implement a treaty, at least in the case of a multi-lateral treaty brought into existence under the auspices of the United Nations or another international agency. Agreement by nations to take common action in pursuit of a common objective evidences the existence of international concern and gives the subject-matter of the treaty a character which is international. I speak of course of a treaty which is genuine and not of a colourable treaty, if that can be imagined, into which Australia has entered solely for the purpose of attracting to the Commonwealth Parliament the exercise of a legislative power over a subject-matter not specifically committed to it by the Constitution. (at p231)

24. It is convenient now to look to Burgess [1936] HCA 52; (1936) 55 CLR 608 , for the judgments in that case, apart from that of Dixon J., support (Latham C.J., Evatt and McTiernan JJ.) or are consistent with (Starke J.) the plenary view of the power which I favour. Latham C.J., Evatt and McTiernan JJ. considered that it was an independent power which, subject to the Constitution, extends to the legislative implementation of Australia's obligations under treaties to which it is a

party. Latham C.J. rejected the suggestion that a distinction should be drawn between international and domestic affairs (1936) 55 CLR, at p 640 , commenting that it is "impossible to say a priori that any subject is necessarily such that it could never properly be dealt with by international agreement" (1936) 55 CLR, at p 641 . The only relevant limitations on the power were that it could not be exercised so as to indirectly amend the Constitution and that it is subject to the prohibitions contained in the Constitution (1936) 55 CLR, at p 642 . Evatt and McTiernan JJ. (1936) 55 CLR, at p 681 were of the same view, saying that "it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement". Their Honours' rejection of the notion that the power does not authorize legislation which operates exclusively or substantially within Australia and its Territories is instanced by their reference to such subject-matters as "air navigation, the manufacture of munitions, the suppression of the drug traffic and standard hours of work in industry" (1936) 55 CLR, at p 641 . These matters, they conceded, are not specifically entrusted to the Commonwealth. Nevertheless, they can properly be made the subject of international convention binding on Australia (1936) 55 CLR, at pp 681-684 whereupon the legislative power under s. 51(xxix) enables the Parliament to implement the convention because so to do is to legislate with respect to "external affairs" (1936) 55 CLR, at pp 687-688 . (at p232)

25. It is by no means clear to me that Starke J. took a more restricted view of the power. Certainly he thought that it was subject to the express and implied limitations in the Constitution (1936) 55 CLR, at p 658 . But he considered that all means - ". . . which are appropriate, and are adopted (sic q.:'adapted') to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power. The power must be construed liberally, and much necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention" (1936) 55 CLR, at pp 659-660 . He reserved the question whether its exercise in relation to a treaty was confined to a treaty of a matter "of sufficient international significance to make it a legitimate subject for international co-operation and agreement" (1936) 55 CLR, at pp 681-684 , a limitation suggested by Willoughby, Constitutional Law of the United States 2nd ed. (1929), vol. 1, p. 519, on the power of Congress. However, his Honour accepted Missouri v. Holland ("the Migratory Birds Case" [1920] USSC 87; (1920) 252 US 416(64 Law Ed 641)), the application of which would give the power a wide scope. (at p232)

26. Dixon J. was more cautious in the operation that he conceded to the power, observing (1936) 55 CLR, at p 669 :
"If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs."

The significance of what his Honour said depends upon the meaning to be given to the nebulous expression "international in character" and what his Honour had in mind when he spoke of "a matter of internal concern which . . . could not be considered as a matter of external affairs". (at p232)

27. Some clue is provided by the contrast between "some matter . . . international in character" and "a matter of internal concern" only and by his Honour's statement of reasons for concluding that the power extended to the implementation of the Convention. He noted that in international law the

question how far sovereignty extends upwards was "one of practical importance in need of settlement by a convention among the nations" (1936) 55 CLR, at p 670 . There was a question as to the terms and conditions on which each nation would allow the nationals of other nations to use its air space. According to his Honour these matters constitute "international affairs" and the provisions of the Convention were "all relevant to the solution" of the questions which arose [1920] USSC 87[1920] USSC 87; ; (1920) 252 US 416(64 Law Ed 641) . In these circumstances it could not be said that the Convention dealt with matters of "internal concern" only. (at p233)

28. In Poole [1939] HCA 19; (1939) 61 CLR 634, at pp 654-655 Evatt J. stated that there was no difference in Burgess, between the members of the Court other than Starke J. as to the test to be applied in deciding whether legislation implementing the Convention is within power. Broadly speaking, the test which they favoured was whether in substance the legislation carries out or gives effect to the Convention. This is the language of Latham C.J. (1936) 55 CLR, at p 646 . However, it seems to me that the Chief Justice was merely reflecting the language of the regulation-making power contained in s. 4 of the Air Navigation Act 1920 (Cth), and I have some doubt whether his Honour was intending by the use of these words to express his view of the limits of the constitutional power in its application to treaties (1936) 55 CLR, at p 638 . For my part I prefer the statement made by Starke J. in Burgess (1936) 55 CLR, at p 660 which I have already quoted. I note that it was quoted by Menzies J. with evident approval in Airlines (No. 2) (1965) 113 CLR, at p 141 . (at p233)

29. The judgments in the subsequent decisions of this Court in Ffrost v. Stevenson [1937] HCA 41; (1937) 58 CLR 528 and Sharkey [1949] HCA 46; (1949) 79 CLR 121 do not throw new light on the question which we have to decide. The issue which arose in Airlines (No. 2) did not require the Court to make a choice between the views which had been offered in Burgess, though Barwick C.J. thought, as I do, that the power is subject to implied, as well as express, constitutional prohibitions (1965) 113 CLR, at p 85 . Likewise the decision in the Seas and Submerged Lands Case [1975] HCA 58; (1975) 135 CLR 337 does not touch the present case, though it is important to note that Murphy J. in that case indorsed the wide view of the power (1975) 135 CLR, at pp 503-504 . (at p234)

30. I should not wish it to be thought from what I have said that the existence of a treaty is an essential pre-requisite to the exercise of the power. That is certainly not my view. Sharkey decided that the power extends to the preservation of friendly relations with any of the Dominions. And there is no reason to distinguish friendly relations with the Dominions from friendly relations with other countries. Moreover, as Professor Zines points out in The High Court and the Constitution (1981), p. 230, "the reasoning in Burgess's case and Airlines (No. 2) would support an Australian law giving effect to an obligation arising under rules of customary international law". Further, it seems to me that a matter which is of external concern to Australia having become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it. Application of the External Affairs Power to the Convention. (at p234)

31. 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. (at p234)

32. 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, e.g. 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. (at p235)

33. 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. (at p235)

34. All the materials indicate that the United Nations consider racial discrimination to be abhorrent conduct which, posing a threat to international peace and security, should be eliminated. At the level of international law the means chosen to attain this end was the formulation of the Convention. It imposes on each of the many parties to it an obligation to eliminate racial discrimination in its territory. The failure of a party to fulfil its obligations becomes a matter of international discussion, disapproval, and perhaps action by way of enforcement. Viewed in this light, the subject-matter of the Convention is international in character. (at p235)

35. It is conceded that, if the external affairs power extends to the Convention, the relevant provisions of the Act, s. 9 and s. 12, give effect to its provisions. I therefore conclude that the two sections are valid. (at p235)

36. In the Koowarta action it is the validity of these sections that is in issue. The State of Queensland in its action seeks a declaration that the whole Act is invalid. However, argument was limited to the validity of the two sections on the footing that at this stage there is no dispute presently in existence which calls for a determination of the validity of the other sections of the Act. The Court should in the exercise of its discretion decline to consider the grant of declaratory relief in relation to the remainder of the Act in the Queensland action. Locus Standi. (at p236)

37. By virtue of s.24(1) "A person aggrieved by an act that he considers to have been unlawful by reason of a provision of Part II" may sue for damages under s.25(d). It is submitted that Mr. Koowarta is not a person aggrieved because his case as pleaded does not come within s.9 or s.12. I do not agree, for I consider that his case comes within s.12. (at p236)

