

Franklin Dam Case & External Affairs Power

The [Tasmanian Dam case](#) is a landmark case in Australian Constitutional law.

This case was concerned with the Commonwealth Government succeeding in stopping a large hydro-electric dam proposed to be constructed in South-West Tasmania. The seven judges of the High Court split 4:3, in deciding that the Commonwealth has the power under section 51 (xxix) (External affairs) of the [Australian Constitution](#), to stop the dam based on Australia's international obligations under the [World Heritage Convention](#).

In the Franklin Dam case, the High Court was asked to consider whether the Commonwealth could use its exclusive power to legislate on external affairs, to interfere with a residual power of a state.

External affairs power S.51(xxix)

Under this section of the constitution, the Commonwealth Parliament has the right to enter into international treaties with other nations. These frequently relate to issues of human rights and the environment (eg: Universal Declaration of Human Rights). However, when the Commonwealth signs such an agreement, this does not automatically create new law in Australia. To do this, the Parliament must pass legislation based on the relevant treaty or convention, which then puts the treaty into effect in Australia. **Simply signing the international treaty does not make Australian Law.**

Background information

In 1972 UNESCO adopts the [Convention for the Protection of the World Cultural and National Heritage](#), 2 years later (1974), using the external affairs power, the Commonwealth ratifies (signs) this convention. (Keep in mind, this does NOT mean that it automatically becomes law in Aust).

In 1981 the premier of Tasmania requested to the Commonwealth Government that three of Tasmania's national parks be placed on the [World Heritage List](#). In 1982 the Tasmanian Government passed the [Gordon River Hydro-Electric Development Act](#) to commence construction of a dam on the Gordon River in an effort to avoid flooding in the area.

In Dec 1982, these three national parks within Tasmania were listed on the [World Heritage List](#). In May 1983, the Commonwealth Government passes the [World Heritage Properties Conservation Act](#), which allowed the Governor-General to declare that certain areas (relating to world heritage sites), must be protected from construction works.

What does this mean?

This meant that the dam being built on the Gordon River, which was now within a World Heritage listed Park, contravened the Commonwealth's legislation to protect these areas from construction.

The case

In 1983 the Commonwealth commenced legal action in the High Court, claiming that the 1982 Tasmanian legislation (regarding the construction of the dam) is invalid and that construction should cease. In a counter attack, the Tasmanian Government began their own proceedings in the High Court, stating that the 1983 Commonwealth Act (to protect world heritage areas) was invalid as the area of law in question was a residual power and therefore claimed the Commonwealth had no jurisdiction (power) to legislate in the area.

The findings

The High Court found in a majority decision (4:3), that if the Commonwealth Parliament was going to be permitted to enter into External Affairs (s.51(xxix)), then it should be able to legislate to enforce these treaties in Australia even if it was in an area of residual power. These judges could be seen to

be adopting a "broad view" of the external affairs power. The Dissenting judges agreed with the Tasmanian claim that to give s.51 a broad reading was a *gross interference with residual powers* (powers of the states).

Significance of interpretation of the constitution

The effect that this case had on the division of powers, was that it ultimately increased the law-making powers of the Commonwealth by allowing them to legislate in an area that has previously been a residual power of the states.

Since the Tasmanian Dam case, the Commonwealth have used the 'external affairs power' to legislate in a number of areas which were considered to be within the law-making power of the states.

A further example 'Human Rights (Sexual Conduct) Act 1994'

This act passed by the Commonwealth, effectively eliminated provisions in Tasmania criminal law that has prohibited certain homosexual acts between consenting adults. The Commonwealth has relied upon article 17 of the International Covenant on Civil and Political Rights, which stated that sexual conduct between consenting adults should not be subject to 'arbitrary interference' from governments.



1. The Tasmanian government wanted to make a dam. This was within the Tasmanian government's law-making powers as per the Commonwealth Constitution.



2. Under s.51, Commonwealth Parliament signed an international treaty to protect world heritage sites. They then passed legislation to uphold this treaty within Australia. 3 of Tasmania's national parks were on this list. The Gordon river, and therefore the dam construction was in one of these heritage listed parks.



3. **ISSUE FOR THE HIGH COURT.** To interpret the constitution to determine whether the Commonwealth can legislate in an area of residual power if it involves a matter of external affairs (exclusive power).

Tasmanian Government.

Claimed residual power over the matter.



Commonwealth Parliament. Claimed they had power to legislate based on their international obligations.



4. **HIGH COURT** found in favour of Commonwealth Parliament. YOUR TASK Explain why, and the impact it had on the division of powers.