GERHARDY . . . . . APPELLANT;
COMPLAINANT,

AND

BROWN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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1984, ADELAIDE, *Aug.* 20, 21.

1985, CANBERRA, *Feb.* 28.

Gibbs C.J., Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.

Constitutional Law (Cth) — Inconsistency between Commonwealth and State laws — Commonwealth Act prohibiting racial discrimination — Special measures for securing adequate advancement of certain racial groups deemed not racial discrimination — State Act granting tract of land to people of particular Aboriginal group — Prohibition of entry by other persons — Whether inconsistency — Whether State Act a "special measure" — The Constitution (63 & 64 *Vict. c.* 12), *s.* 109 — *Racial Discrimination Act* 1975 (*Cth*), *ss.* 9, 10 — *Pitjantjatjara Land Rights Act* 1981 (*S.A.*), *ss.* 18, 19.

Section 9(1) of the *Racial Discrimination Act* 1975 (Cth) made it 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 10(1) provided: "If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin." A "human right or fundamental freedom" in s. 9 and a "right" in s. 10 included by the incorporation of Art. 5(d)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination, "the right to freedom of movement and residence within the border of the State". By force of s. 8(1), ss. 9 and 10 did not apply to "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 . . .".

The *Pitjantjatjara Land Rights Act* 1981 (S.A.) vested the title to a large tract of land in the north-west of South Australia, comprising more than one-tenth of the land area of the State, in the Anangu Pitjantjatjaraku, a

body corporate comprising all Pitjantjatjaras and some other groups of Aboriginal people. Section 18 provided that "All Pitjantjatjaras have unrestricted rights of access to the lands." Section 19 prohibited any non-Pitjantjatjara person from entering the lands without permission.

Held, that the State Act was a "special measure" within s. 8(1) of the Commonwealth Act, and accordingly s. 19 of the State Act was a valid law of the Parliament of South Australia.

Per Gibbs C.J., Mason and Murphy JJ. If the State Act had not been a "special measure" within s. 8(1), s. 19 of the State Act would have been inconsistent with s. 10 of the Commonwealth Act because the right of unrestricted access to the lands was a "right" within s. 10.

Per Brennan J. If the State Act had not been a "special measure", s. 19 would have been inconsistent with both ss. 9 and 10 of the Commonwealth Act.

Per Deane J. If the State Act had not been a "special measure", s. 19 would have been inconsistent with s. 9 of the Commonwealth Act.

Decision of the Supreme Court of South Australia: *Gerhardy v. Brown* (1983), 34 S.A.S.R. 452, reversed.

CAUSE removed under s. 40 of the *Judiciary Act* 1903 (Cth).

Robert John Brown was charged on the complaint of David Alan Gerhardy that on or about 27 February 1982 he committed a breach of s. 19(1) of the *Pitjantjatjara Land Rights Act* 1981 (S.A.) ("the State Act"). The complaint was heard by a special magistrate who found, inter alia, that the defendant, who was an Aboriginal but not a Pitjantjatjara, was on 27 February 1982 on a place within the land the subject of the State Act although he had no written permission from the Anangu Pitjantjatjaraku, the owner of the land. The magistrate stated a case which raised a number of questions of law for the opinion of the Supreme Court of South Australia, including the question whether s. 19 of the State Act was invalid or restricted in its operation by reason of the *Racial Discrimination Act* 1975 (Cth). The matter came before Millhouse J., who held that s. 19 of the State Act was invalid because it was in conflict with s. 9 of the Commonwealth Act ("the Commonwealth Act") and Art. 5(d)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination set out in the schedule to the Commonwealth Act (1). The complainant gave a notice of appeal to the Full Court of the Supreme Court. On the application of the Attorney-General for South Australia and the complainant, that part of the action that is comprised in the notice of appeal was removed into the High Court under s. 40 of the *Judiciary Act* 1903 (Cth).

(1) (1983) 34 S.A.S.R. 452.

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M. F. Gray Q.C., Solicitor-General for the State of South Australia, (with him *B. M. Selway*), for the appellant. The act of refusal of entry to the land based on the authority given by s. 19 of the State Act is not obnoxious to s. 9 of the Commonwealth Act. It is only potentially obnoxious. A State law authorizing the doing of an act which is capable of being inconsistent with Commonwealth law in the manner of its exercise, is not a law to which s. 109 of the Constitution applies. There is no allegation that the grantee has refused permission. The grant of the land is not forbidden by s. 9. There is no discrimination within s. 9 when there is an objective or reasonable justification in the distinction, exclusion, restriction or preference. For there to be discrimination the distinction or differentiation must be arbitrary, invidious or unjustified: *South West Africa Cases (Second Phase)* (2); *Advisory Opinion on Minority Schools in Albania* (3). The distinction here is not based on race as such, but on the recognition of the rights of traditional owners of the land. [He referred to *Reg. v. Toohey; Ex parte Meneling Station* (4).] In any event, the State Act is a "special measure" within Art. 4.1 of the Convention and s. 8 of the Commonwealth Act. Section 10 of the Commonwealth Act does not apply because there is no particular race that suffers a disadvantage. "All persons other than Pitjantjatjaras" do not constitute a race. The right to freedom of movement is subject to reasonable regulation.

G. Griffith Q.C., Solicitor-General for the Commonwealth, (with him *J. R. Mansfield*), for the Attorney-General for the Commonwealth, intervening in support of the appellant. Section 19 of the State Act is not inconsistent with the Commonwealth Act. The subject-matters of the Acts are different. Section 19 contains no provision, nor does it enter any field, relating to racial discrimination. Rather, it provides legal recognition to a certain type of interest in land not previously recognized, namely traditional ownership. It is based on traditional ownership and not on race. Section 9 of the Commonwealth Act is not a source of invalidity. The State Act is not an "act" by a "person" within s. 9(1). If any section is relevant it is s. 10. The rights with which that section deals do not include the right of freedom of movement on to private land or the right of access to such land. We make no submission about Art. 1.4. If s. 10 did apply to s. 19 of the State Act, it would create a Commonwealth right of entry only "to the same extent" as the right

(2) [1966] I.C.J., at pp. 293, 305-306.
(3) (1935) Ser. A/B No. 64.
(4) (1982) 158 C.L.R. 326, at pp. 355-357.

of a Pitjantjatjara. Such a right exists only if such a person also is a "traditional owner" of the land. An application of s. 10 would not render s. 19 void for inconsistency, but would merely create a corresponding right for persons who were "traditional owners" of the lands but were not Pitjantjatjaras. That would not lead to invalidity.

R. Merkel Q.C. (with him *H. Reicher*), for the Anangu Pitjantjatjaraku, intervening by leave. The legislative intents underlying, and the subject-matters covered by, the Commonwealth and State Acts are different. The former is a complete statement of the law in Australia relating to racial discrimination. The latter is a legislative restoration of rights, benefits and privileges in relation to the lands to those people who have, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibility for, the lands. [He referred to *Reg. v. Toohey; Ex parte Northern Land Council* (5); *The Commonwealth v. Tasmania* (the *Tasmanian Dam Case*) (6); and *Milirrpum v. Nabalco Pty. Ltd.* (7).] The rights, benefits and privileges conferred by the State Act on the traditional owners are in furtherance of the objects of that Act. It does not contain any provision, nor does it enter upon the field, relating to racial discrimination. The criterion employed is based not on race but on traditional ownership. There is no direct inconsistency. The State law has not altered, impaired or detracted from the operation of the Commonwealth law or from the objects sought to be achieved by that law. [He referred to *Victoria v. The Commonwealth* (8); *New South Wales v. The Commonwealth* (9); *Metal Trades Industry Association v. Amalgamated Metal Workers & Shipwrights' Union* (10); and *Ansett Transport Industries (Operations) Ltd. v. Wardley* (11).] Analysis of ss. 9, 10, 11 and 12 of the Commonwealth Act and s. 19 of the State Act shows them to be mutually exclusive and not overlapping. [He referred to *Reg. v. Winneke; Ex parte Gallagher* (12).] The State Act confers novel benefits on the traditional owners. The Commonwealth Act does not contain any provision, or exhibit any intent, that any of those benefits (including those conferred by s. 19) are not to be provided by the State Act. The lands in question were not public lands available for public use and enjoyment. Section 9 of the Commonwealth Act has no application to s. 19 of the State Act. The only act

(5) (1981) 151 C.L.R. 170.
(6) (1983) 158 C.L.R. 1.
(7) (1970) 17 F.L.R. 141.
(8) (1937) 58 C.L.R. 618, at p. 630.
(9) (1983) 151 C.L.R. 302.
(10) (1983) 152 C.L.R. 632.
(11) (1980) 142 C.L.R. 237, at pp. 249-250.
(12) (1982) 152 C.L.R. 211.

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which was capable of being proscribed was that of granting or refusing permission. The Act does not expressly or impliedly provide for that decision to be based on racial grounds. No "right or freedom" is nullified or impaired. The respondent had no right or freedom to enter another's property: *Koowarta v. Bjelke-Petersen* (13). The right or freedom must be in some field of "public" life. The right or freedom to enter on private land is not in public life. Section 10 does not apply. Neither s. 19 nor any other provision of the State Act provides for a person of a "particular race" not to enjoy, or to enjoy to a more limited extent, rights enjoyed by persons of other races. Section 8(1) of the Commonwealth Act excludes the application of ss. 9 and 10 by reason of Art. 1.4. The State Act is a special measure for securing advancement of a people. There is no evidence that a period of time has been, or indeed will be, reached where the proviso to the article will apply.

T. A. Gray Q.C. and *W. J. N. Wells*, for the respondent. Section 19 of the State Act is inconsistent with the Commonwealth Act. The latter is intended as a complete statement of the law for Australia relating to racial discrimination: *Viskauskas v. Niland* (14). Section 9 of the Commonwealth Act identifies precisely the distinctions that amount to discrimination. The State Act allows an exception to the prohibition of racial discrimination, or otherwise detracts from the efficacy of the Commonwealth Act. In addition, there is direct inconsistency between the two Acts. Section 9 of the Commonwealth Act renders unlawful that which ss. 6(1) and 19(5) of the State Act authorize, namely the process of negotiating access and of deciding whether to grant or refuse access to a non-Pitjantjatjara. Section 9 renders unlawful that which ss. 38 and 19(1) authorize, namely the prosecution of the respondent for an offence against s. 19(1). Section 9 renders unlawful the enactment of ss. 18 and 19 of the State Act. Section 8 of the Commonwealth Act implies that a "special measure" would be an "act" within s. 9. Sections 6 and 8 of the Commonwealth Act imply that the Crown in right of the State may be a "person" within s. 9. In relation to the respondent, a non-Pitjantjatjara Aboriginal, the State Act is a law to which s. 10(1) of the Commonwealth Act applies. Section 8(1) of the Commonwealth Act does not authorize the State Act as a "special measure". The State Act does not have as its "sole purpose" such protection of a certain racial or ethnic group as is necessary to ensure equal enjoyment or exercise of human rights and fundamental freedoms. It leads to and supports the maintenance of separate

(13) (1982) 153 C.L.R. 168.

(14) (1982) 153 C.L.R. 280.

rights for different racial groups. The objects contemplated by Art. 1.4 of the Convention are the redress of de facto inequality between groups due to the economic, social and cultural conditions prevailing before the adoption of the measure. The Act does not deal with inequality between groups, but grants lands to a particular group and gives it special rights and powers. Alternatively, the Act draws unjustified and arbitrary distinctions, and no reasonable relationship of proportionality exists between the means employed and the aim sought to be realized.

M. F. Gray Q.C., in reply.

Cur. adv. vult.

1985, Feb. 28.

The following written judgments were delivered:—

GIBBS C.J. The question for decision in this case is whether s. 19 of the *Pitjantjatjara Land Rights Act* 1981 (S.A.) ("the Act") is rendered invalid or otherwise affected by the *Racial Discrimination Act* 1975 (Cth), as amended ("the *Racial Discrimination Act*"). The main purpose of the Act was to vest the title to a large tract of land in the north-west of South Australia in the Aboriginal peoples who are said to be its traditional owners. The area in question is called in the Act "the lands", an expression which is defined by s. 4 to mean the lands described in the first schedule. Those lands, we are told, comprise an area of 102,630 square kilometres — i.e., more than one-tenth of the total land area of South Australia which is 984,377 square kilometres. The area is sparsely populated. According to the report made by the Pitjantjatjara Land Rights Working Party of South Australia in June 1978, the Aboriginal people who live in the area, about 2,000 in number, fall into three main groups, apparently distinguished by language or dialect. Those groups, the Ngaanatjara, the Pitjantjatjara and the Yungkutatjara, are associated with different areas within the lands but tend to see themselves as broadly related. The Act embraces all three groups under one name, for by s. 4 "Pitjantjatjara" means:

> "a person who is—
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> (a) a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people;
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> and
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> (b) a traditional owner of the lands, or a part of them".

With regard to the concluding words of this definition, it is strongly suggested by the report that none of the "Pitjantjatjara", as defined, were the traditional owners of all the lands; in other words, some were the traditional owners of some areas and others of other areas,

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although the areas with which the various groups were associated are not capable of being precisely defined. There is, however, no evidence or clear agreed statement before us in relation to these matters. The lands comprised a declared Aboriginal reserve (the North-West Reserve) and a number of pastoral leases, some at least of which related to a property known as Granite Downs Station. The material before us does not make it clear whether any person other than Pitjantjatjaras resided on the lands besides those who may have lived on Granite Downs and a precious stones field at Mintabie. There were at least two dedicated roads through the area, the Stuart Highway and the Oodnadatta to Granite Downs Road.

The Act constituted a body corporate, called "Anangu Pitjantjatjaraku" (which means the Pitjantjatjara peoples), of which all Pitjantjatjaras are members: s. 5. There is constituted an Executive Board which consists of eleven elected members, all Pitjantjatjaras (s. 9), and which is required to carry out, and act in conformity with, the resolutions of Anangu Pitjantjatjaraku: s. 11. Subject to the Act, the proceedings of Anangu Pitjantjatjaraku and the administration of its affairs are to be governed by a Constitution: s. 14.

By s. 15 the Governor may issue a land grant in fee simple of the whole or any part of the lands to Anangu Pitjantjatjaraku: s. 15(1). We are told (although it was not in evidence) that a grant of the whole of the lands was made on 30 October 1981.

Section 18 provides that "All Pitjantjatjaras have unrestricted rights of access to the lands." It is necessary to set out the provisions of s. 19 in full. That section reads:

> "(1) A person (not being a Pitjantjatjara) who enters the lands without the permission of Anangu Pitjantjatjaraku is guilty of an offence and liable to a penalty not exceeding the maximum prescribed by subsection (2).
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> (2) The maximum penalty for an offence against subsection (1) is—
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> (a) where the offence was committed intentionally — a fine of two thousand dollars plus five hundred dollars for each day during which the convicted person remained on the land after the unlawful entry;
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> or
>
> (b) in any other case — a fine of two hundred dollars.
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> (3) An application for permission to enter the lands—
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> (a) must be in writing, and lodged with the Executive Board; and
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> (b) must set out—
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> (i) the purpose for which the applicant seeks to enter the lands;
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> (ii) the period for which the applicant seeks to be upon the lands;

and

(iii) the time at which the applicant seeks to enter the lands, and the place at which he intends to make his entry.