38. The alleged refusal by the Queensland Cabinet and the second defendant, the Minister for Lands, to consent to the transfer of the Archer River Pastoral Holding lease to the Aboriginal Land Fund Commission, a body corporate constituted by the Aboriginal Land Fund Act 1974 (Cth), seems to me to be a breach of s.12(1)(a), (c) or (d) of the Act, provided that the reference to the "second person" in the subsection includes a corporation. By virtue of s.22(a) of the Acts Interpretation Act 1901 (Cth) a reference in a statute to a "Person" includes a reference to a body corporate, unless a contrary intention appears. It is submitted that because, generally speaking, human rights are accorded to individuals, not to corporations, "person" should be confined to individuals. But, the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s. 12 being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race, colour or national or ethnic origin of any associate of that corporation. It is also submitted that the reference in the concluding words to "any relative or associate of that second person" is inappropriate to a corporation. Certainly that is so of "relative", but a corporation may have an "associate". The concluding words are therefore quite consistent with the "second person" denoting a corporation as well as an individual. (at p236)

39. On the pleading Mr. Koowarta has locus standi to bring the action under s.12. I do not find it necessary to consider the question of locus standi under s.9. It is enough that Mr. Koowarta has locus standi to bring the action. (at p236)

40. In the result in Mr. Koowarta's action I would overrule the demurrer. I would dismiss the action by the State of Queensland. (at p236)

MURPHY J. The plaintiff, Mr. Koowarta, seeks to invoke the Racial Discrimination Act 1975 ("the Act") against Queensland and its ministers. Queensland (supported by Western Australia and Victoria intervening) demurs, and in a separate action against the Commonwealth claims a declaration, that ss. 9 and 12 of the Act which are relied upon by the plaintiff are unconstitutional. Mr. Koowarta and the Commonwealth support the validity of the Act (particularly the two challenged sections) on either or both of the constitutional powers to make laws with respect to external affairs and the power to make special laws for the people of any race.

External Affairs. (at p237)

2. 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). (at p237)

3. 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. (at p237)

4. 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. (at p237)

5. Constitutionally, the executive power over Australia's external affairs comes within Ch.III - Eexecutive 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. (at p237)

6. 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. (at p238)

7. 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 the First World War 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. (at p238)

8. 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. (at p238)

9. 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. The Second World War 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 Economic, Social and Cultural Rights and 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. (at p239)

10. 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). 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 multi-lateral 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. Legislative Power with Respect to External Affairs. (at p240)

11. The Constitution, s. 51 provides: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . . (xxix) External affairs." This commits to the Parliament, as representing the authentic will of the Australian people, the power by legislation to regulate and to implement the executive conduct of external affairs. In our municipal, that is national, law this legislative power is subject to, and only to, the limitations expressed or implied in the Constitution. Like the other powers in ss. 51 and 52 it is thus subject to express guarantees or prohibitions (such as those in ss. 80, 99, 116), and to limitations arising from implications including those of the continued existence of the States, and in

my opinion those associated with the implications of freedom of expression and other attributes of a free society to which I referred in Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at p 137 ; Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54, at p 88 ; and McGraw-Hinds (Aust.) Pty. Ltd. v. Smith (1978) 144 CLR 633, at p 670 . It is necessary to mention these limitations in order to dispose of the argument that the external affairs power if not read down from its natural meaning could authorize Parliament to abolish the States or impose censorship pursuant to some treaty obligation. Such laws would be invalid because the Constitution contemplates the continuance of the States, and impliedly contemplates freedom of expression. (at p240)

12. The opening words of s. 51 show the power to make laws "for the peace, order, and good government of the Commonwealth" with respect to the various subjects, including external affairs, is to make laws which will operate in Australia to confer rights on or impose obligations on people whether unorganized or organized into State territories or other organs. In order that a law which operates on persons and events in Australia, that is on internal affairs, may come within the constitutional power, it is necessary and sufficient that it be with respect to external affairs. Thus it is no valid objection that the Racial Discrimination Act 1975 deals, as it does, with internal affairs. Preservation of the world's endangered species, maintenance of universal standards of human rights, control of traffic in drugs of dependence, elimination of infectious diseases, and many others, are for Australia as well as other nations, internal as well as external affairs. The States' contentions are a hardly disguised representation of the State reserved powers doctrine rejected in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129 ("the Engineers' Case"), but now having a new lease (see Gazzo v. Comptroller of Stamps (Vict.) (1981) 149 CLR 227). The argument is that the external affairs power in insufficient to implement certain treaties into which the Executive Government can enter (of which the Convention is an example), and that implementation can be secured only by the co-operation of State Parliaments. Victoria contended that certain provisions of the Narcotic Drugs Act 1967 (Cth) (implementing the Single Convention on Narcotic Drugs) were invalid as beyond the competence of the Parliament; and that a law (pursuant to a treaty obligation) to prevent the emergence of slavery in any part of Australia would also be invalid. No satisfactory test was advanced for deciding which treaties Parliament could implement and which would require action by the States. If these contentions are correct, then as I said in New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 CLR 337, at p 503 ("the Seas and Submerged Lands Case") "Australia would be an international cripple unable to participate fully in the emerging world order." The Constitution envisages no division of external affairs power between the Parliament and the State Parliaments. The Parliament, in exercising the external affairs power (as well as its other powers), is entitled to make laws for the peace order and good government of the Commonwealth, that is, of the people as a whole, notwithstanding the opposition of any State Government or Parliament. The exercise of that power is not an intrusion upon the people of the States. The people of the States are entitled as well as obliged to have the legislative and executive conduct of those affairs which are part of Australia's external affairs carried out by the Parliament and Executive Government of Australia. (at p241)

13. 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. (at p242)

14. The challenged sections are completely authorized by the external affairs power. They need no support from the power in the Constitution, s. 51, to make laws . . . with respect to: (xxvi) the people of any race for whom it is deemed necessary to make special laws. It is therefore unnecessary to deal with the extent to which that power can lend support to those sections and other parts of the Act, although in my opinion, it can do so in the way submitted by the Commonwealth. In par. (xxvi) "for" means "for the benefit of". It does not mean "with respect to", so as to enable laws intended to affect adversely the people of any race. If "with respect to" or some similar expression were intended, it would have been used, as it is in other parts of s. 51 (see the opening words and pars. (xxxi) and (xxxvi)). (at p242)

15. For the reason stated by Stephen J. Mr. Koowarta has standing as plaintiff; there was an act of discrimination against him. The demurrer should be overruled. The challenged sections of the Racial Discrimination Act 1975 are valid. The action by the Government of Queensland for a declaration of invalidity should be dismissed.

APPENDIX. (at p242)

16. Numerous books, articles and government reports starkly outline the discrimination suffered by Australian Aborigines, including:
Annual Reports of Commissioner for Community Relations, especially Annual Report 1978, Ch.5, Discrimination in Queensland, pp. 9-22.
Australian Law Reform Commission Discussion Paper no. 17, Aboriginal Customary Law - Recognition? 1980.

Bandler, Wacvie (1977).
Berdoukas, et al., Content Analysis of N.S.W. Primary School Social Studies

Textbooks with respect to the Development of Racial Attitudes in Children (1970)
Brown, Hirschfeld and Smith, Aboriginals and Islanders in Brisbane, Australian Government Commission of Inquiry into Poverty (1975).

Coombs, Kulinma - Listening to Aboriginal Australians (1978).
Eggleston, Fear, Favour or Affection (1975).
Evans, Saunders and Cronin, Exclusion, Exploitation and Extermination: Race

Relations in Colonial Queensland (1975).
Foley, "Black Queenslanders on Reserves - What Laws do They Want?" (1978) Legal Service Bulletin 3, p. 97.

Gale and Brookman, Race Relations in Australia - The Aborigines (1975).
Gilbert, Because a White Man'll Never Do It (1973).
Gilbert, Living Black (1977).
Hunt, "Aboriginal Women and Colonial Authority", in In Pursuit of Justice;

Women in Australia 1788-1979, Mackinolty and Radi, eds. (1979) p. 32.

Kalokerinos, Every Second Child (1974).
Lippman, Words or Blows: Racial Attitudes in Australia (1973).
Malezer, Foley and Richards, Beyond the Act (1980).
Nettheim, Outlawed - Queensland's Aborigines and Islanders and the Rule of

Law (1973).

Nettheim, Victims of the Law - Black Queenslanders Today (1981).
Parker, "Social Agents as Generators of Crime" Case Study: Aborigines in

Western Australia (1974).
Report on Aboriginals and Torres Strait Islanders on Queensland Reserves, Senate Standing Committee on Constitutional and Legal Affairs (1978).

Reynolds, The Other Side of The Frontier (1981).
Rowley, Destruction of Aboriginal Society (1970).
Rowley, A Matter of Justice (1979).
Ryan, The Aboriginal Tasmanians (1981).
Stone, Aborigines in White Australia: A Documentary History of the Attitudes

Affecting Official Policy and the Australian Aborigines 1697-1973 (1974).
Taft, Attitudes of Western Australians Towards Aborigines in Attitudes and Social Conditions (1970).
Tatz, "Aborigines: Equality or Inequality", (1966) Australian Quarterly, p. 38.

Torry, Double Jeopardy - Black and a Woman (1975).
Walker, My People (1976).
Watson, "Black on Black", in Future Directions 1980 Conference Report, Henry

and Thomson, eds. (1980) p. 142.
Women's Health Conference Report 1975, Health, 25, p. 4. (at p243)

AICKIN J. In these two matters I have had the advantage of reading the reasons for judgment prepared by the Chief Justice. I am in full agreement with those reasons and the conclusions which follow therfrom. There is nothing which I can usefully add. (at p243)

WILSON J. I have had the very considerable advantage of reading the reasons for judgment prepared by the Chief Justice. I agree entirely with both the reasoning of his Honour and the conclusions to which he comes. However, in deference to the importance of the issues of validity touching a highly significant and valued piece of Commonwealth legislation, I wish to make some suplementary remarks. They will be confined to the two grants of legislative power on which the validity of the law was said to rest. In speaking of the law I refer to ss. 9 and 12 of the Racial Discrimination Act 1975 (Cth) (the Act).

Section 51 (xxvi). (at p244)

2. It is a fundamental objective of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) to secure to all human beings the right to equality and freedom before the law without distinction as to race, colour, descent or national or ethnic origin. That objective derives substance and urgency from the declared conviction, contained in the preamble to the Convention, that the existence of racial barriers is repugnant to the ideals of any human society. In substance the preamble testifies to the view that it is essential to the peace and well-being of the international community that the laws of a community apply to all the members of that community regardless of race. It recognizes that there is a generality that is basic to good laws. It is in order to give effect within Australia to the Convention that the Parliament has enacted the

Act. There is a touch of irony in the fact that the Commonwealth seeks to support the validity of an Act to give effect to these principles by relying on a power to enact discriminatory laws, whether for good or ill, for the people of any race. In these days, one would not readily contemplate the use of the power to the detriment of the people of a race; nevertheless, it is basic to an understanding of the scope of the power to recognize that even when it is used for wholly benevolent and laudable purposes it remains a power to discriminate with respect to such a people. The paragraph recognizes that there may be occasions when the circumstances touching the people of a particular race will call for special attention resulting in legislative activity in relation to those people. These laws will be special because they will address a problem that is peculiar to the people of that race. (at p244)

3. The learned Solicitor-General for the Commonwealth argues that there is no necessary singularity attaching to the phrase "the people of any race". He observes that if the Act were to contain a section which specifically applied its provisions to discrimination against the people of a particular race there could be no doubt that the law was within the power. If then there followed a series of provisions applying the Act in turn to the people of every race in Australia then in his submission the same result would follow. What can be done severally can be done in a global way. The Act is within the power because it is a law with respect to the people of any race who suffer discrimination on racial grounds, the Parliament having deemed it necessary to secure to them this special protection. (at p245)

4. This ingenious submission cannot be accepted. If the Act can apply with respect to the people of any race at all who may happen to be the victims of discrimination on account of their race, then it is not a special law. It is a general law directed to the elimination of all racial discrimination in the community. The power contained in s. 51(xxvi) is activated when the Parliament discerns circumstances which in its view give rise to a necessity to make a special law. That necessity can arise only from circumstances considered to be compelling in relation to a section of the community, namely, the people of a particular race or races. As the Chief Justice has observed, the power is apt to enable the Parliament, if it considered it necessary to do so, to prohibit racial discrimination against the people of the Aboriginal race.Section 51(xxix). (at p245)

5. In R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936) 55 CLR 608, at p 642 , Latham C.J. said: "Thus it appears to me that even if the most limited criterion be applied this convention falls within the subjects which may properly be dealt with by international agreement and which in themselves have an external aspect" (my emphasis).

Although in the course of his judgment the Chief Justice had favoured a broader view of the power than that expressed in the passage I have cited, the decision itself provides no authority for any wider view. The Court decided that so much of s. 4 of the Air Navigation Act 1920 as empowered the Governor-General to make regulations for the purpose of carrying out and giving effect to the Paris Convention of 1919 for the regulation of aerial navigation was a valid exercise of the external affairs power. That Convention secured to Australia the enjoyment of sovereignty over its airspace and imposed obligations relating to the use of that airspace by the aircraft of other countries. The law by which the Parliament sought to discharge those obligations, while forming part of the domestic law of the Commonwealth, clearly exhibited an external aspect. (at p245)

6. Burgess was the first occasion in which the question of the validity of the law rested squarely on the external affairs power. In McKelvey v. Meagher [1906] HCA 56; (1906) 4 CLR 265 it was acknowledged that s. 51(xxix) would empower the Parliament to legislate generally as to the surrender of fugitive offenders from other parts of the British Dominions. In Roche v. Kronheimer

[1921] HCA 25; (1921) 29 CLR 329, at p 339 Higgins J. expressed the view that the Treaty of Peace Act 1919, which enabled the Governor-General to implement provisions of the peace treaty authorizing the charging of property within Australia of German nationals, could be upheld both under the defence power and the external affairs power. (at p246)

7. Again, since Burgess there has been little occasion for the Court to examine the external affairs power. In R. v. Sharkey [1949] HCA 46; (1949) 79 CLR 121 all the members of the Court acknowledged that s. 24A(1)(c) of the Crimes Act 1914-1946 (Cth) was a law with respect to external affairs. That provision was one of a number of paragraphs relating to sedition and spoke of exciting disaffection "against the Government or Constitution of any of the King's Dominions". (at p246)

8. In Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54 , the validity of certain of the Air Navigation Regulations (Cth) was again in question. Barwick C.J., McTiernan, Menzies and Owen JJ. found support for the regulations in the external affairs power in so far as they implemented within Australia the Chicago Convention on International Civil Aviation 1944. As the Chicago Convention had a similar subject-matter and imposed obligations comparable to those imposed by the Paris Convention, the decision adds little to Burgess. The members of the Court refrained from any general discussion of the scope of the power. (at p246)

9. In New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 CLR 337 , the Court held the Seas and Submerged Lands Act 1973 (Cth) to be a valid exercise of the external affairs power. The Act vested sovereignty in the territorial sea of Australia and sovereign rights in respect of the continental shelf in the Crown in right of the Commonwealth. The conclusion in favour of validity rested on the power in s. 51(xxix) to give effect to the international conventions, scheduled in the Act, touching the territorial sea and the continental shelf respectively. Three members of the Court also found a sufficient nexus to the power in the fact that the subject-matter of the Act was geographically external to Australia. (at p246)

10. I have reviewed these cases in order to show the very limited authority that they provide. In every case the law in question was one which, in the words of Latham C.J. in Burgess, had an external aspect. The operation of the law within Australia was necessarily invested with an international character. Whether it was the extradition of fugitive offenders from abroad, the seizure of the property of enemy aliens, the safety and efficiency of aerial navigation within Australian airspace used by foreign aircraft, the vesting of sovereignty in areas beyond Australia or the protection of foreign governments from seditious activity within Australia, the law bore on its face the marks of an external affair. It follows that the wide-ranging views expressed by members of the Court from time to time, although naturally deserving of respect, cannot determine the problem which the present case presents. (at p247)