(4) The applicant shall, at the request of Anangu Pitjantjatjaraku, furnish such further information as it may reasonably require to determine the application.

(5) Upon an application under this section, Anangu Pitjantjatjaraku may, by instrument in writing—

(a) grant permission to enter the lands unconditionally;

(b) grant permission to enter the lands subject to such conditions as it thinks fit;

or

(c) refuse permission to enter the lands.

(6) Anangu Pitjantjatjaraku may, upon such conditions as it thinks fit, delegate any of its powers under subsection (5) to any group of Pitjantjatjaras.

(7) A delegation under subsection (6) is revocable at will and does not derogate from the power of Anangu Pitjantjatjaraku to act itself in any matter.

(8) This section does not apply to—

(a) a police officer acting in the course of carrying out his official duties;

(b) any other officer appointed pursuant to statute acting in the course of carrying out his official duties;

(c) a person acting upon the written authority of the Minister of Aboriginal Affairs, who enters the lands for the purpose of carrying out functions that have been assigned to a Minister or instrumentality of the Crown or a department of government;

(d) a member of the Parliament of the State or the Commonwealth, a person who is genuinely a candidate for election as a member of the Parliament of the State or the Commonwealth, or a person who is accompanying and genuinely assisting any such member or candidate;

(e) entry upon the lands in case of emergency;

or

(f) entry upon the lands in pursuance of Division III, Division IV or Division VI of this Part [Part III].

(9) Where a person proposes to enter the lands in pursuance of subsection (8) (b), (c) or (d) reasonable notice of the time, place and purpose of the proposed entry must be given to Anangu Pitjantjatjaraku.

(10) If Anangu Pitjantjatjaraku, by notice in writing to the Minister of Aboriginal Affairs, objects to an authorized person entering or remaining upon the lands, the Minister shall revoke or modify the authorization in order to give effect to the objection unless he is satisfied that there are sufficient reasons why the authorization should continue notwithstanding the objection.

(11) Where a pastoral lease remains in force in relation to any part of the lands, the holder of the lease, and any member of his

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family, any employee or member of an employee's family, and any other person authorized in writing by the lessee, may, without the permission of Anangu Pitjantjatjaraku, enter land comprised in the lease.

(12) Where an authorization in granted by a lessee under subsection (11), notice in writing of the authorization shall be given by the lessee to Anangu Pitjantjatjaraku within one month after the authorization was granted."

Division III provides a procedure under which permission may be obtained to carry out mining operations on the lands and, if such permission is granted, the permittee and his agents, contractors and employees may enter the lands accordingly. Division IV entitles certain classes of persons, without permission under the Act, to enter the Mintabie precious stones field. Division VI entitles any member of the public to free and unrestricted access to either of the roads already mentioned and to land comprised in a road reserve.

The respondent, Robert John Brown, was charged on the complaint of David Alan Gerhardy that on or about 27 February 1982 he committed a breach of s. 19(1) of the Act. The complaint was heard by a special magistrate who, after making certain findings, stated a case which raised a number of questions of law for the opinion of the Supreme Court of South Australia. For present purposes, it is unnecessary to refer to the facts as found by the magistrate other than to say that the defendant, who is an Aboriginal but not a Pitjantjatjara, was on 27 February 1982 on a place within the lands although he had no written permission from the Anangu Pitjantjatjaraku or from the Executive Board or any delegate of either body to enter the lands. The matter came before Millhouse J., who decided to deal first with the constitutional question whether the Act was wholly or partly invalid. He held that s. 19 was invalid because it is in conflict with s. 9 of the *Racial Discrimination Act* and Art. 5(d)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination ("the Convention") set out in the schedule to the *Racial Discrimination Act*. He did not deal with the other arguments raised on behalf of the defendant and they do not concern us. From his decision the complainant gave a notice of appeal to the Full Court of the Supreme Court. On the application of the Attorney-General for South Australia and the complainant that part of the action that is comprised in the notice of appeal has been removed into this Court under s. 40 of the *Judiciary Act*.

The provisions of the *Racial Discrimination Act* were fully discussed in *Koowarta v. Bjelke-Petersen* (15) and again in

(15) (1982) 153 C.L.R. 168.

Viskauskas v. Niland (16). For the purposes of this judgment it is necessary to refer in particular to the following provisions. Section 8(1) provides as follows:

> "This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3)."

By par. 4 of Art. 1 of the Convention it is provided:

> "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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

Sub-sections (1) and (2) of s. 9 provide as follows:

> "(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."

Article 5 provides, inter alia, as follows:

> "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:
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> . . .
>
> (d) Other civil rights, in particular:
>
> (i) The right to freedom of movement and residence within the border of the State".

Section 10(1) and (2) provide as follows:

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or

(16) (1983) 153 C.L.R. 280.

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national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

Three arguments were advanced in support of the defendant's case. The first argument takes as its starting point the decision in *Viskauskas v. Niland* that the *Racial Discrimination Act* is intended to be exhaustive and exclusive — i.e., that it is intended to be a complete statement of the law of Australia relating to racial discrimination (17). It is then submitted that the State Act allows an exception to the prohibition of racial discrimination which is made by s. 9 of the *Racial Discrimination Act* or otherwise detracts from the efficacy of the latter Act. If this is intended to mean that there is a direct inconsistency between the two statutes, it is simply another way of stating the second argument to which I shall shortly turn. If, however (as the reference to *Viskauskas v. Niland* suggests), it is intended to mean that the State Act enters a field which the Commonwealth has intended wholly to cover, the argument cannot be accepted. The *Racial Discrimination Act* is intended to be a complete statement of the law relating to racial discrimination. The State Act is not a law relating to racial discrimination. It deals not with that subject, but with the ownership and use of certain lands in South Australia. If its provisions result in racial discrimination the question is whether, in doing so, they directly conflict with any provision of the *Racial Discrimination Act*.

The second argument in that there is a direct inconsistency between s. 19 of the Act and s. 9 of the *Racial Discrimination Act*. This argument was accepted by Millhouse J., who expressed his conclusion succinctly as follows (18):

> "Section 19 is in conflict with Art. 5(d)(i) of the Convention: s. 19 interferes with 'the right to freedom of movement' on the basis of race: it prohibits anyone who is not a Pitjantjatjara from entering freely a very large part of the State: anyone who is not a Pitjantjatjara is kept out (subject to exceptions) unless with permission. That is directly contrary to s. 9 of the Commonwealth Act and Art. 5 of the Convention which requires the right to 'freedom of movement'. . . ."

A consideration of the true meaning and effect of s. 9(1) of the

(17) (1983) 153 C.L.R., at p. 292.

(18) (1983) 34 S.A.S.R., at p. 459.

Racial Discrimination Act raises some questions of great importance, but they need not be considered, since in my opinion the submission that s. 19 of the Act is in conflict with s. 9(1) of the *Racial Discrimination Act* fails at the outset. Section 9(1) makes it unlawful for a person to do any act of the kind which the sub-section describes. The sub-section does not make it unlawful for a State to make a law. It is true that by s. 6 of the *Racial Discrimination Act* that Act binds the Crown in right of the Commonwealth and of each State and that by s. 22(a) of the *Acts Interpretation Act* 1901 (Cth), as amended, unless the contrary intention appears "person" in any Act shall include a body politic or corporate as well as an individual. However, the words "it is unlawful for a person to do any act" do not naturally describe the steps taken by the legislature and the Governor of a State to pass a Bill into law. Indeed it would be not only surprising, but of very doubtful constitutional validity, for the Commonwealth Parliament to make it unlawful for a State Parliament to pass a law of a particular kind. Section 109 of the Constitution, which provides for the consequences of inconsistency between State and Commonwealth laws, operates only when both laws are in existence and s. 107 preserves the powers of the Parliaments of the States unless exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. However, even if it were possible for the Commonwealth Parliament to forbid a State Parliament to exercise its legislative power, the words of s. 9(1) are not apt to achieve such a result. That is made clear by the provisions of s. 10 which expressly indicates the manner in which the Parliament intended that State laws should be directly affected by the *Racial Discrimination Act*. The argument that there is a direct inconsistency between s. 19 of the Act and s. 9 of the *Racial Discrimination Act* cannot be accepted.

It is necessary to advert to some further matters in relation to the scope of s. 9(1) of the *Racial Discrimination Act*. First, in my opinion, the act of the Governor of South Australia in issuing a land grant under s. 15 of the Act was not itself made unlawful by s. 9(1). Speaking broadly, that sub-section deals with acts of racial discrimination, i.e., with acts which make a distinction on racial grounds. As the words of the sub-section themselves show, what is made unlawful is an act which involves a distinction, exclusion, restriction or preference between one person or group or class of persons and others, when that distinction, exclusion, restriction or preference is based on race, colour, descent or national or ethnic origin and has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or

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fundamental freedom of the kind mentioned in the sub-section. If a statute which confers a power does not leave it open to the person exercising the power to discriminate in doing so, the exercise of the power is not rendered unlawful by s. 9(1). Under s. 15(1) of the Act, the Governor had no power to discriminate between persons or groups or classes of persons in the exercise of his power. He could issue or refrain from issuing the land grant, and he could grant the whole or part of the lands, but he had no discretion to decide who should be the grantee. He could make the grant to Anangu Pitjantjatjaraku but to no-one else. His grant therefore did not involve a distinction, preference, exclusion or restriction of any kind. The case is comparable to that in which special legislation empowers the Governor to vest a particular piece of land in, say, an agricultural company or a mining company all the members of which are white, or in an ecclesiastical corporation all the members of which are of the same ethnic origin. No discrimination is involved in the act of the Governor in exercising his power in such a case.

Similarly, the argument that the prosecution of the defendant for an offence against s. 19(1) was an act of discrimination is quite untenable. No distinction or preference was involved in laying a complaint against the defendant for an offence which he was alleged to have committed; no other person could properly be charged as the principal offender in such a case.

The final matter that may be mentioned in relation to s. 9(1) is that s. 19(5) of the Act does not require or allow Anangu Pitjantjatjaraku to make any distinction on the ground of race, colour, descent or national or ethnic origin in deciding to grant or refuse permission to enter the lands. It is not necessary further to discuss that question in the present case, for it appears from the findings of the special magistrate that the defendant did not lodge an application in writing for permission to enter the lands so that no occasion arose for the exercise of the power to grant or refuse any such application.

The third and final argument submitted on behalf of the defendant raises what is in my opinion the critical question in the case. That argument is that the Act is a State law to which the provisions of s. 10(1) of the *Racial Discrimination Act* apply. Of course, if s. 10(1) applies it will not render s. 19 void; its effect will be to confer on persons who are not Pitjantjatjaras the same rights as persons who are Pitjantjatjaras. The defendant's submission is that the consequence would be that all persons would then have unrestricted rights of access to the lands.

In reply to this argument, counsel for the Attorney-General for South Australia and the complainant, and counsel for the inter-

veners, made submissions which may be shortly stated as follows, although not all counsel supported every submission: (1) s. 19 of the Act is not a law by reason of which "persons of a particular race" do not enjoy the right which under s. 18 of the Act is enjoyed by the Pitjantjatjaras; (2) if s. 10(1) applies it will confer on a person who is not a Pitjantjatjara a right of access to the lands only if that person is a traditional owner of them; (3) the right of unrestricted access given to the Pitjantjatjaras is not a right of the kind to which s. 10(1) refers; and (4) in any case s. 19 is a special measure to which Art. 1(4) of the Convention applies and is therefore protected by s. 8(1) of the *Racial Discrimination Act*.

The submission that s. 19 of the Act does not disadvantage or treat unequally "persons of a particular race", requires a narrow and literal meaning to be given to s. 10(1) of the *Racial Discrimination Act*. Section 19, it is said, at most has the effect that all persons other than the Pitjantjatjaras are prevented from enjoying the unrestricted right of access that is enjoyed by Pitjantjatjaras; since persons of all races other than Pitjantjatjaras are prevented from enjoying that right, s. 10(1), which speaks of a law by reason of which "persons of a particular race . . ." do not enjoy a right that is enjoyed by persons of another race, does not apply. To give s. 10(1) this meaning would be to deprive it of much of its intended efficacy and would permit its provisions to be easily evaded. On this suggested construction, it would be possible, for example, for the law of a State effectively to provide that only persons of the white races might use certain public facilities, for such a law would disadvantage, not persons of a particular race, but persons of many races. It is absurd to think that this result was intended and the suggested construction is plainly incorrect.

The next submission takes as its starting point the incontrovertible fact that the right given by s. 18 of the Act is enjoyed by a person who is a member of one or other of the three groups of peoples mentioned in par. (a) of the definition of "Pitjantjatjara" only if that person is also a traditional owner of the lands or a part of them. It is then submitted that s. 10(1) of the *Racial Discrimination Act* (if it applied) would do not more than enable a person who is not a member of any one of those three groups to enjoy the right of access to the lands to the same extent as a person who is a member of one of those groups, i.e., only if he is himself a traditional owner of the lands or a part of them. As I have said, there is a lack of evidence regarding the traditional ownership of the lands. It does not appear whether there are other peoples than Pitjantjatjara, Yungkutatjara and Ngaanatjara who are the traditional owners of any parts of the lands, or whether there are any members of any of

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those three groups of peoples who are not traditional owners of any part of the lands. If all the members of those groups are traditional owners, par. (b) of the definition of "Pitjantjatjara" adds nothing to it. If there are persons who are not members of those groups but who are traditional owners of a part of the lands, those persons must be Aboriginals, for "traditional owner" is defined in s. 4 of the Act as follows:

> "'traditional owner' in relation to the lands means an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them".

On any view the right given by s. 18 of the Act is enjoyed by persons of the Aboriginal race, and not by persons of any other race. It is equally true that no person can enjoy that right unless he or she is a traditional owner of a part of the lands. It is therefore understandable that it should be argued that the right is enjoyed by a person who is a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people only to the extent to which that person is a traditional owner, and that s. 10(1) enables that right to be enjoyed by a person who is not a member of one of those groups of peoples only if he or she is a traditional owner. In the present case the magistrate found that there was no evidence before him as to whether or not the defendant is a traditional owner of any part of the lands.