11. I turn now to the statute under challenge. It is clear from the terms of ss. 9 and 12 of the Act, which the Chief Justice has set out, that they lack this external aspect to which I have referred. Each section makes it unlawful for any person to engage in the conduct which is described therein. Generally speaking, that conduct is of a type which, if it were to occur at all, would take place in the ordinary day-to-day intercourse of persons in Australia. It is true that the Convention is set out in a schedule to the Act, and that the preamble to the Act testifies to the purpose of the Parliament to give affect to the Convention. Section 7 of the Act, which approves the ratification by Australia of the Convention is undoubtedly valid. However it is well established that the true nature and character of a law is to be determined, not by the motives of the Parliament, but by its direct legal

operation according to its terms: South Australia v. The Commonwealth [1942] HCA 14; (1942) 65 CLR 373, at pp 424-426 ; Bank of N.S.W. v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at pp 186-187 ; Fairfax v. Federal Commissioner of Taxation [1965] HCA 64; ; (1965) 114 CLR 1, at pp 7, 14, 16 . If the true nature of ss. 9 and 12 is to be ascertained by seeing what they do in creating, changing, regulating or abolishing rights, duties, powers or privileges, then the answer must be that they are directed to removing racial discrimination from all relationships within the Australian community. It is certainly a law with respect to that topic, but of course the Constitution does not grant to the Parliament a legislative power in those terms. Is it a law with respect to external affairs? (at p247)

12. The Commonwealth argues for a positive response to that question, and it is unnecessary for me to repeat again what appears in other judgments. The initial proposition on which it relies is that, by reason of its ratification of the Convention if not directly by reference to an emerging rule of customary international law, Australia is under an obligation to the world community "to prohibit and to eliminate racial discrimination in all its forms" (Art. 5). I readily accept the proposition. I acknowledge too that of all Australia's international obligations there must be few, if any, of greater humanitarian importance than the obligation to strive for racial equality. As Egon Schwelb observed in 1966 in an article in the International and Comparative Law Quarterly, vol. 15 (1966), 996, at p. 1057, the idea of racial equality has emerged as the one which, more than any other, dominates the thoughts and actions of the post-World War II world. The role of the Committee on the Elimination of Racial Discrimination established by Art. 8 emphasizes the onerous character of the obligations arising under the Convention. (at p248)

13. Nevertheless, the outstanding importance of this particular obligation must not blind us to the wide-ranging implications of the next step in the Commonwealth's argument. It is that the existence of this obligation necessarily brings into existence an external affair within the meaning of s. 51(xxix), thereby investing the Parliament with legislative power to discharge it. It is immaterial that the legislation may be, as is ss. 9 and 12 of the Act under consideration here, wholly domestic in its operation. It is nevertheless a law with respect to external affairs. The implications of the argument are profound, for if this argument holds good for an obligation such as the elimination of racial discrimination, it must likewise hold good for all the other important obligations which arise out of Australia's international relations. In my opinion, there is no rational basis on which to distinguish one obligation and another. It is to be assumed that the Commonwealth only enters into an international obligation because to do so is believed to be relevant and therefore important to the advancement of the interests of Australia. Although the external affairs power is sometimes likened to the defence power, there is in my opinion a significant distinction to be drawn. Whereas the needs of defence will vary with the existence and character of hostilities in which Australia may be engaged and consequently the scope of the power will expand or contract accordingly, there is no such ebb and flow in the conduct of Australia's international relations. The technological revolution in communications coupled with the search for peace and security during the decades of this century have led to the close interdependence of nation with nation. Both economically and socially the earth is now likened to a global village where the international community concerns itself increasingly with matters which formerly were regarded as only of domestic concern. There is now no limit to the range of matters which may assume an international character, and this situation is unlikely to change. These considerations underline the importance of identifying clearly the criteria which will attract to a law of the Parliament the character of a law with respect to external affairs. (at p249)

14. The broader question then is whether the Parliament is competent, by reason of s. 51(xxix), to

give effect within Australia to every obligation which Australia assumes within the community of nations. In answering that question, it must be borne in mind that a distinction is to be drawn on the one hand between Australia as a fully autonomous sovereign nation within the international community with all the rights and responsibilities that attach to that status, and on the other hand the identity of the Commonwealth as a constituent unit of a federation possessed of the legislative powers conferred upon it by the Constitution. I would respectfully adopt, as my own, the illuminating discussion of sovereignty as between nation and nation, and sovereignty as it may come to be distributed domestically within the polity of an individual nation state which is undertaken by Stephen J. in New South Wales v. The Commonwealth (1975) 135 CLR, at pp451-455 . It is unnecessary to repeat it. The distinction provides the setting in which the Commonwealth must be recognized as fully competent to engage Australia in international relationships, while allowing at the same time for such a possible distribution of legislative power within the federation as may render it unable by its own laws to implement treaty obligations. If a situation of this kind occurs, it obviously renders the conduct of foreign affairs more complex than in the case of a unitary state. (at p249)

15. The absence in municipal law of legislative power to implement an international obligation affords no excuse in international law for non-compliance. In former times the difficulty was diminished by resort to federal clauses such as Art. 19(7) of the constitution of the International Labour Organization. Nowadays, however, the tide of international opinion runs strongly against such clauses, leaving only resort to the practice of recording reservations to the ratification of a convention or treaty. The full significance of such a practice remains to be seen. (at p249)

16. However, it does not follow in such a case that Australia is an "international cripple unable to participate fully in the emerging world order", as was suggested by Murphy J. in New South Wales v. The Commonwealth (1975) 135 CLR, at p503 . As I have said, the Commonwealth is fully equipped to represent this country abroad, to negotiate agreements and understandings and to assume obligations. In doing so, however, it will know that if any of these obligations require for their discharge the enactment of laws within Australia, the Parliament may not itself be competent to effect compliance. It may be inhibited by express prohibitions contained in the Constitution, for example ss. 92, 114, 116 and 117, or the subject-matter of the legislation required to effect compliance may fall outside the enumerated powers of the legislature. In the latter case, there is no doubt that the State legislature will be competent to do whatever is necessary. The task of ensuring the co-operation of the States may present a political challenge, although the developing practice of including State representatives in Commonwealth delegations to international conferences on subjects which may call for implementation by State legislatures augurs well for future co-operation in the pursuit of an effective foreign policy and the maintenance of good international relations: see Burmester, "The Australian States and Participation in the Foreign Policy Process", Federal Law Review, vol. 9 (1978), p.257. For a recent example of the attachment of reservations to Australia's ratification of an international convention, see the International Covenant on Civil and Political Rights 1966, which is scheduled in the Human Rights Commission Act 1981. (at p250)

17. The Chief Justice has referred to the decision of the Judicial Committee in Attorney-General (Canada) v. Attorney-General (Ontario) (1937) AC 326 where their Lordships expressed the view that in the totality of Dominion and provincial legislative powers, Canada was fully equipped to implement any international obligations that might be incurred. The decision in that case, though not the accuracy of the observation to which I have referred, was subjected to a good deal of criticism. However, a recent assessment appears in an article by Edward McWhinney in the Canadian Yearbook of International Law (1969), vol. 7, p. 3, wherein, at pp. 4-5, the author wrote:

"Not merely has the Labour Conventions decision not rendered impossible the conduct of a rational Canadian foreign policy. In fact, no single example has ever been cited, in the years since 1937 . . . where its rationale has presented any practical difficulties, or even mild inconvenience, in the conduct of Canada's foreign relations. At the concrete, empirical level, it has in fact proved easily possible for Canadians to live with the decision; . . . "
Cf. also the decision of the Constitutional Court of West Germany in the Concordat Case (1957) 6 B Verf GE, 309 , which provides another example of a federation confronted with an international relationship in the context of divided internal legislative competence. For a detailed review of the making and performance of treaties in federal states, see L. Wildhaber, Treatymaking Power and Constitution (1971), p. 278 ff. (at p251)

18. I come now to answer the broader question to which I have referred. In my opinion, the power in s. 51(xxix) does not extend to enable the Parliament to implement every obligation which Australia assumes in its international relations. The discrimen to be applied is that which is established by the earlier decisions of this Court. It follows that Australia's obligation to eliminate racial discrimination within Australia will only assume the character of an external affair for the purposes of s. 51(xxix) if the manner of its implementation necessarily exhibits an international character. In the context of Australia's municipal law, it is by reference to what the law does that its character must be determined. As I have already observed, ss. 9 and 12 of the Act do not exhibit the necessary external aspect. They are not, in my opinion, laws with respect to external affairs. (at p251)

19. It will be appreciated that thus far I have confined my attention directly to a construction of the scope of the power in relation to the Act in question, without any specific regard to the effect of implications which are to be drawn from the federal character of the Constitution. Yet it will be evident that those implications provide strong support for the conclusion I have expressed. I have sought to demonstrate that if ss. 9 and 12 of the Act are valid exercise of the power to enact laws with respect to external affairs, it would be difficult to deny a power to implement any international obligation. Certainly the entire field of human rights and fundamental freedoms would come within the reach of paramount Commonwealth legislative power. In addition to the Covenant on Racial Discrimination, there is now the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, in addition to the Covenants of the International Labour Organization. There are Declarations on the rights of the child, the rights of mentally retarded persons, and the rights of disabled persons. It is no exaggeration to say that what is emerging is a sophisticated network of international arrangements directed to the personal, economic, social and cultural development of all human beings. The effect of investing the Parliament with power through s. 51(xxix) in all these areas would be to transfer to the Commonwealth virtually unlimited power in almost every conceivable aspect of life in Australia, including health and hospitals, the workplace, law and order, the economy, education, and recreational and cultural activity, to mention but a few general heads. In New South Wales v. The Commonwealth (1975) 135 CLR, at p503 , Murphy J. asserted the impracticability of dealing, at an executive level, with many aspects of Australia's internal affairs other than in the context of international arrangements. He referred specifically to the subjects of minerals and energy, primary industry, the environment and the general management of the economy. That assertion may well be correct, but can it be supposed, consistently with the federal nature of the Constitution, that the power of the Parliament with respect to external affairs extends to support any laws operating within Australia which have the purpose and effect of carrying out the obligations which form part of these arrangements? So broad a power, if exercised, may leave the existence of the States as constitutional units intact but it would deny to them any significant legislative role in the federation. (at p252)

20. In recent years there have been repeated references in the United States Supreme Court to the operation of constitutional implications to restrain congressional power. In Oregon v. Mitchell [1970] USSC 207; (1970) 400 US 112, at p 128 (27 Law Ed (2d) 272, at p 283) , Black J. said: " . . . the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority . . . " Elsewhere in his opinion he asserted that the argument in favour of congressional power would, if carried to its logical conclusion, "blot out all state power, leaving the 50 States as little more than impotent figureheads" (1970) 400 US, at p 126 (27 LawEd (2d), at p 282) . See also Fry v. United States [1975] USSC 98; (1975) 421 US 542, at p 547 n 7 (44 LawEd(2d) 363, at p 369) , and the dissenting opinion of Rehnquist J. (1975) 421 US, at p 549 (44 LawEd (2d), at p 370) . Again, in National League of Cities v. Usery [1976] USSC 136; (1976) 426 US 833 (49 Law Ed (2d) 245) , the Court restrained Congress from wielding its commerce power in a fashion that would impair the States' ability to function effectively in a federal system: "This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution" (1976) 426 US, at p 852 (49 Law Ed (2d), at p 257) . (at p252)

21. For the reasons contained in the judgment of the Chief Justice, supported by these supplementary observations, I would hold that ss. 9 and 12 are beyond the legislative power of the Commonwealth. As we have both said, it is clearly within the power of the Parliament to legislate under s. 51(xxix) to ban racial discrimination against the people of the Aboriginal race. For the rest, the Commonwealth must seek the co-operation of State legislatures to ensure that Australia's international obligations under the Convention are fulfilled. (at p253)

22. I would make the orders proposed by the Chief Justice. (at p253)

BRENNAN J. Lord Atkin in delivering the reasons for judgment of the Judicial Committee in Attorney-General (Canada) v. Attorney-General (Ontario) (1937) AC 326, at p 347 distinguished between the formation and the performance of treaty obligations. The making of a treaty is a function of the executive, but legislation to implement a treaty is a matter for the legislature. He said in reference to the Canadian Constitution (1937) AC, at p 348 :

"The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures." (at p253)

2. Section 51(xxix) of our Constitution confers a power upon the federal Parliament to make laws "with respect to external affairs". The extent of that power is in question. Does par. (xxix) confer upon the Commonwealth Parliament the competence to legislate for the performance of treaty obligations? If the answer is negative, the Commonwealth will on occasions require the concurrence of the State Parliaments to perform its treaty obligations. If the answer is affirmative, a large and increasing area of Commonwealth legislative power is recognized. Neither of these considerations determines the conclusion. (at p253)

3. A denial of Commonwealth power to legislate in performance of some treaty obligations might inhibit the conduct of Australia's relations with the member States of the international community,

but the status of Australia as an international person would not be diminished thereby. If inhibition results from a constitutional limitation upon Commonwealth legislative powers, the political consequence must be accepted. As Stephen J. said in New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 CLR 337, at p 446 :

"Whatever limitations the federal character of the Constitution imposes upon the Commonwealth's ability to give full effect in all respects to international obligations which it might undertake, this is no novel international phenomenon. It is no more than a well recognized outcome of the federal system of distribution of powers and in no way detracts from the full recognition of the Commonwealth as an international person in international law."

An inability on the part of the Commonwealth to legislate in performance of some treaty obligations is not a constitutional imperative for giving an affirmative answer to the question posed. (at p254)

4. The principal argument proffered against an affirmative answer is that it would empower the Crown in right of the Commonwealth - in effect, the Executive Government of the day - by entering into an international agreement on any subject to acquire for the Commonwealth Parliament a legislative power with respect to that subject, although the Constitution had not conferred that power upon the Parliament. It is argued that legislative powers so deliberately distributed by the Constitution might be redistributed by executive action and the powers of the States eroded by the making of treaties. (By treaty I mean to include all agreements made by Australia with other international persons so as to be binding upon Australia and one or more other international persons.) Yet there is no doubt that par. (xxix) is an independent and plenary head of power which will support legislation for the performance of treaty obligations, at least in some instances. In New South Wales v. The Commonwealth (1975) 135 CLR, at p 365 , Barwick C.J., speaking of the regulations considered in R. v. Burgess; Ex parte Henry [1936] HCA 52; (1936) 55 CLR 608 , said: " . . . it is clear from the reasons for judgment that if the regulations had been apt to carry out the convention, the fact that they operated upon matters which otherwise did not fall within the power of the Parliament would not have invalidated them. Being laws validly made under the plenary power given by s. 51(xxix), they would not have needed any other power to support them." Whether the content of par. (xxix) be large or small, the external affairs power is an addition to the other powers conferred upon the federal Parliament. The subjects upon which the Parliament may legislate are necessarily enlarged by any enlargement of what is truly comprehended in "external affairs", and it is irrelevant that such an additional subject-matter is not also within another head of power. Whatever construction be placed on par. (xxix), it is clearly a growth point of federal power, for its content grows with the growth in Australia's external affairs. The connotation of external affairs is constant, but it denotes a widening range of subject. When the Australian federation came into being, the Commonwealth's external relations were almost wholly with England. Australia established its High Commission in London in 1910. But the years since 1940, when Australia first established other diplomatic posts overseas, have seen not only a widening of Australia's relationship with the members of the international community but an increase in the subjects of international cooperation, agreement and concern, an increase that would not have been generally anticipated in 1901. (at p255)