The question is a difficult one, but there are, in my opinion, good reasons for rejecting the argument which I have been discussing. The words in s. 10(1), "to the same extent", refer rather to the scope of the right than to the qualifications for enjoying it. A person who enjoys a right under s. 18 of the Act enjoys it without any restriction — that is to say, of course, any restriction imposed by the Act itself; other laws may limit the right. Moreover, the qualification for enjoying the right — traditional ownership — is itself based on racial origin. Recourse to the notion of traditional ownership may readily be had to effect the most obnoxious discrimination. On the one hand, members of a particular race may be confined to one area, not, it may be said, because of their race, but because it is their traditional homeland; on the other hand, the right to own land may be conferred only on members of a favoured race, not, it may be said, because they belong to that race, but because they are the traditional owners. I see no distinction between the effect of ss. 18 and 19 of the Act, and that of a law which provided as follows: white men and women who are the traditional owners of land in a particular town have unrestricted rights of access to that town; no-one else may enter it without their

permission. It would not be right to give s. 10(1) a construction which fails to give its words their natural meaning and at the same time renders it ineffective to mitigate the effect of legislation which attempts to disguise the fact that it effects a discrimination based on race, colour or national or ethnic origin by attaching to the criteria of entitlement to the right in question some additional characteristic which persons of the disadvantaged race, colour or national or ethnic origin would be unable to satisfy. It is true that the added criterion introduced by the definition of "Pitjantjatjara" is not merely colourable or adventitious. The object of the Act is to give rights to the lands to a group of associated peoples who traditionally own various parts of them. The importance attached to protecting the interests of the traditional owners, and preserving Pitjantjatjara traditions and culture, is shown by a number of sections of the Act: see ss. 7, 20(15)(a), 24(2), 36(4). The limitation of the definition of "Pitjantjatjara" to traditional owners genuinely reflects the true purpose of the Act, which is to restore the lands to their traditional Aboriginal owners. However, for the reasons I have given I cannot accept the argument that if s. 10(1) applies it has the effect that a person who is not of the Pitjantjatjara peoples has a right of access to the lands only if he is a traditional owner of part of them.

I come then to the question whether the right of unrestricted access to the lands under s. 18 of the Act is a right of a kind referred to in s. 10(1) of the *Racial Discrimination Act*.

The provisions of s. 10 of the *Racial Discrimination Act* were not considered in *Koowarta v. Bjelke-Petersen* (19). The provisions of Pt II of the *Racial Discrimination Act* other than ss. 8 and 10 may be regarded as amplifying and applying to particular cases the provisions of s. 9 which prohibit acts of discrimination by persons (including the Crown). Section 10 has a different purpose. It is the only provision of the *Racial Discrimination Act* which deals with the effect of legislation which brings about discrimination. The words of s. 10(1) are wide; they refer to laws by reason of which persons of (inter alia) one race do not enjoy "a right" that is enjoyed by persons of another race. By s. 10(2), a reference to a right includes, but is not expressly limited to, a reference to a right of a kind referred to in Art. 5 of the Convention. Although the validity of s. 10(1) was not argued before us, there can be no doubt that its provisions will be valid only if they conform to, and carry into effect, the provisions of the Convention. Under Art. 5 States Parties to the Convention undertake to prohibit and eliminate racial discrimination "in all its forms". If s. 10(1) and (2) have the effect of

(19) (1982) 153 C.L.R. 168.

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prohibiting and eliminating racial discrimination they will be valid notwithstanding that they comprehend rights other than those specifically mentioned in Art. 5. It is therefore unnecessary to consider the meaning of the words "the right to freedom of movement" in Art. 5(d)(i). However, the term "racial discrimination" is defined in Art. 1(1) of the Convention to 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". The conclusion seems to be inescapable that the word "right" in s. 10(1) must be intended to refer only to a human right "in the political, economic, social, cultural or any other field of public life". The question is whether the right conferred by s. 18 is a right of that description. In other words, is it a right in some "field of public life"?

Notwithstanding the reference in Art. 1(1) to "social" life, the words "any other field of public life" indicate that the Convention is not concerned with rights that are purely private, such as the right of a landowner to decide for himself what persons he will allow on his lands when they are not open to use by the public. It is tempting to draw an analogy between the situation brought about by ss. 18 and 19 of the Act and the position of any landowner who has an unrestricted right of access to his own lands and the right to grant or refuse permission to others to enter them, particularly when the landowner is a corporation. However, the vast area of the lands is enough in itself to falsify the analogy. If the vesting of the ownership of lands in a corporation were enough to justify the exclusion of persons from those lands on the ground of race, it would be easy indeed to introduce a system of apartheid without contravening the Convention or the *Racial Discrimination Act*. Moreover, the corporation Anangu Pitjantjatjaraku is created for convenience, by a public statute, so that the lands, traditionally owned by peoples of the various groups that the Act calls Pitjantjatjaras, may be vested in it. The words of the Convention, and those of the *Racial Discrimination Act* which are taken from the Convention, are vague and elastic and in applying them one is likely to get more assistance from the realities of life than from books of jurisprudence. The right, given by statute, of access to an area so large that it constitutes more than one-tenth of the State, seems to me to be a right in a field of public life. It is true to say, on the one hand, that the pre-existing right of a person other than a Pitjantjatjara of access to the lands was not unfettered and, on the other, that s. 19 admits (rather meagrely) some exceptions to the

prohibition which it imposes on entry without consent. Nevertheless, s. 18 does confer a right which can in my opinion properly be regarded as a human right in some field of public life, and the effect of s. 19 is that persons who are not Pitjantjatjaras do not enjoy that right. Unless s. 8(1) renders s. 10(1) inapplicable, the latter subsection will apply and will give persons who are not Pitjantjatjaras an unrestricted right of access to the lands, subject, of course, to such restrictions as are validly imposed by other laws.

The question then is whether s. 19 may be justified as a special measure to which Art. 1(4) of the Convention applies. If so, s. 10(1) does not apply, for it was not suggested that the measures in question are measures to which s. 10(1) is applied by virtue of s. 10(3). The legislature has no doubt acted on the view that to enable the Pitjantjatjaras to live on the land in accordance with their traditions and customs and to maintain their relationship to the land, which is a relationship quite different from that to which persons of European descent are accustomed, it is necessary not only that they should own the land but also that they should have full control of access to it. There can be little doubt that the provisions of s. 19 of the Act were intended to be a protective measure, enacted in the interests of racial or ethnic groups thought to require that protection. There was no evidence put before the Court to show that the facts either did or did not satisfy the words of Art. 1(4). The case is not one in which the constitutional validity of a statute depends upon facts, but it is closely analogous to such a case, since the combined effect of s. 109 of the Constitution and ss. 8 and 10 of the *Racial Discrimination Act* is that the extent to which the Act can operate depends on whether the Act is a special measure to which Art. 1(4) applies. In *Breen v. Sneddon* (20), Dixon C.J. pointed out the distinction between ordinary questions of fact which arise between parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which the constitutional validity of some general law may depend. He said that matters of the latter description cannot and do not form issues between parties to be tried like the former questions but simply involve information which the Court should have in order to judge properly of the validity of the statute. He went on to cite a passage from *Commonwealth Freighters Pty. Ltd. v. Sneddon* (21), where he had said that "if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by

(20) (1961) 106 C.L.R. 406, at pp. 411-412.

(21) (1959) 102 C.L.R. 280, at p. 292.

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the court as best it can, when the court is called upon to pronounce upon validity". That statement is, in my opinion, applicable to the present case and we must determine as best we can the facts which will enable us to answer the question whether the Act is a special measure within Art. 1(4). We may take judicial notice of facts that are notorious and may rely on the material placed before us, particularly that contained in the report to which I have already referred. In the light of that material it can hardly be doubted that the three ethnic groups do require special protection within the meaning of Art. 1(4). Further, there is no reason to conclude that the protection afforded by the Act is more than is necessary, having regard to the nature of the lands, the uses to which they have been put, the preservation of the rights of existing users and the special provisions designed to ensure justice to the most likely potential users, viz. miners, as well as the needs of the protected groups. It was submitted for the defendant that "the sole purpose" of the Act was not that described in Art. 1(4), since, it was submitted, the Act discloses at least three purposes — to make a land grant (s. 15), to grant a power to control access to the lands (s. 19) and to restrict alienation of the lands granted (s. 17). This is too narrow a view; the Act obviously adopts a number of measures to achieve its purpose, but nevertheless has the sole purpose of securing the advancement of the ethnic groups in question.

It was further submitted on behalf of the defendant that the measures taken by the Act lead to the maintenance of separate rights for different racial groups contrary to the proviso to Art. 1(4). It is obvious enough that measures within the introductory words of Art. 1(4) may involve some special rights for the members of the protected group. The proviso that such measures should not lead to the maintenance of separate rights for different racial groups cannot be intended to prevent special rights being conferred for the purpose mentioned in the article; it must be intended to prevent such rights from being maintained, i.e., kept in force. In my opinion, the words of both limbs of the proviso should be read together. The proviso as a whole appears to be designed to prevent such special rights as are granted from being indefinitely maintained or continued after the special measures have achieved their objective. It cannot be said that the present case falls within the proviso. The special measures were taken only in 1981 and it is obvious from the nature of things that a considerable time may elapse before it can be hoped that the special measures will be effective. It is, however, a matter of concern that the Act has an obvious air of permanency. It does seem to be intended to set up permanently a separate regime for the Pitjantjatjaras. I doubt whether it would be allowable under the

Convention, which by the proviso to Art. 1(4) recognizes that protection may degenerate into discrimination, to keep s. 19 permanently in force. That however is a matter for the future. The situation to which the proviso is directed has not yet been reached. The Act as a whole may be upheld as a special measure within s. 8(1) of the *Racial Discrimination Act*.

For these reasons I would allow the appeal and would answer in the negative the question whether s. 19 of the Act is invalid or restricted in its operation by reason of the *Racial Discrimination Act*.

MASON J. This appeal against an order made by Millhouse J. in the Supreme Court of South Australia answering questions in a special case was removed into this Court by order made under s. 40 of the *Judiciary Act* 1903 (Cth), as amended. The special case was stated by Mr. Chivell, a special magistrate sitting in the Court of Summary Jurisdiction at Oodnadatta, pursuant to s. 162 of the *Justices Act* 1921-1982 (S.A.). The substantial question raised by the special case is whether s. 19 of the *Pitjantjatjara Land Rights Act* 1981 (S.A.) ("the State Act") is invalid or restricted in its operation by reason of the *Racial Discrimination Act* 1975 (Cth), as amended ("the Commonwealth Act"), which gives effect in Australia to the International Convention on the Elimination of All Forms of Racial Discrimination ("the Convention"), on the ground that s. 19 of the State Act discriminates against persons who are not members of the Pitjantjatjara peoples.

The State Act, which is designed to protect the Pitjantjatjara peoples, provides for the vesting of title to extensive lands described in the First Schedule to the Act ("the lands"), amounting in all to one-tenth approximately of the area of the State, in Anangu Pitjantjatjaraku (s. 15), this being a composite name given to the body corporate established by the State Act (s. 5(1)), of which all Pitjantjatjaras are members (s. 5(2)).

The name "Pitjantjatjara" is defined by s. 4 to mean a person who is both (a) a member of the Pitjantjatjara, Yungkutatjara and Ngaanatjara people; and (b) a traditional owner of the lands, or a part of them. The expression "traditional owner" in relation to the lands is also defined by s. 4 to mean:

> "... an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them".

Section 18 of the State Act provides that "All Pitjantjatjaras have unrestricted rights of access to the lands." In contradistinction, s. 19(1) and (2) provides:

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"(1) A person (not being a Pitjantjatjara) who enters the lands without the permission of Anangu Pitjantjatjaraku is guilty of an offence and liable to a penalty not exceeding the maximum prescribed by subsection (2).

(2) The maximum penalty for an offence against subsection (1) is—

(a) where the offence was committed intentionally — a fine of two thousand dollars plus five hundred dollars for each day during which the convicted person remained on the land after the unlawful entry;

or

(b) in any other case — a fine of two hundred dollars."

An application for permission to enter the lands under s. 19 must be in writing and lodged with the Executive Board of the body corporate (s. 19(3)(a)). It must set out—

"(i) the purpose for which the applicant seeks to enter the lands;

(ii) the period for which the applicant seeks to be upon the lands;

and

(iii) the time at which the applicant seeks to enter the lands, and the place at which he intends to make his entry" (s. 19(3)(b)).

The applicant, at the request of the body corporate, is bound to furnish such information as it may reasonably require to determine the application: s. 19(4). The body corporate may by instrument in writing grant permission to enter unconditionally, grant permission to enter subject to conditions or refuse permission: s. 19(5). Notwithstanding the general prohibition in s. 19(1), certain categories of persons performing public duties or functions are permitted to enter the lands: s. 19(8)(a)-(d). In addition, entry in case of emergency and entry for certain specific purposes is authorized: s. 19(8)(e) and (f).

The respondent, Robert John Brown, was charged with an offence against s. 19(1) in that he entered the lands on 27 February 1982 without the permission of the body corporate. According to the facts recited in the special case, the respondent entered the lands on that day and did so without having the permission of the body corporate. Questions 1 and 2 in the special case, as stated by the magistrate, are in these terms:

"1. Is the *Pitjantjatjara Land Rights Act* 1981, hereinafter referred to as 'the Act' and in particular, s. 19 and any other section thereof relevant to these proceedings, invalid or restricted in its operation by reason of a law of the Commonwealth, and in particular, the *Racial Discrimination Act* 1975?

2. If the answer to Question 1 is that the Act is restricted in its operation, does the complaint herein fall within the area of valid operation of the Act?"

Millhouse J. concluded that s. 19(1) of the State Act is inconsistent with Art. 5(d)(i) of the Convention which recognizes "The right to freedom of movement and residence within the border of the State" and with s. 9 of the Commonwealth Act. He answered questions 1 and 2 as follows:

"1. . . .

Answer: Section 19 of the *Pitjantjatjara Land Rights Act* 1981 is invalid by reason of the *Racial Discrimination Act* 1975. No other section relevant to these proceedings is invalid.

2. . . .

Answer: In the light of my answer to Question 1, this question is not applicable."

Before this Court it was agreed that question 1 should be amended so as to read:

"Is s. 19 of the *Pitjantjatjara Land Rights Act* 1981 invalid or restricted in its operation by reason of the *Racial Discrimination Act* 1975?"

Section 15(1) of the State Act authorizes the issue by the Governor of a land grant in fee simple of the whole or any part of the lands to the body corporate. There are certain restrictions (see s. 15(2) and (3)) on the exercise by the Governor of his powers under s. 15(1) in relation to land in which other persons have an estate or interest, but these restrictions may be disregarded for the purposes of this case. We were informed that the Governor has issued a land grant to the body corporate pursuant to s. 15(1).

We were further informed that two public roads only traverse the lands. These public roads are the Stuart Highway and the Oodnadatta to Granite Downs Road which are referred to in the second schedule to the State Act. The area comprised within 100 metres to each side of the centre line of these roads is constituted a road reserve: s. 33(1). A member of the public is entitled to free and unrestricted access to the roads and to land comprised in a road reserve: s. 33(3).