5. It has not been doubted that federal legislative power under par. (xxix) has grown since 1901. Paragraph (xxix) has been held to support legislation for the acceptance and government of the Mandated Territory of New Guinea (Jolley v. Mainka [1933] HCA 43; (1933) 49 CLR 242, at pp250, 281, 286), for the reciprocal surrender of persons charged with criminal offences (Ffrost v. Stevenson [1937] HCA 41; (1937) 58 CLR 528, at p 557), to carry into execution within Australia

the provisions of Pt X of the Treaty of Versailles (Roche v. Kronheimer [1921] HCA 25; (1921) 29 CLR 329, at pp 338-339 ; and see R. v. Burgess; Ex parte Henry (1936) 55 CLR, at p 641), to give effect to the Paris Convention for the Regulation of Air Navigation (R. v. Poole; Ex parte Henry (No. 2) (1939) 61 CLR634, at pp 644-645, 654), to carry out certain provisions of the Chicago Convention on International Civil Aviation (Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3[1965] HCA 3; ; (1965) 113 CLR 54) and to give effect to the Convention on the Territorial Sea and the Continguous Zone (New South Wales v. The Commonwealth (1975) 135 CLR, at pp 361, 364-365, 377, 475-476, 503). It would embrace an old and descredited fallacy to read down par. (xxix) in order to deny the Commonwealth Parliament power to legislate with respect to a subject-matter which had hitherto been the subject of State legislation alone. Menzies J. laid that fallacy to rest in Airlines of N.S.W. (No. 2) (1965) 113 CLR, at p 143 : "Arguments based upon the extent of State legislative power, or, the extent to which that power has been exercised, to measure or confine the legislative power of the Commonwealth, must, since the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 fall upon deaf ears." There is no constitutional imperative for rejecting the affirmative answer to the questions posed. If an affirmative answer be given, it remains for decision in the case of each treaty obligation whether a law to perform the obligation should be enacted by the federal Parliament or by the Parliaments of the States or whether no law be enacted; but that decision would be taken having regard to political, administrative and financial considerations, and not according to constitutional constraints. (at p255)

6. The validity of a law enacted in reliance on par. (xxix) does not turn upon broad considerations of the desirability or otherwise of conferring power upon the Commonwealth Parliament to perform treaty obligations; inevitably it turns upon the words of the Constitution. The elements of the external affairs power are to be found in the two phrases which in combination confer and define the relevant power to make federal laws: "with respect to" and "external affairs". (at p256)

7. The former phrase imports a connexion between a law and the subject-matter which falls within the constitutional head of power. The effect of a law is the touchstone for determining whether it is a law with respect to one of the several heads of power enumerated in the paragraphs of s. 51, at all events where the relevant head describes a field of activity. And the effect of the law is ascertained by reference to the character of the rights, duties, powers or privileges which the law creates or affects (Bank of N.S.W. v. The Commonwealth [1948] HCA 7 [1948] HCA 7; ; (1948) 76 CLR 1, at p 187 ; Fairfax v. Federal Commissioner of Taxation [1965] HCA 64; (1965) 114 CLR 1, at p 7). If a law is enacted in performance of a treaty obligation, that law is not a law with respect to the making or ratification of or accession to the treaty, but with respect to the subject of the obligation. It is the character of that subject as an external affair which may attract the support of par. (xxix), not the antecedent making, ratification or accession to the agreement. That distinction appears to underlie what Dixon J. said in R. v. Burgess; Ex parte Henry (1936) 55 CLR, at p 669 :

"If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs." (at p256)

8. When the subject-matter of a law is the subject of a treaty obligation and is "indisputably international in character", par. (xxix) is available to support the law. The present question is whether a law which creates or affects rights, duties, powers or privileges regulating a field of activity which is the subject of a treaty obligation is a law with respect to an external affair, or whether some additional quality, "indisputably international", must be found in the subject of the treaty obligation. That question did not fall for decision in New South Wales v. The Commonwealth, and the judgments in that case which harked back to what Dixon J. had said in R. v. Burgess; Ex parte Henry left that question open. Thus Gibbs J. said (1975) 135 CLR, at p 390 :

"The external affairs power authorizes the Parliament to make a law for the purpose of carrying out or giving effect to a treaty, at least if the treaty is in reference to some matter indisputably international in character."

And Mason J. said (1975) 135 CLR, at p 470 :

"There is abundant authority for the proposition that the subject matter extends to Australia's relationships with other countries and in particular to carrying into effect treaties and conventions entered into with other countries, provided at any rate that they are truly international in character (R. v. Burgess; Ex parte Henry; Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2))."

The question resolves itself into an inquiry as to what it is that stamps " a matter of internal concern" with the character of an external affair, for a law in respect of a matter of internal concern will be supported by par. (xxix) if the matter of internal concern is an external affair. (at p257)

9. Can a matter of internal concern be or become an external affair? In R. v. Sharkey [1949] HCA 46; (1949) 79 CLR 121 , a law with respect to sedition was held to be supported by par. (xxix) in so far as the purpose of the seditious conduct was exciting "disaffection against the Government or Constitution of any of the King's Dominions". A law defining a crime was supported because such a crime, though locally committed, had the potential to affect Australia's external relations. The reason for upholding the provision was stated by Latham C.J. (1949) 79 CLR, at pp 136-137 :

"The preservation of friendly relations with other Dominions is an important part of the management of the external affairs of the Commonwealth. The prevention and punishment of the excitement of disaffection within the Commonwealth against the Government or Constitution of any other Dominion may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions."

And McTiernan J. said (1949) 79 CLR at p 157 :

"Section 24A (1) refers to the Constitutions and Governments of other Dominions. To the extent to which the sections punish the expression in Australia of dissatisfaction of a seditious character with those Constitutions and Governments, I think that the sections are justified by the power vested by s. 51(xxix.) to legislate with respect to external affairs. This expression . . . covers the relations between the Government of this country and the Government of another Dominion. These relations could be affected if seditious offences against the Government or Constitution of another Dominion were committed here with impunity. The power to legislate with respect to external affairs extends to the punishment in Australia of such offences." (at p258)

10. When a particular subject affects or is likely to affect Australia's relations with other international persons, a law with respect to that subject is a law with respect to external affairs. The effect of the law upon the subject which affects or is likely to affect Australia's relationships provides the connexion which the words "with respect to" require. (at p258)

11. Those relationships, various in form and significance, are the substance of Australia's external affairs. I would adopt with respect what Stephen J. said in New South Wales v. The Commonwealth (1975) 135 CLR, at pp 449-450 :

"It is international intercourse between nation states which is the substance of a nation's external affairs. Treaties and conventions to which a nation may become a party form, no doubt, an important part of those affairs, but 'external affairs' will also include 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 are external affairs of that nation, for instance, conduct in 'violation of international comity', R. v. Burgess; Ex parte Henry, per Dixon J. (1936) 55 CLR, at p669 ".

Today it cannot reasonably be asserted that all aspects of the internal legal order of a nation are incapable of affecting relations between that nation and other nations. No doubt there are questions of degree which require evaluation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them, but contemporary experience manifests the capacity of the internal affairs of a nation to affect its external relationships. (at p258)

12. Where a particular aspect of the internal legal order of a nation is made the subject of a treaty obligation, there is a powerful indication that that subject does affect the parties to the treaty and their relations one with another. They select that aspect as an element of their relationship, the obligee nations expecting and being entitled in international law to action by the obligor nation in performance of the treaty. And therefore to subject an aspect of the internal legal order to treaty obligation stamps the subject of the obligation with the character of an external affair. That is consistent with the view of the majority of the Court in R. v. Burgess; Ex parte Henry where Latham C.J. said (1936) 55 CLR, at p 644 :"The Commonwealth Parliament was given power to legislate to give effect to international obligations binding the Commonwealth or to protect national rights internationally obtained by the Commonwealth whenever legislation was necessary or deemed to be desirable for this purpose."

Starke J. said (1936) 55 CLR, at p 657 : "The Constitution, in the legislative power to make laws with respect to external affairs, recognizes that the Commonwealth will have political relations with other Powers and States, and legislative power is conferred upon it in comprehensive terms, so that it may control those foreign or external relations, and implement obligations that may have been assumed in the course of those relations."

And Evatt and McTiernan JJ. said (1936) 55 CLR, at p681 : "In truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement."

These views were adhered to in R. v. Poole; Ex parte Henry (No. 2) [1939] HCA 19[1939] HCA 19; ; (1939) 61 CLR 634 and by Evatt J. in Ffrost v. Stevenson (1937) 58 CLR, at pp 585-586 . They were repeated in Airlines of N.S.W. (No. 2) by Windeyer J. (1965) 113 CLR, at p152 : "A law necessary to give effect to a particular treaty obligation of the Commonwealth is a law with respect to external affairs." If Australia, in the conduct of its relations with other nations, accepts a treaty obligation with respect to an aspect of Australia's internal legal order, the subject of the obligation thereby becomes (if it was not previously) an external affair, and a law with respect to that subject is a law with respect to external affairs. (at p259)

13. It follows that to search for some further quality in the subject, an "indisputably international" quality, is a work of supererogation. The international quality of the subject is established by its effect or likely effect upon Australia's external relations and that effect or likely effect is sufficiently established by the acceptance of a treaty obligation with respect to that subject. (at p260)

14. I would agree, however, that a law with respect to a particular subject would not necessarily attract the support of par. (xxix) if a treaty obligation had been accepted with respect to that subject merely as a means of conferring legislative power upon the Commonwealth Parliament. Such a colourable attempt to convert a matter of internal concern into an external affair would fail because the subject of the treaty obligation would not in truth affect or be likely to affect Australia's relations with other nations. And so Barwick C.J. in Airlines of N.S.W. (No. 2) (1965) 113 CLR, at p85 expressed his opinion that "the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament". Windeyer J. (1965) 113 CLR, at p153 also reserved his opinion upon the controversial question "whether the mere making of a treaty between the Commonwealth and some foreign country upon any subject can enlarge the constitutional powers of the Commonwealth Parliament". But the circumstances surrounding the making of the treaty there in question - the Chicago Convention earlier mentioned - clearly attracted the external affairs power to sustain the validity of a law enacted in conformity with the obligations accepted under the Convention. The Chief Justice listed the indicia which excluded any suggestion that the treaty was not an "external affair" (1937) 58 CLR, at pp 585-586 :

"Suffice it now to say that in my opinion the Chicago Convention, having regard to its subject matter, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes upon the parties to it unquestionably is, or, at any rate, brings into existence, an external affair of Australia." (at p260)

15. 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. 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. (at p260)

16. 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. If there were a disconformity between ss. 9 and 12 on the one hand and the Convention obligation on the other, the Convention obligation might fail to stamp the character of an external affair upon some part of the subject-matter of ss. 9 and 12, and further consideration would have to be given to their validity (cf. R. v. Burgess; Ex parte Henry; Airlines of N.S.W. (No. 2), esp. per Menzies J. (1965) 113 CLR, at p 141). (at p261)

17. If there had been a material disconformity, it may have been necessary to consider whether any parts of ss. 9 and 12 which were not in implementation of the Convention might have been supported as an appropriate legislative means of performing an obligation to eliminate racial discrimination as an obligation binding in international law dehors the Convention. It is unnecessary to examine the nexus between a non-treaty obligation and a law enacted in purported reliance on par. (xxix) in performance of such an obligation. I would defer that examination until the circumstances of some particular case require it. It suffices in this case that ss. 9 and 12 were enacted in performance of the Convention obligation and are therefore valid. (at p261)

18. It was sought to uphold the validity of these sections in reliance also upon s. 51(xxvi) of the Constitution. I would not hold these sections to be a law with respect to "The people of any race for whom it is deemed necessary to make special laws". It is of the essence of a law falling within par. (xxvi) that it discriminates between the people of the race for whom the special laws are made and other people, whereas the Act seeks to eliminate racial discrimination. Sections 9 and 12 of the Act protect any person aggrieved by a contravention of their respective provisions, irrespec tive of his race or of the race of the person whose conduct he considers to have contravened these provisions. These provisions sweep into their protection the people of all races, whether or not they are the people of a race for whom it is deemed necessary to make special laws. The Convention itself exhibits the difference between a law which discriminates between the people of a particular race and other people and a law which is calculated to eliminate racial discrimination. The general proscription of racial discrimination is made subject to an exception in favour of "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms" (Art. 1, cl. 4). Were it not for that exception, beneficial discriminatory laws would have fallen within the Convention obligation "to prohibit and to eliminate racial discrimination in all its forms" (Art. 5). Paragraph (xxvi) is not, in my opinion, a foundation for the validity of ss. 9 and 12 of the Act. (at p262)

19. The action brought by the State of Queensland against the Commonwealth in this Court seeking a declaration that the Act is invalid or alternatively a declaration that particular sections of the Act are invalid has been argued together with those parts of Mr. Koowarta's action against Mr. Bjelke-Petersen and others pending in the Supreme Court of Queensland which have been removed into this Court. The relevance of ss. 9 and 12 to Mr. Koowarta's cause of action has been treated without objection as sufficient to warrant the determination of their validity in the action in which the State of Queensland seeks a declaration. In the latter action it was not appropriate to consider other sections of the Act. The conclusion that ss. 9 and 12 are valid therefore disposes of the live issues in that action, but it leaves outstanding a further issue for determination upon the defendants' demurrer to Mr. Koowarta's statement of claim. (at p262)

20. The whole of the defendants' demurrer was removed into this Court. The grounds of the demurrer were the invalidity of the provisions of the Act upon which Mr. Koowarta relies to found his claim for relief and a further ground, namely, "the Plaintiff is not, within the meaning of the

Racial Discrimination Act 1975, a person aggrieved by the matters alleged in the Statement of Claim and does not otherwise have locus standi to bring this action". The ground must now be considered. Mr. Koowarta seeks to enforce statutory rights conferred by the operation of s. 24(1) of the Act upon ss. 9 and 12 respectively. Section 24(1) provides:

"A person aggrieved by an act that he considers to have been unlawful by reason of a provision of Part II may subject to this section institute a proceeding in relation to the act by way of civil action in a court of competent jurisdiction for any one or more of the remedies specified in section 25." Part II includes ss. 9 and 12. The remedies claimed by the plaintiff included damages specified in s. 25. Section 25(d) provides that where a defendant does an act which is unlawful by reason of a provision of Pt II, the court may award

> "damages against the defendant in respect of -
> (i) loss suffered by a person aggrieved by the relevant act, including loss of any benefit that that person might reasonably have been expected to obtain if the relevant act had not been done; and
> (ii) loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act". (at p263)

21. As Mr. Koowarta's action rests on ss. 9 and 12 of the Act, he is not a person aggrieved and he has no standing to institute proceedings in the Supreme Court unless he claims relief upon facts which fall within those sections or within some part of them. The defendants submit that the facts alleged in the statement of claim do not fall within any part of those sections and that there is no statutory right upon which the plaintiff might rely. It was not argued that the defendants were not bound by ss. 9 and 12 in respect of the acts alleged in the statement of claim. It is necessary briefly to examine the allegations made by the plaintiff and the sections upon which he relies. (at p263)

22. The Aboriginal Land Fund Commission ("the Commission"), established by s. 4 of the Aboriginal Land Fund Act 1974 (Cth), entered into a written agreement with the lessees of the Archer River Pastoral Holding in Queensland for the purchase of the lease of that Pastoral Holding. The Commission was authorized to do so by s. 21 of its Act. The lease was transferable from the vendor Crown lessees to the Commission with the written permission of the Minister for Lands which the Minister was empowered to grant or refuse in his absolute discretion (The Land Act 1962 (Q.), s. 286). Permission was refused. The second defendant, who was then the Minister for Lands, gave a statement of reasons for the refusal, recalling an earlier declaration of government policy in these terms:
"The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation."

He then quoted the decision of the Queensland Cabinet with respect to the transfer of the Archer River Pastoral Holding:
"(1) That Cabinet's policy regarding Aboriginal reserve lands . . .