The State Act defines the functions of the body corporate in these terms:

"(a) to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect to those wishes and opinions;

(b) to protect the interests of traditional owners in relation to the management, use and control of the lands;

(c) to negotiate with persons desiring to use, occupy or gain access to any part of the lands;

and

(d) to administer land vested in Anangu Pitjantjatjaraku" (s. 6(1)).

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Provision is made for the election and functions of the Executive Board with powers to act on behalf of the body corporate: see ss. 9, 10 and 11.

The Commonwealth Act makes provision for giving effect to the Convention. It approves ratification by Australia of the Convention (s. 7). Part II of the Commonwealth Act contains a number of provisions prohibiting racial discrimination. The Part commences with s. 8, which by sub-section (1) provides:

> "This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3)."

The prohibitions which are relevant to the present case are those contained in ss. 9 and 10. Section 9 provides:

> "(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.
>
> (3) Sub-section (1) does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.
>
> (4) The succeeding provisions of this Part do not limit the generality of sub-section (1)."

The operation of s. 9 is confined to making unlawful the acts which it describes. It is s. 10 that is directed to the operation of laws, whether Commonwealth, State or Territory laws, which discriminate by reference to race, colour or national or ethnic origin. Accordingly, we must look to s. 10, rather than to s. 9, of the Commonwealth Act, in order to determine the impact which that Act has on s. 19 of the State Act. This is not to say that s. 9 of the Commonwealth Act cannot operate as a source of invalidity of inconsistent State laws, by means of s. 109 of the Constitution. Inconsistency may arise because a State Law is a law dealing with racial discrimination, the Commonwealth law being intended to occupy that field to the exclusion of any other law: *Viskauskas v.*

Niland (22). Or it may arise because a State law makes lawful the doing of an act which s. 9 forbids: see *Clyde Engineering Co. Ltd. v. Cowburn* (23). But, neither the State Act, nor s. 19, is a law dealing with racial discrimination; nor does either make lawful the doing of an act proscribed by s. 9. And s. 10 of the Commonwealth Act, by making specific provision in the case of State laws which discriminate in the manner already described, makes it clear that s. 9 is not intended to apply to such a situation.

One important aspect of s. 9 of the Commonwealth Act, which the respondent's argument raises for consideration, however, is the effect of the section in relation to an act done pursuant to a statute which authorizes the conferring of a benefit, or the imposition of a burden or liability, on persons of a race or races, but not on persons of another race or races. This question arises because the respondent submits that the issue by the Governor of a land grant under s. 15 of the State Act and the prosecution of the respondent for an offence under s. 19 of that Act fell foul of s. 9(1) of the Commonwealth Act. Because s. 9(1) creates a criminal offence and because the sub-section is aimed at an act whose purpose or effect is to nullify or impair the recognition, enjoyment or exercise on an equal footing of a relevant human right or fundamental freedom, the operation of the sub-section does not extend to circumstances in which the actor, having statutory authority to confer a benefit or to impose a burden or liability only in a particular way, acts in accordance with that authority.

The argument against this interpretation is that so to construe s. 9(1) may weaken the operation of the Commonwealth Act as a measure for the elimination of racial discrimination. If this be the true interpretation of the sub-section, it is questioned whether the Commonwealth Act contains any provision which is effective to combat an act otherwise discriminatory done pursuant to statutory authority when the statute does not permit the act to be done in a non-discriminatory way. The force of the argument turns partly on the ambit of s. 10(1) of the Commonwealth Act when it refers to "a right" in the context of "enjoy a right". This aspect of s. 10(1) has its difficulties. As they were not explored in argument, I do not consider it appropriate to embark upon them. It is enough for me to say that s. 15 of the State Act does not authorize the issue of a land grant to persons other than Anangu Pitjantjatjaraku and that to prosecute the respondent for an offence under s. 19 involves no

(22) (1983) 153 C.L.R. 280.

(23) (1926) 37 C.L.R. 466, at p. 490.

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element of racial discrimination because it is not suggested that any other person committed an offence.

Section 10 is not aimed at striking down a law which is discriminatory or is inconsistent with the Convention. Instead it seeks to ensure a right to equality before the law by providing that persons of the race discriminated against by a discriminatory law shall enjoy the same rights under that law as other persons. It provides:

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
>
> (3) Where a law contains a provision that—
>
> (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
>
> (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander,
>
> not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by him."

Unlike s. 9, s. 10 makes no reference to "descent", a word which appears consistently in the provisions of the Convention. The reason for its omission in s. 10 is not apparent, but its omission is not material to the present case.

Koowarta v. Bjelke-Petersen (24) decided by majority that ss. 9 and 12 of the Commonwealth Act were valid laws with respect to external affairs within the meaning of s. 51(xxix). It was common ground between the parties in that case that the two sections of the Commonwealth Act gave effect to the provisions of the Convention. *Koowarta* involved no decision as to the validity of s. 10 of the

(24) (1982) 153 C.L.R. 168.

Commonwealth Act. The validity of the section is not an issue in the present case. For this reason we should proceed on the assumption that it is a legislative implementation of the provisions of the Convention, in particular of Arts. 2 and 5, an assumption which in my view is well founded, as will appear later. The section seeks to give effect to Australia's obligation to eliminate the relevant racial discrimination by giving to persons of the race discriminated against the enjoyment of relevant rights to the same extent as persons of another race.

By Art. 1.1 of the Convention the term "racial discrimination" is defined to 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 1.4 provides:

> "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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

It is this provision to which s. 8(1) of the Commonwealth Act refers when it provides that Pt II does not apply to special measures.

Article 2, so far as it is relevant to the present case, provides:

> "1. 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:
>
> ...
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
>
> ...
>
> 2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These

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measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Whereas Art. 1.4 provides merely that the taking of special measures does not constitute racial discrimination, Art. 2.2 imposes an obligation to take special measures. There are minor differences in the expression of the two provisions — "special" cf. "special and concrete" measures; "adequate advancement" cf. "adequate development and protection" — and a difference in the way in which the proviso is expressed in each article. However, both provisions deal with the same subject-matter and insist that the measures to which they refer shall not be continued after their object has been achieved.

Article 5 is to be understood against the background of these provisions. It commences in this way:

> "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 . . ."

There follows mention of: (a) the right to equal treatment in the administration of justice; (b) the right to security of person and protection by the State against violence or bodily harm; and (c) political rights. Paragraph (d) is in these terms:

> "Other civil rights, in particular:
>
> (i) The right to freedom of movement and residence within the border of the State;
>
> (ii) The right to leave any country, including one's own, and to return to one's country;
>
> (iii) The right to nationality;
>
> (iv) The right to marriage and choice of spouse;
>
> (v) The right to own property alone as well as in association with others;
>
> (vi) The right to inherit;
>
> (vii) The right to freedom of thought, conscience and religion;
>
> (viii) The right to freedom of opinion and expression;
>
> (ix) The right to freedom of peaceful assembly and association;"

There follows par. (e) which refers to 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;

(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) The right to public health, medical care, social security and social services;
(v) The right to education and training;
(vi) The right to equal participation in cultural activities;"

The final provision in Art. 5 is par. (f) which is in these terms:

"The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."

By subscribing to these provisions, the nations which adhere to the Convention assume an international obligation to eliminate racial discrimination as that term is defined in relation to human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life, notably those which are set out in Art. 5. The words "any other field of public life" do not attach any significant limitation to the area of human rights and fundamental freedoms with which the Convention is concerned. Article 5 specifies a number of rights which would in other contexts be thought to lie outside public life, e.g., the right to inherit (par. (d)(vi)) and the right of access (par. (f)).

The Convention does not impose an obligation on a nation which is party to the Convention to introduce such human rights and fundamental freedoms; instead, it imposes an obligation to eliminate racial discrimination in relation to such rights and freedoms and to guarantee equality before the law in the enjoyment of them. Accordingly, under the Convention it is necessary to determine not only whether there is racial discrimination but also whether that discrimination has a purpose or effect of nullifying or impairing the enjoyment on an equal footing of human rights or fundamental freedoms of the kind to which the Convention refers.

In this respect s. 10 does not precisely follow the language of the definition of "racial discrimination" in Art. 1.1. For the operation of the section it is enough that persons of a particular race, colour or national or ethnic origin, in contradistinction to persons of another race, colour or national or ethnic origin do not enjoy a relevant right or enjoy it to a more limited extent. And the section speaks merely of the enjoyment of rights, whereas Art. 1.1 speaks of the "recognition, enjoyment or exercise on an equal footing" of rights. By confining itself to the word "enjoyment", s. 10 follows the example of Art. 5 which likewise does not adopt the formula found in Art. 1.1.

These differences in language may be put to one side for it is not suggested that they are significant for the purposes of the present

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case. The undertaking given by each State in Art. 2.1(c) to "amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists" may be discharged by: (a) repealing the law which provides for racial discrimination; (b) amending that law so that it provides for non-differential enjoyment of the relevant right by persons without regard to race, colour, descent, or origin; and (c) enacting a law which operates otherwise than by way of amendment in the strict sense and enables persons discriminated against to enjoy the right to the same extent as persons of another race, colour, descent, or origin. In the context of Art. 2.1(c) the word "amend" should be liberally interpreted so as to embrace the enactment of a separate statute or regulation which, instead of operating as a statutory amendment of a discriminatory law, confers the right in question on persons of a race discriminated against. There is no reason for giving the word the narrow technical meaning that it bears in the area of statutory interpretation in Australian domestic law according to which a law of the Commonwealth Parliament does not operate by way of amending a State law.

Of these modes of discharging the undertaking contained in Art. 2.1(c), s. 10 pursues (c) rather than (a) or (b). It operates to confer on the persons discriminated against the enjoyment of a relevant right to the same extent as it is enjoyed by persons of another race, colour or national or ethnic origin. By this means, it endeavours to "guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law" in the enjoyment of the relevant rights.

Section 10 is expressed to operate "upon Commonwealth, State and Territory laws". Here we are concerned with the operation of the section in relation to a State law. If racial discrimination arises under or by virtue of State law because the relevant State law merely omits to make enjoyment of the right universal, i.e. by failing to confer it on persons of a particular race, then s. 10 operates to confer that right on persons of that particular race. In this situation the section proceeds on the footing that the right which it confers is complementary to the right created by the State law. Because it exhibits no intention to occupy the field occupied by the positive provisions of State law to the exclusion of that law the provisions of the State law remain unaffected.

However, the discrimination alleged here arises, not from a mere omission on the part of the State Act to confer rights on persons who are not Pitjantjatjaras, but from the presence of s. 19 which positively prohibits non-Pitjantjatjaras from entering the lands without the written permission of the body corporate. When racial

discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s. 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s. 10 and the prohibition contained in the State law. But, the important question which would then arise is: would the invalidity of the prohibition under s. 109 of the Constitution result in the other provisions of the State law also becoming inoperative, notwithstanding a manifest Commonwealth legislative intention that so much of the State law as conferred the relevant right on the persons of the privileged race should remain on foot? Although it is unnecessary to pursue this question to a conclusion, I should mention that total inconsistency of the State law would only ensue in the unlikely event that it appeared that the provisions conferring a benefit on the privileged race were intended to operate if, and only if, the prohibition took effect. In that unlikely event the prohibition and the other provisions of the State law would be interdependent with the result that the provisions could not be severed.

Section 10 makes no reference to racial discrimination; nor does it make any reference, as s. 9(1) does, to the elements of the definition of "racial discrimination" in Art. 1.1 of the Convention. Instead s. 10 is expressed to operate where persons of a particular race, colour or origin *do not enjoy* a right that is enjoyed by persons of another race, colour or origin, or do not enjoy that right to the same extent. Some question as to the validity of s. 10 might be thought to arise because it fails to follow the language of Art. 2 of the Convention. The exclusion of persons of a race, colour or origin from the enjoyment of a relevant right by reason of a law does not necessarily involve "racial discrimination" in that it may not amount to a distinction, exclusion, restriction or preference "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise" of the right "on an equal footing". Consequently, s. 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination.

To bring this matter within s. 10 the respondent must establish: (1) that the Pitjantjatjaras are persons of a race, colour or national or ethnic origin; (2) that persons other than the Pitjantjatjaras are persons who fall within the class "persons of a particular race, colour or national or ethnic origin"; (3) that by reason of s. 19 of the State Act all such persons do not enjoy the right of access which is given

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by s. 18 to Pitjantjatjaras; (4) that the exclusion of all such persons from enjoyment of the right of access to the lands arises by reason of statutory provisions whose purpose or effect is to create racial discrimination; (5) that this exclusion amounts to an exclusion from enjoyment of a human right or fundamental freedom or a right of a kind referred to in Art. 5 of the Convention; and (6) that s. 18 of the State Act of which it forms part, is not a special measure within the meaning of Art. 1.4 of the Convention.

Each of these matters involves some complications. Some of these complications arise from the statutory definition of "Pitjantjatjara" which includes the element of traditional ownership of the lands, or a part of them. There is the question whether this element of the definition precludes us from otherwise saying that the Pitjantjatjaras are persons of a race, colour or origin. I do not think it does. We do not know whether there are some members of the Pitjantjatjara peoples who are not traditional owners of the lands, or a part of them. Nor do we know whether there are traditional owners who are not members of the Pitjantjatjara peoples. But even if there are such persons who are not traditional owners and therefore not entitled to the right of access given by s. 18, it is correct to say that the section confers a right of access on persons of a race, colour or origin because it is not essential to the operation of s. 10(1) that all members of that race, colour or origin enjoy the relevant right. That members of the Pitjantjatjara peoples are persons of a race, colour or national or ethnic origin was not questioned in argument.

The next requirement, that "persons of a particular race, colour or national or ethnic origin" do not enjoy the right, seems as a matter of language to look to the exclusion of persons of a *particular* race, colour or origin from the enjoyment of a right enjoyed by persons of another race or races. The statutory presumption that words in the singular include the plural (*Acts Interpretation Act* 1901 (Cth), s. 23(b)) no doubt enables the section to be read as embracing the exclusion of persons of more than one race. But does it embrace the exclusion of all persons other than the persons of a specified race or races? To give the persons of one race the enjoyment of a specific right or privilege is to exclude persons of all other races from the enjoyment of that right or privilege. Such an exclusion is no doubt inconsistent with the Convention and the objects which it is designed to attain. But it is not evident that it is an exclusion which falls within the operation of s. 10(1). There is the problem of giving effect to the word "particular" when the effect of the exclusion is that all persons other than the persons of a specified race enjoy the relevant right. The draftsman of the sub-section seems to have had his focus on discrimination against a particular race — the obvious

case — rather than on discrimination in favour of a particular race. In this situation it may be legitimate to look beyond the narrow focus of the draftsman to the broader sweep of the Convention which the statute is designed to implement.

Because we do not know whether there are any members of the Pitjantjatjara peoples who are not traditional owners, there is a difficulty in saying that all non-Pitjantjatjaras are "persons of a particular race, colour or national or ethnic origin" — the class of non-Pitjantjatjaras may include members of the Pitjantjatjara peoples who are not traditional owners of the lands, or a part of them. However, we are justified in concluding that all persons who are not members of the Pitjantjatjara peoples are necessarily members of the class of non-Pitjantjatjaras and that they answer the statutory description.

In the light of what I have already said the third issue does not call for detailed discussion. The regulation of access to the lands in question by s. 19 on the part of non-Pitjantjatjaras stands in marked contrast with the right of access enjoyed by the Pitjantjatjaras under s. 18. The contrast is such that it may be said accurately that non-Pitjantjatjara peoples do not enjoy the right of access enjoyed by the Pitjantjatjara peoples or, alternatively, that non-Pitjantjatjara peoples enjoy a right of access to a lesser extent than Pitjantjatjara peoples.

The questions whether the lack of enjoyment of the right of access arises by reason of a law whose purpose and effect is to create racial discrimination and whether the right of access given by s. 18 is a human right or fundamental freedom or is otherwise a right of a kind referred to in Art. 5 of the Convention may be considered together. Although s. 10(2) includes rights of a kind referred to in Art. 5, it is not confined to the rights actually mentioned in that article. What then are the other rights, if any, to which s. 10(1) relates? The answer is the human rights and fundamental freedoms with which the Convention is concerned, the rights enumerated in Art. 5 being particular instances of those rights and freedoms, without necessarily constituting a comprehensive statement of them.

In deciding whether the right of access given by s. 18 is a human right or fundamental freedom we encounter the ever present problem of defining or describing the concept of human rights. The expression "human rights" is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society. The expression includes claims of individuals as members of a racial or ethnic group to equal treatment of the members of that group in common with

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other persons and to the protection and preservation of the cultural and spiritual heritage of that group. As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. The primary difficulty is that of ascertaining the precise content of the relevant right or freedom. This is not a matter with which the Convention concerns itself.

The concept of human rights as it is expressed in the Convention and in the United Nations Universal Declaration of Human Rights evokes universal values, i.e. values common to all societies. This involves a paradox because the rights which are accorded to individuals in particular societies are the subject of infinite variation throughout the world with the result that it is not possible, as it is in the case of a particular society, or in the case of homogeneous societies which are grouped together, e.g. the European Economic Community, to distil common values readily or perhaps at all. Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right.

This observation is particularly true of the concept of freedom of movement, which is central to the respondent's case. In broad terms the concept may be said to embrace a claim to immunity from unnecessary restrictions on one's freedom of movement and a claim to protection by law from unnecessary restrictions upon one's freedom of movement by the State or by other individuals. It extends, generally speaking, to movement without impediment throughout the State, but subject to compliance with regulations legitimately made in the public interest, such as traffic laws, and subject to the private and property rights of others. And it would include a right of access to facilities necessary for the enjoyment of freedom of movement, subject to legitimate regulation of those facilities. The concept would also ordinarily include a right of access to places and services used by members of the public — a matter explicitly dealt with in Art. 5(f).

Despite the lack of universal consensus on content, it is no doubt correct to say that, in general, freedom of movement does not extend to access to property in private ownership. The differentiation made by ss. 18 and 19 of the State Act between access by Pitjantjatjaras and access by other persons relates to the right of access to property which is vested in Anangu Pitjantjatjaraku. Because this amounts to a discrimination in favour of the owner of that property as against non-owners, there is the question whether

(a) it constitutes racial discrimination in the sense contemplated by the Commonwealth Act and the Convention, and if so, (b) whether it amounts to racial discrimination in the enjoyment of a human right or fundamental freedom.

In considering these matters it is necessary to look to the purpose and effect of the State Act, rather than to concentrate on ss. 18 and 19 in isolation. As we have seen, the purpose and effect of the State Act is to provide for the vesting of the lands in a body corporate of which all Pitjantjatjaras are members, to give them a right to participate (including voting) in the affairs of the body corporate, and to give them the right of access for which s. 18 provides, the lesser right of access available to non-Pitjantjatjaras being regulated by s. 19. If this were all, there would be little to be said for the view that the effect of the State Act was not to discriminate against non-Pitjantjatjaras — it is a condition of eligibility of participation in the affairs of the body corporate (the owner) and of access under s. 18 that a person is a Pitjantjatjara. The right of participation and of access is conferred by reference to race, colour or origin, notwithstanding that some Pitjantjatjaras may not be eligible because they are not traditional owners. However, it is the underlying purpose of the State Act to vest the lands in, and make them available for use by, their traditional owners and that is said to give the operation of the State Act a different complexion. It is to be seen as a legislative measure which seeks to convert the traditional land ownership of the Pitjantjatjara people into a modern legal framework approximating as closely as may be to the central feature of traditional Aboriginal ownership. Conceding this to be so, I nevertheless regard the conclusion as inevitable that the effect of the State Act is to discriminate by reference to race, colour or origin because eligibility to enjoy the right which the statute confers depends in the manner described on membership of the Pitjantjatjara peoples.

The point has already been made that freedom of movement considered as a human right or fundamental freedom, does not generally extend to access to privately owned lands. The same comment may be made of other human rights and fundamental freedoms. In the context of the Convention itself the point gains added force from the inclusion in par. (f) of Art. 5 as a material human right or fundamental freedom of the right of access to places and services intended for use by the general public.

However, in exceptional circumstances freedom of movement may include access to privately owned lands. If, for example, the purpose and effect of vesting extensive tracts of land in private ownership and denying a right of access to non-owners was to impede or defeat the individual's freedom of movement across a

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State or, more relevantly, to exclude persons of a particular race from exercising their freedom of movement across a State, the vesting of ownership and the denial of access would then constitute an interference with freedom of movement and amount to racial discrimination within the meaning of the Convention.

Although the lands occupy an infertile, sparsely inhabited and relatively undeveloped portion of the State, in which the Pitjantjatjara peoples have long had close social, economic and spiritual affiliations and responsibilities in accordance with Aboriginal tradition, the fact that the lands constitute one-tenth approximately of the area of the State of South Australia, suggests that the vesting of title to the lands and the restrictions on access imposed by s. 19 on non-Pitjantjatjaras amounted to an impairment of their freedom of movement.

However, in my opinion the State Act should be regarded as amounting to a special measure within the meaning of Art. 1.4 of the Convention, as provided by s. 8(1) of the Commonwealth Act. Article 1.4 proceeds on the footing that certain groups or individuals may require protection in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms and that, but for some such provision as Art. 1.4, the giving of this protection would in some situations at least amount to racial discrimination. It is obvious that legislative as well as executive measures may qualify as special measures for the reason that the need to ensure to individuals or groups equal enjoyment of human rights and fundamental freedoms may require either legislative or executive action.

The substantial question raised by Art. 1.4 is whether it embraces a legislative measure such as the State Act, the object of which is to vest in a body corporate for the benefit of the people of a particular race or races, title to land with which they have been traditionally associated, the title being inalienable and access to others being restricted. In considering this question we need to recall that the object of legislation of this kind is not merely to restore to an Aboriginal people the lands which they occupied traditionally, but also to provide that people with the means to protect and preserve their culture. So much is made clear in the case of the State Act by the Minister's Second Reading Speech on the introduction of the Bill in the South Australian House of Assembly: *Hansard*, House of Assembly, 23 October 1980, p. 1387.

As we have seen, the concept of human rights, though generally associated in Western thought with the rights of individuals, extends also to the rights of peoples and the protection and preservation of their cultures. Legislative action having the purpose and effect of

reserving land for indigenous peoples and prohibiting its acquisition by others is not uncommon. It has taken place, for example, in Fiji and American Samoa — see V. van Dyke, "The Cultural Rights of People" in *Universal Human Rights*, vol. 2, no. 2, p. 1, esp. at pp. 15-17. Underlying this legislative approach is the belief that indigenous people may require special protection as a group because their lack of education, customs, values and weakness, particularly if they are a minority, may lead to an inability to defend and promote their own interests in transactions with the members of the dominant society. As van Dyke comments (p. 6):

> "The most common kind of protection . . . is the reservation of land and the grant of special status that permits them to follow their customary laws, and maintain their cultural and religious values. The usual rule is that they are individually free to leave the reserve, but that outsiders are not free to go in."

Quite apart from the assistance that we derive from taking account of matters of general public knowledge concerning Aboriginals, the materials before the Court, including the Report of the Pitjantjatjara Land Rights Working Party of South Australia, justify the conclusion that the Pitjantjatjara peoples are a racial or ethnic group requiring protection of the kind which the State Act affords within the meaning of Art. 1.4. I have expressed this conclusion in a general, rather than a precise way, because it seems to me that it is debatable whether the protection which the Pitjantjatjara peoples actually require calls for a provision as stringent in its operation as s. 19. However, the provision is but one element in the entire regime of protection which the State Act provides for the Pitjantjatjara peoples and in my view it is appropriate and adapted to a regime of the kind which is necessary.

The remaining question is whether the State Act satisfies the proviso to Art. 1.4. The provisos to Arts. 1.4 and 2.2 are not expressed in identical terms. In the first the proviso is that "such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved". In the second the proviso requires that the measures shall not "entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved". The difference in expression does not warrant a difference in interpretation because both provisions insist that the special measures shall be discontinued after achievement of the objects for which they were taken. Even so, there is some difficulty in fitting legislative regime of the type in question within the framework of the proviso. It is looking primarily to

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measures of a temporary character, perhaps conferring special rights, which will alleviate the disadvantages under which the people of a particular race labour at a particular stage in their evolution. In the present case the legislative regime has about it an air of permanence. It may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples. Whether that be so is a question which can only be answered in the fullness of time and in the light of the future development of the Pitjantjatjara peoples and their culture. The fact that it may prove necessary to continue the regime indefinitely does not involve an infringement of the proviso. What it requires is a discontinuance of the special measures after achievement of the objects for which they were taken. It does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of special measures in the first place.

That the State Act is expressed to operate indefinitely is not a problem. It would be impracticable for the legislation to specify a terminal point in the operation of the regime which it introduces. It is sufficient to say that, if and in so far as the validity of the State Act depends on its fitting the character of special measures within Art. 1.4 of the Convention, its validity would come in question once the proviso to the article ceases to be satisfied.

For the foregoing reasons I consider that the State Act is valid, and that the appeal should be allowed. I would answer the questions in the special case as follows:

1. No.
2. Does not arise.

MURPHY J. Section 19 of the *Pitjantjatjara Land Rights Act* 1981 (S.A.) ("the State Act") prohibits any persons other than those of prescribed Aboriginal tribes from entering certain lands in South Australia except with permission. Section 10(1) of the *Racial Discrimination Act* (1975) ("the *Racial Discrimination Act*") states that "If, by reason of . . . a provision of, a law of . . . a State . . ., persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin". The effect of s. 8(1) of the *Racial Discrimination Act*, read with Art. 1, par. 4 of the Convention, is that Pt II of the Act (which includes s. 10) does not

apply to "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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved". The issue is whether s. 19 of the State Act is invalid because of inconsistency with the *Racial Discrimination Act*. The case is reduced to deciding whether s. 19 of the State Act would, except for s. 8 of the *Racial Discrimination Act* be inconsistent with s. 10 of that Act, and if so, whether it is saved by s. 8 as a "special measure".

The challenged part of the State Act discriminates on racial grounds by providing for exclusion from the land on a racial basis. A discrimination on racial grounds in favour of a racial group against the rest of the community is within the intendment of the *Racial Discrimination Act*, which should not be read pedantically.

If s. 10 of the *Racial Discrimination Act* applies in a case such as this only where the discrimination is in a field of public life (see s. 9(1) and the definition of "racial discrimination" in Art. 1 of the Convention) that is so here. The relevant right alleged here to be infringed by the State law is contained in Art. 5(d)(i) — "the right to freedom of movement and residence within the border of the State". The fact that the lands are owned by a non-government corporation does not take the discrimination into a private zone. The power to exclude from lands which are about one-tenth of the land area of South Australia, is an exercise of public power. The distinction between public power and private power is not clear-cut and one may shade into the other: see *Forbes v. N.S.W. Trotting Club Ltd.* (25). Here, however, the exercise of the power to exclude is of public power due to the size of the area involved and the fact that it is exercised by a body vested with particular statutory authority. In other cases, other factors will be relevant.

Section 10(1) of the *Racial Discrimination Act* applies, and its effect is that persons who are not Pitjantjatjaras would be given an unrestricted right of access to the lands thus rendering s. 19 of the State Act ineffective unless it can be justified as a special measure within s. 8(1) of the *Racial Discrimination Act*.

The general presumption is that legislation is valid. It was not

(25) (1979) 143 C.L.R. 242, at p. 275.

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argued that the presumption was inapplicable to this State Act. A corollary to the presumption of validity is the presumption of all facts and circumstances necessary to validity. It follows that we should presume that the facts and circumstances are such that the challenged provisions are special measures within s. 8 and do not violate the provisos in that section. There was no evidence to displace those presumptions. Therefore I am not satisfied that the presumption of validity is displaced. The provisos are so couched that questions of continuing validity of the challenged provisions may arise if the special measures are continued indefinitely.

The questions should be answered:

1. No.

2. Does not arise.

WILSON J. These proceedings have been removed from the Supreme Court of South Australia into this Court on the motion of the Attorney-General for South Australia pursuant to s. 40 of the *Judiciary Act* 1903 (Cth) as amended. The question which the Court is required to determine is whether s. 19 of the *Pitjantjatjara Land Rights Act* 1981 (S.A.) ("the State Act") is invalid or restricted in its operation by reason of the *Racial Discrimination Act* 1975 (Cth), as amended ("the Commonwealth Act").

The question arises in this way. The State Act is designed to grant land rights to a group of Aboriginal people in South Australia, its principal purpose being described in the long title as providing for the vesting of title to certain lands in the people known as Anangu Pitjantjatjaraku. Anangu Pitjantjatjaraku is the name of a body corporate created by the State Act (s. 5(1)) and all Pitjantjatjaras are members of it (s. 5(2)). "Pitjantjatjara" is defined in s. 4 to mean:

> "a person who is—
>
> (a) a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people;
>
> and
>
> (b) a traditional owner of the lands, or a part of them".

"The lands" are described in the First Schedule to the State Act and comprise an area of about 102,630 square kilometres or a little more than one-tenth of the total area of South Australia. The greater part of the lands was formerly an Aboriginal reserve created and administered under laws of the State but they also include a number of pastoral leases forming the property known as Granite Downs Station. The State Act authorizes the Governor to issue a land grant, in fee simple, of the whole or any part of the lands to Anangu Pitjantjatjaraku (s. 15) and the Court was informed that the whole of the lands described in the First Schedule was granted accordingly,

with appropriate savings of the rights of pastoral lessees, on 30 October 1981.