> remain uncharged.(2) That in accordance with such policy and as it is considered that sufficient land in Queensland is already reserved and available for use and benefit of Aborigines, no consent be given to the transfer of Archer River Pastoral Holding No. 4785 to the Aboriginal Land Fund Commission." (at p263)

23. Upon these allegations, which were admitted, it would be open to find that the reason for refusal of permission was the race of the persons who were the proposed users of the Pastoral Holding. So much was conceded. Mr. Koowarta, the plaintiff, alleges that he, an Aboriginal and a member of the Winychanam Group of Aboriginal people, had moved the Commission to enter into the agreement for the purchase of the Pastoral Holding with a view to its use by the group for grazing and other purposes. The Commission was empowered by its Act to grant an interest in land to an Aboriginal corporation for the purpose of enabling the members of the corporation to occupy that land or to an Aboriginal land trust for the purpose of enabling Aboriginals to occupy that land (Aboriginal Land Fund Act, s. 20(1)). In In re Ross; Ex parte Attorney-General (N.T.) [1980] HCA 2; (1980) 54 ALJR 145, at p 149 it was held that "when the Commission acquires an interest in land it must be for the purpose of enabling Aborigines to occupy it". The statement of claim implies that, had permission for the transfer to the Commission been granted, the Winychanam Group including the plaintiff would have used the land. The plaintiff alleges that he is a person aggrieved, that he has suffered loss, and that he has suffered loss of dignity, injury to feelings and humiliation, and he claims damages. (at p264)

24. The provisions which, upon the facts alleged, appear to have the greatest relevance are ss. 9(1) and 12(1)(d). 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." (at p264)

25. 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] HCA 51; (1980) 147 CLR 142, at p 159 ; Reg. v. Chief Immigration Officer; Ex parte Bibi (1976) 1 WLR 979, at p 984; (1976) All ER 843, at p 847). 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 pp 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 (Vict.) v. The Commonwealth [1945] HCA 30; (1945) 71 CLR 237, at p 267). (at p265)

26. 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. (at p265)

27. 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 subsection. 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 par. (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. (at p266)

28. But no licence was granted to the plaintiff. He acquired no right which he was entitled to enjoy. Is he "aggrieved" by the refusal of permission to transfer the lease to the Commission because he has lost an expectancy of a licence, albeit an expectancy which was not founded upon any legal or equitable right vested in him? It is unusual for a statute to impose a duty not to prevent another from getting, having or using a mere opportunity to obtain a legal right; it is unusual for a statute to confer a statutory right reciprocal to such a duty. Nevertheless, as that appears to be the object and purpose of the Convention, it is the effect of the act. The essence of the problem which the Convention sets out to remedy is not merely the denial of equality in the enforcement of legal rights but the denial of an opportunity to acquire legal rights or to avoid the incurring of legal liabilities when that denial of opportunity is based on race, colour, descent or national or ethnic origin. The Convention seeks not only the equal protection of the law for persons of all races, but equal opportunity to obtain the rights and freedoms which the law protects. The effect of s. 9 of the Act, though reproducing the Convention definition of racial discrimination, would be small indeed if "the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom" related only to rights which might be enforced or freedoms which might be defended

under the laws otherwise in force. In forbidding any act involving racial discrimination, s. 9 fulfils the Convention undertaking to prohibit racial discrimination in all its forms (Arts. 1 and 5). The generality of s. 9 is not limited by the subsequent more particular provisions of Pt II (s. 9(4)). The scope of s. 9 is recognized by the provision in s. 25(d)(i) for the recovery of damages for the "loss of any benefit that that person might reasonably have been expected to obtain". The loss of a benefit which was expected to be obtained would not be linked causally to an act contravening s. 9 unless that section (and perhaps the more particular provisions of Pt II) prohibited conduct which might occasion the loss of an expectation of benefit as well as conduct which might occasion the loss of a benefit to which the person aggrieved was entitled. (at p267)

29. Thus "a distinction, exclusion, restriction or preference" which has the "effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing" of a "civil right" comprehends the denial of an opportunity to acquire a legal right to use land. It follows that a denial of an opportunity for the plaintiff to obtain a licence to use land satisfies that element of s. 9(1) upon which argument was presented in the present case. As such a denial is implied in the facts alleged in the statement of claim, I would uphold the plaintiff's standing to sue under s. 9. (at p267)

30. The plaintiff's standing under s. 12(1) depends upon whether, on the facts alleged, he is "a second person" or, if the Commission is a second person, he is an "associate of that second person" within the meaning of those terms in the sub-section. The second person mentioned in par. (d) of s. 12(1) is a person who is refused permission "to occupy any land". (at p267)

31. When an Act relating to racial discrimination refers to the occupation of land, prima facie the reference is to the physical occupation of the land by natural persons. In Madrassa Anjuman Islamia v. Johannesburg Municipal Council (1922) 1 AC 500 , the Judicial Committee considered a provision of the Vrededorp Stands Act 1907, that the owner of a stand should not "permit any Asiatic, native or coloured person (other than the bona fide servant of a white person for the time being residing on the stand) to reside on or occupy the stand or any part thereof". Viscount Cave, who delivered their Lordships' judgment, said (1922) AC, at p 504 :

"The word 'occupy' is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability; . . . At other times 'occupation' demotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or pew, or where a person who allows his horses or cattle to be in a field or to pass along a highway, is said to be the occupier of the field or highway for the purpose of s. 68 of the Railway Clauses Act, 1845 . . . Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used. In the present case it appears reasonably clear that the word is used in the second or more popular sense above described. . . . "

And later (1922) AC, at p 505 :

". . . it is plain, from the fact that the prohibition is made to depend on race or colour, that it is the physical presence of the persons described, and not their right of possession in a legal or technical sense, which the statute has in view." (at p268)

32. In my opinion, "occupy" in s. 12(1)(d) connotes physical occupation by a natural person. On this construction, the Winychanam Group were the proposed occupants of the land, not the Commission. It may be doubted whether a corporation could occupy land in the sense in which that term is used in s. 12(1)(d). In the Madrassa Case, a company had been formed by the Asiatic persons occupying

the stand, and the company became the lessee of the stand. Their Lordships rejected the proposition that the company was in occupation of the Stand. The company, said Viscount Cave (1922) AC 505 , "having no corporeal existence, could not occupy the stand in the above sense". (at p268)

33. Occupation for the purposes of par. (d) is not necessarily exclusive occupation. It may be occupation with others; it may be as a licensee or invitee of another occupier (see sub-s. (2)). It is to be distinguished from the right to occupy mentioned in par. (e). It follows that if an owner of land or another with the requisite authority refuses permission to a person physically to occupy it, that is a refusal of permission to occupy land within par. (d). The nature or source of the right in enjoyment of which an intending occupant would otherwise have occupied the land is not material to the question whether the intending occupant is refused permission to occupy. (at p268)

34. On the facts alleged in the statement of claim, it was the proposed physical occupation of the Pastoral Holding by an Aboriginal group (including, as it happened, the plaintiff) which the Minister refused to permit. The Minister refused permission to occupy by refusing permission to transfer the lease to the Commission. The plaintiff, as one of those who was refused permission to occupy the Pastoral Holding, is "a second person" within the meaning of that term in par. (d) and he is a person aggrieved by the refusal. It is unnecessary to consider whether the plaintiff might be an "associate" of the Commission, or whether the Commission could have gone into occupation of the land if permission to transfer had not been refused. I would uphold the plaintiff's standing to sue under s. 12. (at p268)

35. The demurrer in Mr. Koowarta's action must therefore be overruled with costs and the action remitted to the Supreme Court of Queensland. The action in this Court between the State of Queensland and the Commonwealth of Australia should be dismissed with costs. (at p268)

ORDER

KOOWARTA V. BJELKE-PETERSEN

Demurrer overruled with costs.

STATE OF QUEENSLAND V. THE COMMONWEALTH

Demurrer allowed. Action dismissed with costs.

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