The State Act places considerable emphasis upon traditional ownership of the lands. "Traditional owner" is defined in s. 4, in relation to the lands, to mean:

> "... an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them".

Section 6(1) provides:

> "The functions of Anangu Pitjantjatjaraku are as follows:
>
> (a) to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect to those wishes and opinions;
>
> (b) to protect the interests of traditional owners in relation to the management, use and control of the lands;
>
> (c) to negotiate with persons desiring to use, occupy or gain access to any part of the lands;
>
> and
>
> (d) to administer land vested in Anangu Pitjantjatjaraku."

Section 7 obliges Anangu Pitjantjatjaraku, before carrying out any proposal relating to any portion of the lands, to have regard to the interests of, and to consult with, traditional owners having a particular interest in that portion of the lands or otherwise affected by it. Anangu Pitjantjatjaraku shall not carry out the proposal unless satisfied that those traditional owners understand the nature and purpose of the proposal and consent to it.

The State Act also contains detailed provisions governing other matters, including the constitution and operation of an Executive Board (whose function is to carry out the resolutions of Anangu Pitjantjatjaraku), entry to the lands, the conduct of mining operations on the lands, and the construction of roads by the Commission of Highways. It is with ss. 18 and 19, dealing with entry to the lands, that these proceedings are concerned. Section 18 provides that all Pitjantjatjaras have unrestricted rights of access to the lands. Section 19 provides that a person (not being a Pitjantjatjara) who enters the lands without the permission of Anangu Pitjantjatjaraku is guilty of an offence and liable to a penalty. An application for permission to enter must be made in writing and lodged with the Executive Board and permission may be granted, by instrument in writing, by Anangu Pitjantjatjaraku or by any group of Pitjantjatjaras to whom Anangu Pitjantjatjaraku has delegated the power to do so. The section contains a number of exceptions, including entry upon the lands by a police officer or other officer

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carrying out official duties, members of parliament or in case of emergency. These exceptions are not presently material.

The respondent is an Aboriginal person who tribal origins are apparently in New South Wales. He is not a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people. It does not appear whether or not he is a "traditional owner" within the meaning of that term in the State Act. Although it might be assumed that the traditional owners are drawn solely from one or other of the peoples mentioned, the respondent relies on the absence of any evidence to that effect. On 27 February 1982 the respondent was present on the lands, believing that he had permission to be there, albeit informal permission. He had not applied in writing and no permission had been granted to him by an instrument in writing. He was later charged with an offence under s. 19 of the State Act, namely, that on or about 27 February 1982, in the State of South Australia, being a person not a Pitjantjatjara, he entered on the lands without the permission of Anangu Pitjantjatjaraku. The complaint was heard at Oodnadatta on 29 and 30 November 1982 when the Special Magistrate stated a special case reserving questions of law for the consideration of the Supreme Court of South Australia, pursuant to s. 162 of the *Justices Act* 1921 (S.A.) as amended. The special case was considered by Millhouse J., who concluded that s. 19 was inconsistent with s. 9 of the Commonwealth Act and therefore invalid by reason of s. 109 of the Constitution. An appeal to the Full Court was instituted and thereafter, as I have indicated, the matter was removed into this Court.

It is important to emphasize the limited reach of the question which now requires determination. No issue was raised as to whether in respects relevant to this case the Commonwealth Act represents a faithful implementation of the International Convention on the Elimination of all Forms of Racial Discrimination ("the Convention") so as to constitute an exercise of the power of the Parliament to legislate with respect to external affairs: Constitution, s. 51(xxix). In the course of argument a number of difficulties of construction and of operation of the State Act were canvassed. Some of those difficulties were compounded by a lack of evidence. We are concerned only with the threshold question as to whether the prosecution of the respondent can proceed.

Counsel for the respondent relies on s. 9(1) or alternatively on s. 10(1) of the Commonwealth Act. Those provisions are set out in other judgments. In relation to the former provision, a provision which renders unlawful any act involving racial discrimination, counsel argues that the restriction of access to the lands by non-

Pitjantjatjaras involves a distinction based on race within the meaning of that phrase in s. 9(1) and is therefore inconsistent with the sub-section. Accordingly, s. 19 is invalid by reason of s. 109 of the Constitution. In relation to s. 10(1), the argument is that the respondent, by virtue of that sub-section, is entitled to enjoy the same right of access to the lands as a Pitjantjatjara. These submissions may not be without substance, unless the State Act satisfies the description of a "special measure" within the meaning of s. 8(1) of the Commonwealth Act, a question to which I come later in these reasons.

On the other hand, the learned Solicitor-General for South Australia, appearing for the appellant and for the Attorney-General of South Australia, argues, inter alia, that the State Act does not involve any racial discrimination within the meaning of the Commonwealth Act. The submission is that the State Act proceeds to vest lands and to grant the right to control access to those lands by reference to a criterion which is not racial in character. That criterion is traditional ownership of the lands in question. It is true that every traditional owner will be an Aboriginal person but he is not a traditional owner for that reason. It is not his race that invests him with the character of a traditional owner. There must be the further distinguishing characteristic that he has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them. It is this special relationship to the lands which, as I have already noted, provides the pivot on which the Act turns. As the Premier of South Australia informed the House of Assembly when introducing the Bill for the State Act, the object of the Act is to recognize the existence of the relationship and to provide the means whereby such owners can "protect and preserve their culture": see *Hansard*, House of Assembly, 23 October 1980, p. 1387. The submission seeks to draw support from s. 18 of the Commonwealth Act which provides:

> "A reference in this Part [Pt II] 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."

This provision may operate to exclude the State Act from the reach of the Commonwealth Act for the reason that although the definition of "Pitjantjatjara" includes a distinction based on race, namely, the reference to a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people, it is the second limb of the definition relating to traditional ownership that supplies the dominant reason for the enactment and consequently for the distinctions

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that it creates. The critical question is whether the fact that the ownership is a product of Aboriginal tradition and hence cannot be possessed by a person who is not an Aboriginal necessarily imports a distinction based on race. No doubt this is a matter upon which minds may differ and I do not find it necessary to reach a firm conclusion upon it because of the answer that I give to the question whether the State Act is a "special measure".

Section 8 of the Commonwealth Act appears in Pt II of the Act, which carries the heading "Prohibition of Racial Discrimination", and contains also ss. 9 and 10. Section 8(1) provides:

> "This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3)."

The exception referred to in this sub-section is not material. It follows that ss. 9 and 10 of the Commonwealth Act can only be relevant to the respondent's defence to his prosecution for an offence under s. 19 of the State Act if the State Act fails to satisfy the description of a "special measure" within the meaning of that expression in s. 8(1). That sub-section is clearly capable of application to a measure, whether of a legislative or executive nature, of a State. In that respect, so far as a State law is involved, the provision has the effect of limiting the field of possible inconsistency between such a law and the Commonwealth Act. The last-mentioned Act does not define "special measures" beyond saying that they are measures to which Art. 1(4) of the Convention applies. That paragraph is to be read and understood in the light of Art. 2(2), to which it is related: see the Travaux Preparatoires in respect of the Convention, pars. 90-91, p. 26. The two provisions are as follows:

> Art. 2(2). "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."
>
> Art. 1(4). "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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to

> the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

In my opinion, the State Act bears upon its face the clear stamp of a special measure such as is contemplated by the Convention. The emphasis upon traditional ownership and the functions of Anangu Pitjantjatjaraku set out in s. 6(1) are plainly directed to enabling the Pitjantjatjaras to protect and preserve their culture, a culture which, as the Premier observed in the House of Assembly in the course of the Second Reading Speech (see *Hansard*, House of Assembly, 23 October 1980, p. 1387) "is still largely intact". In his speech, the Premier refers to the extensive discussions and negotiations with the Aboriginal leaders of the relevant tribes that preceded the preparation of the Bill. The result is a measure directed to securing for the Pitjantjatjaras such advancement as will enhance their capacity to experience the full and equal enjoyment of human rights and fundamental freedoms. This conclusion is open notwithstanding the uncertain content of the phrase "human rights and fundamental freedoms". There is no reason to doubt that the detailed provisions regarding access to the lands which are contained in s. 19 were seen by the legislature as reasonable and necessary measures to enable Anangu Pitjantjatjaraku to discharge its functions in a manner most conducive to the advancement and protection of its members.

The effect of the proviso to Art. 1(4), read in the light of the second sentence of Art. 2(2), is to ensure that in no case shall a special measure entail as a consequence the maintenance of unequal or separate rights after the objectives for which they were taken have been achieved. This may pose a problem at some time in the future but in my opinion the absence of any reference in the State Act to meet the condition contained in the proviso does not deny its present character as a special measure.

It follows then, in my view, that the Commonwealth Act does not affect the operation of s. 19 of the State Act.

There is a further submission, advanced by the Solicitor-General for South Australia, upon which I should comment. The submission is that racial discrimination within the meaning of the Convention refers only to those distinctions or differentiations which are arbitrary, invidious or unjustified. It is a submission from which the Solicitor-General for the Commonwealth dissociated the Commonwealth. It may be true that some of the problems surrounding the implementation of the Convention would be minimized if it were possible to place acts of benign discrimination, including well-motivated legislative acts, altogether beyond the reach of the Convention on the ground that such assistance to a deprived racial

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group was not embraced within the evil to which the Convention is directed. This understanding of racial discrimination has been expounded by W. A. McKean, both in an article published in 1970 entitled "The Meaning of Discrimination in International and Municipal Law" in *The British Year Book of International Law*, vol. 44, p. 177 and recently in a monograph, *Equality and Discrimination Under International Law* (1983), pp. 286-288.

Whether or not it is desirable to adopt such an understanding of the concept of racial discrimination, in my opinion it is not possible to construe the Convention so as to give effect to it. Such a construction would be incompatible with the recognition the Convention expressly gives to special measures. To paraphrase Art. 1(1), the paragraph defines racial discrimination to mean "any distinction, exclusion, restriction or preference" based on race which has the effect of impairing the enjoyment on an equal footing of a human right in a field of public life. That definition is not confined to distinctions which are arbitrary, invidious or unjustified. It refers to *any* distinction, etc. It was therefore necessary for the article to go on to deal with special measures, measures which notwithstanding their benign character would otherwise be proscribed with all other acts of racial discrimination. Such measures are deemed not to be racial discrimination so long as the proviso is satisfied. If the Convention did not intend "racial discrimination" to bear an inclusive meaning, there would be no need to make any provision for special measures.

I would allow the appeal and would answer the questions put to the Court in the negative.

BRENNAN J. The respondent, Mr. R. J. Brown, was charged before a court of summary jurisdiction at Oodnadatta with the offence that he, not being a Pitjantjatjara, on or about 27 February 1982 entered on the lands described in the First Schedule to the *Pitjantjatjara Land Rights Act* 1981 (S.A.) ("the Land Rights Act") without the permission of Anangu Pitjantjatjaraku, contrary to the provisions of s. 19 of that Act. The special magistrate who constituted the Court stated a special case raising certain questions of law for the opinion of the Supreme Court. Millhouse J., answering the first question in the case, held that s. 19 of the Land Rights Act is invalid by reason of the *Racial Discrimination Act* 1975 (Cth). An appeal from that judgment was removed into this Court.

Section 19(1) of the Land Rights Act prohibits under penalty entry upon the lands described in the First Schedule to that Act by a person who is not a Pitjantjatjara unless that person has the

permission of Anangu Pitjantjatjaraku. "Pitjantjatjara" is defined by s. 4 to mean—

> "a person who is—
>
> (a) a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people;
>
> and
>
> (b) a traditional owner of the lands, or a part of them".

All Pitjantjatjaras have unrestricted rights of access to the lands (s. 18). The general prohibition upon entry by non-Pitjantjatjaras contained in s. 19(1) is subject to certain exceptions (sub-ss. (8), (11)) which are not presently material. Anangu Pitjantjatjaraku is a body corporate, the members of which are all Pitjantjatjaras: s. 5. Permits for entry by non-Pitjantjatjaras may be issued in writing by the Executive Board of Anangu Pitjantjatjaraku or its delegate on an application in writing lodged with the Executive Board: sub-ss. (3), (5), (6). One of the functions of Anangu Pitjantjatjaraku is to negotiate with persons desiring to use, occupy or gain access to any part of the lands: s. 6(1)(c).

The area of the lands is 102,630 square kilometres, slightly more than 10 per cent of the land area of South Australia. By far the greater part of the lands described in the First Schedule consist of what used to be the North-West Aboriginal Reserve. Before the Land Rights Act came into operation, it was an offence for a non-Aboriginal person (subject to certain exceptions) to be within the boundaries of the reserve without the Minister's written consent: see *Community Welfare Act* 1972 (S.A.), s. 88, repealed by s. 7 of the *Community Welfare Act Amendment Act* 1981 (S.A.). But the Land Rights Act did more than change the repository of power to issue permits to enter the lands. It authorized the Governor to issue a land grant, in fee simple, of the whole or any part of the lands to Anangu Pitjantjatjaraku: s. 15(1). Land vested in Anangu Pitjantjatjaraku is, generally speaking, inalienable and not liable to compulsory acquisition under a law of the State: s. 17. The Land Rights Act came into force on 2 October 1981; a land grant to Anangu Pitjantjatjaraku was issued on 30 October 1981. Section 19 thus authorizes Anangu Pitjantjatjaraku to regulate entry upon land which it owns. But that power is not an incident of ownership; it is a special statutory power.

A Pitjantjatjara who has "unrestricted rights of access to the lands" — i.e., to every part of the lands — may be a "traditional owner" in respect of only some part of the lands. The term "traditional owner" in relation to the lands is defined by s. 4 to mean—

> "an Aboriginal person who has, in accordance with Aboriginal

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tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them".

It is a function of Anangu Pitjantjatjaraku "to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect to those wishes and opinions": s. 6(1)(a).

The statutory rights conferred on Pitjantjatjaras are not defined by reference to the rights or usages acknowledged by or contained in Aboriginal tradition. The context of the statutory rights does not depend on concepts outside our legal system. Those rights are conferred on all Pitjantjatjaras, in some cases to be enforced and enjoyed individually (e.g., the unrestricted right of access to the lands), in some cases to be enforced only in conjunction with other Pitjantjatjaras (e.g., the right to have effect given to expression of wishes and opinions in relation to the management, use and control of the lands), and in some cases, to be enjoyed subject to the powers of the legal owner of the lands, Anangu Pitjantjatjaraku (e.g., the right to use a part of the lands in a particular way). Of course, the Executive Board of Anangu Pitjantjatjaraku is bound to carry out the resolutions of the corporation (s. 11) of which all Pitjantjatjaras are members (s. 5(2)). Although there is no precise correspondence between the rights and powers conferred on Pitjantjatjaras by the Land Rights Act and the traditional rights and obligations of Pitjantjatjaras or of particular Pitjantjatjara groups with respect to their clan territory or "country", the rights and powers conferred upon Pitjantjatjaras are sufficient to permit the use and management of the lands in such a way as to allow their traditional relationship with their country to be enjoyed and their traditional obligations in respect of their country to be fulfilled. Those Pitjantjatjaras who, by Aboriginal tradition, have "social, economic and spiritual affiliations" with the lands are enabled to foster and develop those affiliations and to discharge their "responsibilities for" the lands. The Report of the Pitjantjatjara Land Rights Working Party of South Australia, 1978 which preceded the enactment of the Land Rights Act, stated:

> "At the core of the Pitjantjatjara demand for land rights is the desire on the part of individuals to strengthen clan life and for many this means leaving the missions and government settlements for their homelands to resume responsibility for their clan territory — a trend otherwise known as the 'outstation movement'. The fundamental implication of granting land rights is the freedom thus guaranteed to the Pitjantjatjara to take up, and in many cases rebuild, the whole gamut of rights and responsibilities associated with these centres, revered and

> desired for their place as the backbone of the relation of the people to their environment."

The grant of title to the lands to Anangu Pitjantjatjaraku, pursuant to s. 15, guarantees Pitjantjatjaras' collective ability "to take up" or "rebuild" their traditional relationship with their country. The working party, having commented on the spiritual and cultural connexion between the Pitjantjatjaras and their country, saw "an indisputable need for the Pitjantjatjara not only to own their own land, but to be facilitated to be in full control of access to it". Effect is given to this view by s. 19. Control of access by non-Pitjantjatjaras to the lands is ancillary to the enjoyment by Pitjantjatjaras of the rights over or in respect of the lands which the other provisions of the Land Rights Act confer on them. The legal title to the lands is vested in Anangu Pitjantjatjaraku but the traditional owners and, subject to their wishes and opinions, all other Pitjantjatjaras may use any part of the lands without interference from non-Pitjantjatjaras except for the classes specified in sub-ss. (8) and (11) of s. 19. True it is that s. 19, in requiring a non-Pitjantjatjara to apply to Anangu Pitjantjatjaraku or its delegate for permission to enter and in requiring the permission to be written, precludes, perhaps harshly, an individual Pitjantjatjara from inviting a non-Pitjantjatjara onto the land. Individual convenience has given way to group protection. It is clear, however, that the purpose of s. 19 is to control the access by non-Pitjantjatjaras to the land in order to secure the uninterrupted enjoyment by Pitjantjatjaras of the use and management of the lands which the Land Rights Act permits. Section 19 came into force before and operates irrespective of the vesting of the legal title in Anangu Pitjantjatjaraku. Nevertheless, the vesting of legal title in a Pitjantjatjara corporation for the benefit of Pitjantjatjaras was the chief purpose of the Act and it is artificial to regard s. 19 as having a purpose or operation divorced from their use and management of the lands. The Land Rights Act does not purport to restore to the present generation of Pitjantjatjaras any legal rights which their forbears possessed; it is intended to provide the legal means by which present and future Pitjantjatjara generations may take up and rebuild their relationship with their country in accordance with tradition.

This brief conspectus of the Land Rights Act shows that it treats Pitjantjatjaras and non-Pitjantjatjaras differently. The issue of a land grant to a Pitjantjatjara corporation, Anangu Pitjantjatjaraku, is authorized; but no other person may acquire any proprietary, occupational or usufructuary interest in lands. Pitjantjatjaras have unrestricted access to the land; but, except for those classes referred

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to in sub-ss. (8) and (11) of s. 19, no other person has a right of access though he may seek and be given written permission to enter. The difference in treatment is based on race. I use the expression "based on race" to mean "based on race, colour, descent or national or ethnic origin" — the words used in s. 9(1) of the *Racial Discrimination Act*. It may be that "descent" or "ethnic origin" are more precisely descriptive of the basis of the differential treatment, but in this case nothing turns on the choice of expression.

It was argued that the difference in treatment is not based on race but on the traditional ownership of the lands which par. (b) of the definition of "Pitjantjatjara" makes an essential criterion of membership of the benefited class. Traditional ownership is itself a criterion based on race. As a matter of fact as well as of statutory definition, all traditional owners must be Aborigines. If the benefited class were defined simply in terms of "traditional owners", the definition would nevertheless be based on race, for the attribute of "traditional owners" (in the sense in which the expression is used in the Land Rights Act) is specific to Aborigines, and the attribute of traditional ownership of particular land is specific to particular Aboriginal peoples. A definition of a class by reference to an attribute specific to a particular race identifies the members of that race as the members of the class as surely as if membership of the particular race was expressed in the definition. It can be said that the Pitjantjatjaras' traditional "social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them" is the reason why the Land Rights Act was enacted, but that traditional relationship is a badge of distinction between particular Aboriginal peoples and all others, and the reason for the legislation is the benefiting of those particular Aboriginal peoples. I suspect that par. (a) of the definition of "Pitjantjatjara" adds little, practically speaking, to identify the members of the class who are traditional owners. If all traditional owners of the lands or of any part of the lands are members of one or other of the peoples mentioned in par. (a), par. (a) adds nothing to the definition. Paragraph (a) merely excludes from the benefited class any traditional owners who are not members of one or other of those peoples. It serves to emphasize, however, the racial basis of classification. It is thus true to say that membership or non-membership of a racially-defined class determines the treatment of a particular person under the Land Rights Act.

The difference in the treatment of Pitjantjatjaras and non-Pitjantjatjaras invites consideration of the *Racial Discrimination Act*. The *Racial Discrimination Act* was enacted to give effect to the International Convention on the Elimination of All Forms of Racial

Discrimination ("the Convention") which is set out in the schedule to the *Racial Discrimination Act*. No challenge to the validity of the *Racial Discrimination Act* is made. At the material time, that Act was the "exhaustive and exclusive" statement of the law for Australia relating to racial discrimination: *Viskauskas v. Niland* (26). In that case, the Court said (27) that the Commonwealth Parliament could not "admit the possibility that a State law might allow exceptions to the prohibition of racial discrimination or might otherwise detract from the efficacy of the Commonwealth law". When the Commonwealth Parliament, in performance of an international treaty obligation, introduces the provisions of an international convention into Australian municipal law, it is beyond the limits of the power conferred by s. 51(xxix) of the Constitution for the Commonwealth Parliament to enact a law that operates, or that permits a State law to operate, in a manner inconsistent to any substantial extent with the operation which international law intends the Convention provisions to have.

It is necessary therefore to ascertain the scope of the relevant provisions of the *Racial Discrimination Act* and to ascertain whether those provisions have any relevant effect on the operation of the Land Rights Act. If the *Racial Discrimination Act* prohibits or prevents what the Land Rights Act purports to authorize or provide, the *Racial Discrimination Act* prevails by force of s. 109 of the Constitution. The relevant provisions of the *Racial Discrimination Act* are s. 9, which prohibits certain acts of racial discrimination, and s. 10, which prevents the occurrence of a particular kind of discrimination that might be provided for by a State law. However, neither of those sections applies to, or in relation to the application of, the Land Rights Act if the Land Rights Act is a "special measure" to which Art. 1(4) of the Convention applies: s. 8(1) of the *Racial Discrimination Act*. Section 8(1) provides as follows:

> "This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3)."

The exception is not presently material. I put aside for the moment the question whether the Land Rights Act (or s. 19 thereof) is a "special measure". That question is more conveniently considered after the operation of ss. 9 and 10 are examined and their effect on the Land Rights Act is ascertained on the assumption that they apply in relation to the application of that Act. That assumption will

(26) (1983) 153 C.L.R. 280.

(27) (1983) 153 C.L.R., at p. 292.

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be made until I come to consider whether the Land Rights Act is a special measure to which Art. 1(4) of the Convention applies.

Section 9(1) of the *Racial Discrimination Act* provides:

> "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."

This provision prohibits acts involving racial discrimination as defined by the Convention. The Convention definition of "racial discrimination" (Art. 1(1)) is reproduced almost precisely by the words of s. 9(1).

Section 10 provides, inter alia—

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

Among the rights referred to in Art. 5 of the Convention is the "right to freedom of movement and residence within the border of the State" (par. (d)(i)).

The respondent's argument not only seeks to uphold the conclusion of Millhouse J. that s. 19 of the Land Rights Act is inconsistent with s. 9 of the *Racial Discrimination Act*; the argument goes further to submit that the enactment of ss. 18 and 19 of the Land Rights Act amounts to the doing of an "act" prohibited by s. 9 of the *Racial Discrimination Act*. If s. 9 were construed as encompassing a prohibition directed to State Parliaments to refrain from enacting discriminatory legislation with respect to matters that are within the legislative competence of the States, s. 9 would itself be invalid. Section 107 of the Constitution preserves and confirms the legislative competence of State Parliaments to make laws with respect to any topic that is not exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the

States: *Reg. v. Phillips* (28) per Windeyer J. It is therefore outside the powers of the Commonwealth Parliament to prohibit the Parliament of a State from exercising that Parliament's powers to enact laws, whether discriminatory or not, with respect to a topic within its competence. It is not to the point that a law, if enacted by the State Parliament, will be invalid by reason of its inconsistency with a Commonwealth law. A Commonwealth law purporting to prohibit a State Parliament from enacting a law finds no support in s. 109 of the Constitution; rather, s. 109 operates on a law that a State Parliament has lawfully enacted. The enactment of a State law on a matter within its competence cannot be an "act" which the Commonwealth Parliament can make it "unlawful for a person to do", whether or not the State law would, if enacted, be invalidated by s. 109. Section 9 of the *Racial Discrimination Act* cannot be construed as purporting to prohibit the enactment of discriminatory laws by the Parliament of a State, although the validity of discriminatory State laws if enacted is another question.

A State law cannot validly authorize the doing of an act if the doing of that act is prohibited by s. 9 of the *Racial Discrimination Act*. There is an inconsistency between a State law which purports to authorize the doing of an act and a Commonwealth law which prohibits the doing of such an act, and the State law is to the extent of the inconsistency invalid: *Clyde Engineering Co. Ltd. v. Cowburn* (29). If the Land Rights Act authorizes the doing of an act prohibited by s. 9 of the *Racial Discrimination Act*, the provision of the Land Rights Act which confers the authority is invalid at least to that extent. It was argued that there are two acts which the Land Rights Act authorizes to be done which fall under the prohibition contained in s. 9 of the *Racial Discrimination Act*. The first is the issuing of a land grant to Anangu Pitjantjatjaraku pursuant to s. 15(1) of the Land Rights Act; the second is the institution of proceedings under s. 38 of that Act against a person who is allegedly guilty of an offence under s. 19. If the issuing of a land grant to Anangu Pitjantjatjaraku is prohibited by s. 9 of the *Racial Discrimination Act*, s. 15 of the Land Rights Act is invalid. The invalidity of s. 15 would affect the validity of s. 19. Although the exclusion of non-Pitjantjatjaras from the lands is effected by s. 19, not by s. 15 nor by the exercise of proprietary rights acquired pursuant to s. 15, the State Parliament clearly intended the exclusion to enure for the benefit of Pitjantjatjaras as the persons able to use and manage the lands by virtue of the title vested in their corporation. Since the

(28) (1970) 125 C.L.R. 93, at p. 116.

(29) (1926) 37 C.L.R. 466, at p. 490.

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vesting of an inalienable fee simple title in Anangu Pitjantjatjaraku is the chief purpose of the Act, and since ss. 18 and 19 are ancillary to s. 15, the invalidation of s. 15 would bring down ss. 18 and 19 also. Thus, the first means of attacking the validity of s. 19 is by attacking the lawfulness of issuing the land grant pursuant to s. 15.

The other act which might arguably fall within the prohibition contained in s. 9(1) is the institution, pursuant to s. 38, of a summary prosecution for breach of s. 19. There is no substance in this argument. If s. 19 be otherwise valid, a provision for its enforcement by prosecution cannot make it invalid. There is nothing in the Land Rights Act which authorizes discriminatory enforcement of s. 19. Whoever is a party to a breach of s. 19 — whether Pitjantjatjara or non-Pitjantjatjara — is liable to prosecution.

The second means of attacking the validity of s. 19 is by attributing to s. 10 of the *Racial Discrimination Act* an application to s. 18 of the Land Rights Act. It can have an application only on the assumption that the Land Rights Act is not a special measure to which Art. 1(4) of the Convention applies. Let that assumption be made for the moment. The next step is to say that s. 10 confers on all non-Pitjantjatjaras an entitlement to enjoy to the same extent as Pitjantjatjaras the right of unrestricted access to the lands which Pitjantjatjaras enjoy by reason of s. 18 "notwithstanding anything in" the Land Rights Act. Section 10 provides that "persons of a particular race, colour or national or ethnic origin" should enjoy a right "enjoyed by persons of another race, colour or national or ethnic origin". It was submitted that s. 10 applies only when all the persons who suffer the comparative disadvantage are of the one race, colour or national or ethnic origin, and that the section does not apply when those persons are of several races (in the present context, all non-Pitjantjatjara races) and constitute the majority of the community. The submission was founded on the use of the word "particular". But the submission overlooks the distributive operation of s. 10 which provides that each racial group ("persons of a particular race") should enjoy the right enjoyed by the advantaged racial group ("persons of another race"). If the persons suffering a comparative disadvantage are of different races, s. 10 operates so that every disadvantaged racial group enjoys the same right to the same extent as it is enjoyed by the advantaged racial group. In the present context, each one of the non-Pitjantjatjara racial groups would acquire the enjoyment of the right to free access enjoyed by the Pitjantjatjaras pursuant to s. 18 of the Land Rights Act.

The next step is to say that the right conferred on Pitjantjatjaras by s. 18 is a right of the kind referred to in s. 10 of the *Racial Discrimination Act*, i.e., a right enjoyed "by reason of . . . a law . . .

of a State". It may be that that expression confines the operation of s. 10 to rights arising from statutory laws, but it is not necessary to decide that question. The right created by s. 18 is a statutory right, not a proprietary right. Nor is s. 19 merely a statutory confirmation of the proprietary rights of Anangu Pitjantjatjaraku. An owner of land has his remedy for trespass; but s. 19(1) gives an additional protection. The final step is to say that the enjoyment by every racial group of the right conferred on Pitjantjatjaras by s. 18 is inconsistent with the provisions of s. 19. It is submitted that the right conferred by s. 18 is enjoyed by Pitjantjatjaras only if they are traditional owners of the lands or some part of the lands and that others are entitled to enjoy that right only "to the same extent". If there are no other traditional owners than the peoples mentioned in par. (a) of the definition, so the submission runs, there are no other racial groups who could enjoy the s. 18 right. The submission confuses the right with the persons on whom it is conferred. The advantaged racial group are the Pitjantjatjaras. Traditional ownership is an element in the definition of the group, not of the right conferred on them. The right conferred on the group by s. 18 would be made a universal right by s. 10 of the *Racial Discrimination Act* if Pt II of the *Racial Discrimination Act* applies to the Land Rights Act. That operation of s. 10 would be inconsistent with s. 19 of the Land Rights Act.

If the Land Rights Act is a special measure, then there is no inconsistency between it and s. 9 or s. 10 of the *Racial Discrimination Act* for on that hypothesis those sections do not apply in relation to the Land Rights Act. If the Land Rights Act is not a special measure, s. 19 of that Act is inconsistent with s. 10 of the *Racial Discrimination Act*. Section 19 would also fall if the issuing of a land grant is an act of racial discrimination prohibited by s. 9(1). It is therefore necessary to consider whether s. 9(1) makes unlawful the issuing of a land grant to Anangu Pitjantjatjaraku and whether the Land Rights Act is a special measure. These questions require consideration of the meaning and operation of the relevant provisions of the *Racial Discrimination Act* and of the convention to which the text of that Act refers. The introduction into a Commonwealth statute of Convention provisions drawn in general terms produces novel problems of statutory interpretation. The Act, incorporating some of the terms of the convention and referring to others, may be thought to employ what Lord Simon of Glaisdale described in a similar context as "rubbery and elusive language" (*Ealing L.B.C. v. Race Relations Board* (30)) for which a strict or

(30) [1972] A.C. 342, at p. 362.

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legalistic construction would not be appropriate: per Lord Fraser of Tullybelton in *Mandla v. Dowell Lee* (31). I have elsewhere stated my opinion that the true meaning of the Act is ascertained by reference to the meaning in international law of the corresponding Convention provisions (*Koowarta v. Bjelke-Petersen* (32)) and that Art. 31 of the Vienna Convention on the Law of Treaties furnishes the most authoritative declaration of the emergent international rules for the interpretation of treaty provisions: *The Commonwealth v. Tasmania* (the *Tasmanian Dam Case*) (33). Art. 31(1) of the Vienna Convention provides:

> "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."

The context includes, inter alia, the preambles to the treaty: Art. 31(2). The objects and purposes of the Convention appear in the preambles to the Convention, the first three of which read as follows—

> "*Considering* that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,
>
> *Considering* that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,
>
> *Considering* that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination."

The States Parties to the Convention acknowledge the object of securing human dignity for all and equality between human beings through the achievement of universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race. The modern international concern with human rights and fundamental freedoms for all had its origin in the treaties signed and declarations made by certain European States after the First World War guaranteeing the protection of racial minorities: see McKean, *Equality and Discrimination Under International Law* (1983), Ch. I and II. The concern of that time with the rights and freedoms of

(31) [1983] 2 A.C. 548, at p. 565.
(32) (1982) 153 C.L.R. 168, at pp. 264-265.
(33) (1983) 158 C.L.R., at pp. 222-223.

minorities has been subsumed under a concern that the human rights and fundamental freedoms of all human beings be respected and observed. The securing of universal respect for and observance of human rights and fundamental freedoms for all is a broader object than the protection of minorities; the attaining of the broader object would preclude unjustified discrimination on any ground against any minority or, for that matter, any majority.

The Convention does not seek to achieve so broad an object. It condemns discrimination that is "based on race, colour, descent or national or ethnic origin"; it does not concern itself with discrimination on other grounds, for example, religious or political belief. The Convention pursues the aim of racial equality which, as Dr. Egon Schwelb wrote in "Elimination of Racial Discrimination", *International and Comparative Law Quarterly* (1966), vol. 15, p. 1057, "has permeated the law-making, the standard-setting and the standard-applying activities of the United Nations family of organizations since 1945". Racial equality is the opposite of racial discrimination, and full racial equality would be achieved by the elimination of all forms of racial discrimination. However, the Convention does not seek to eliminate racial discrimination in every field of life. The Convention definition of racial discrimination, substantially reproduced in s. 9(1), comprehends a distinction etc. based on race that "has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right and fundamental freedom in the political, economic, social, cultural or any other field of public life". (It may be that some of the rights listed in Art. 5 of the Convention, which are apparently intended to be particular rights or freedoms of the kind mentioned in the definition, do not in truth fall within the specified fields, but that is of no relevance in this case.) The object of the Convention is thus limited in some respects. At its heart is the object of achieving universal recognition and observance of human rights and fundamental freedoms for all, and the limitation of the Convention's object to the achievement of racial equality in the fields of public life focuses attention on particular ways in which human rights and fundamental freedoms should be recognized and observed.

The recognition and observance of human rights and fundamental freedoms by a State involves a restraint on the untrammelled exercise of its sovereign powers in order to ensure that the dignity of human beings within each State is respected and that equality among human beings prevails. Clearly enough, human rights and fundamental freedoms are not to be understood as the rights and freedoms which a person has under a particular legal system; they

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are rights and freedoms which every legal system ought to recognize and observe. They are inalienable rights and freedoms that a human being possesses simply in virtue of his humanity, independently of any society to which he belongs, independently of the legal regime which governs it, and independently of any right or freedom that he might acquire by entering into a special relationship with another. The term connotes the rights and freedoms which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born — "free and equal in dignity and rights", as the Universal Declaration of Human Rights proclaims. The State and other persons are bound morally, though not legally, to recognize and observe those rights and freedoms. What is their content? The Universal Declaration of Human Rights contains a general statement of human rights, and particular examples (some relating, perhaps, to private fields of life) are set out in Art. 5 of the Convention. But an attempt to define human rights and fundamental freedoms exhaustively is bound to fail, for the respective religious, cultural and political systems of the world would attribute differing contents to the notions of freedom and dignity and would perceive at least some differences in the rights and freedoms that are conducive to their attainment: see Donnelly, "Human Rights and Human Dignity", *American Political Science Review* (1982), vol. 76, p. 303.

In time, international law may spell out with more precision the contents of human rights and fundamental freedoms, but for the present it must be accepted that the term is imprecise in its meaning. That is not to say that it is devoid of meaning, much less to say that the provisions of the *Racial Discrimination Act* which contain or incorporate a reference to the term, namely, ss. 8(1) and 9(1), have no effect or operation. But it is not necessary to give an exhaustive definition to human rights and fundamental freedoms in order to give meaning to those provisions.

The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society. If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others can engage in such an activity in similar circumstances, or to enjoy the public benefits of that society to the same extent as others may do, and that the disability exists because of the racial classification, there is a prima

facie nullification or impairment of human rights and fundamental freedoms. To that general proposition, there are some exceptions.

First, human rights and fundamental freedoms are not nullified or impaired where some attribute specific to the racially classified group reasonably requires differential treatment of those who are members of the group and those who are not in order to effect a legitimate object (not being the making of a racial distinction). The possession of such an attribute by itself does not affect the human rights and fundamental freedoms of an individual; it is only the selection of the attribute as the criterion of differential treatment that may nullify or impair those rights and freedoms. Thus the colour of a race does not affect the human rights and fundamental freedoms of the members of the race, but a colour bar ordinarily does. The first exception may be illustrated by an example. An artist who needs the services of a Pitjantjatjara as a model does not impair the human rights and fundamental freedoms of others when he employs a Pitjantjatjara simply because he is a Pitjantjatjara. A person of another racial group could not offer the required authenticity of appearance of a Pitjantjatjara, and could not be heard to say that his human rights and fundamental freedoms had been nullified or impaired. This is a rare exception, for there are few legitimate objects that do require differential treatment based on specific racial attributes. Differential treatment based on a specific racial attribute ordinarily constitutes racial discrimination. I need not refer again to this exception for it has no relevance to the present case and will seldom be relevant in other cases of alleged racial discrimination (though it may be of considerable relevance where other kinds of discrimination are in issue). The second exception arises when the differential treatment is manifestly based on race, but that treatment is, or is due to, a special measure to which Art. 1(4) of the Convention applies. Then the racial distinction is justified by special considerations.

In the present case, the law of South Australia accords differential treatment to Pitjantjatjaras and non-Pitjantjatjaras with respect to the right of access to approximately 10 per cent of the land area of South Australia and with respect to the acquisition of proprietary, occupational and usufructuary rights in or over Crown lands. When the land grant was issued, non-Pitjantjatjaras lost any opportunity to acquire, either by alienation from the Crown or by transfer after alienation, any estate or interest in the lands: Land Rights Act, s. 17. The right of non-Pitjantjatjaras to freedom of movement over a large area of South Australia — a right of the kind set out in Art. 5(1)(d)(i) of the Convention — is impaired. The impairment of the right of non-Pitjantjatjaras is not based on the ownership of the

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lands by Anangu Pitjantjatjaraku, but simply on racial classification. Though s. 19 confers, as we have seen, protection that supplements the proprietary rights of the owner, its operation is independent of the vesting of title. The difference in treatment is based not on common law proprietary rights but on race. The differential treatment of Pitjantjatjaras and non-Pitjantjatjaras achieves no legitimate object except to confer a privilege on Pitjantjatjaras. Assuming for the moment that the Land Rights Act is not a special measure, it is, in my opinion, clearly discriminatory. The inequality of treatment is produced by the law itself, not by any act done in exercise of a discretion created by the law. A discriminatory law or a discriminatory act done in due obedience to the law denies the human right of equality before the law, referred to in the third preamble to the Convention. The right to equality before the law without distinction as to race is guaranteed by the States Parties to the Convention: Art. 5. The claim to equality before the law is, as Sir Hersch Lauterpacht wrote (*An International Bill of the Rights of Man* (1945), p. 115), "in a substantial sense the most fundamental of the rights of man . . . It is the starting point of all other liberties". A distinction etc. based on race that is required by law nullifies the enjoyment of the human right to equality before the law.

But it has long been recognized that formal equality before the law is insufficient to eliminate all forms of racial discrimination. In its *Advisory Opinion on Minority Schools in Albania* (34), the Permanent Court of International Justice noted the need for equality in fact as well as in law, saying:

> "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact. . . ."

As Mathew J. said in the Supreme Court of India in *Kerala v. Thomas* (35), quoting from a joint judgment of Chandrachud J. and himself:

> "It is obvious that equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations."

(34) (1935) Ser. A/B No. 64, at p. 19.

(35) [1976] 1 S.C.R. 906, at p. 951.

In the same case, Ray C.J. pithily observed (36):

> "Equality of opportunity for unequals can only mean aggravation of inequality."

The validity of these observations is manifest. Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life". In an opinion which dissented on a point that is not material here, Judge Tanaka wrote in the *South West Africa Cases (Second Phase)* (37):

> "We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.
>
> The question is, in what case equal treatment or different treatment should exist. If we attach importance to the fact that no man is strictly equal to another and he may have some particularities, the principle of equal treatment could be easily evaded by referring to any factual and legal differences and the existence of this principle would be virtually denied. A different treatment comes into question only when and to the extent that it corresponds to the nature of the difference. To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists. Accordingly, not every different treatment can be justified by the existence of differences, but only such as corresponds to the differences themselves, namely that which is called for by the idea of justice — 'the principle to treat equal equally and unequal according to its inequality, constitutes an essential content of the idea of justice' (Goetz Hueck, *Der Grundsatz der Gleichmässigen Behandlung in Privatrecht*, 1958, p. 106) [*translation*].
>
> Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law.
>
> Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness."

Formal equality must yield on occasions to achieve what the Permanent Court in the *Minority Schools of Albania Opinion* (38) called "effective, genuine equality".

(36) [1976] 1 S.C.R., at p. 933.
(37) [1966] I.C.J. R., at pp. 305-306.
(38) (1935) Ser. A/B No. 64, at p. 19.

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A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of special measures. A special measure is, ex hypothesis, discriminatory in character; it denies formal equality before the law in order to achieve effective and genuine equality. As Vierdag in *The Concept of Discrimination in International Law* (1973), p. 136 says:

> "The seeming, formal equality that in a way may appear from equal treatment is replaced by an apparent inequality of treatment that is aimed at achieving 'real', material equality — somewhere in the future. And this inequality of treatment is accorded precisely on the basis of the characteristics that made it necessary to grant it: race, religion, social origin, and so on."

A legally required distinction, exclusion, restriction or preference based on race nullifies or impairs formal equality in the enjoyment of human rights and fundamental freedoms, but it may advance effective and genuine equality. In that event, it wears the aspect of a special measure calculated to eliminate inequality in fact. Some writers regard benign discrimination as falling outside the conception of discrimination in international law. Thus, McKean, op.cit., p. 288, expresses the view that the provision of special measures is not now regarded as constituting racial discrimination:

> "It is now generally accepted that the provision of special measures of protection for socially, economically, or culturally deprived groups is not discrimination, so long as these special measures are not continued after the need for them has disappeared. Such measures must be strictly compensatory and not permanent or else they will become discriminatory. It is important that these measures should be optional and not against the will of the particular groups affected, and they must be frequently reconsidered to ensure that they do not degenerate into discrimination. The other type of protective measure which is permissible is the provision of special rights for minority groups to maintain their own languages, culture, and religious practices, and to establish schools, libraries, churches, and similar institutions. These measures are not discriminatory because they merely allow minorities to enjoy rights which are exercised by the rest of the population. Such measures produce 'an equilibrium between different situations' and should be maintained as long as the groups concerned wish."

A similar view is expressed by Mr. Partlett in his article "Benign Racial Discrimination: Equality and Aborigines", *Federal Law Review*, (1979), vol. 10, p. 238.

In the United States, a majority of the Supreme Court has held that the clause in the Fourteenth Amendment which guarantees "the equal protection of the laws" is not necessarily violated by a racial classification which is calculated to redress the disparate impact of past discrimination, at least where the instances of past

discrimination are specific: *University of California Regents v. Bakke* (39). Blackmun J. said (40):

> "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot — we dare not — let the Equal Protection Clause perpetuate racial supremacy."

If racial discrimination in Art. 1(1) of the Convention does not include benign discrimination effected by a special measure, there is an argument that s. 9(1) does not make unlawful an act which involves benign discrimination though it involves formal discrimination. Whatever may be the connotation of the term "discrimination" in international law generally, in the context of the Convention Art. 1(4) expresses an exception to what otherwise falls within Art. 1(1): see *Koowarta* (41). Section 9(1) picks up the general conception of discrimination in Art. 1(1) but not the exception expressed in Art. 1(4). Section 9(1) relates to all formal discrimination including benign discrimination unless the benign discrimination is effected by a special measure which s. 8(1) takes out of the ambit of s. 9(1). Section 8(1) would have no operation if the exception was already provided for by s. 9(1). The draftsman of the Act has sought to achieve in the text of the statute substantially the same effect as was achieved by the Convention: he has prevented the application of s. 9(1) to, or in relation to the application of, a special measure to which Art. 1(4) applies. Section 9(1) therefore prohibits all acts involving a distinction, exclusion, restriction or preference based on race that denies formal equality before the law unless the distinction, restriction or preference is for the purpose of achieving effective and genuine equality and otherwise satisfies the description of a special measure. And so, an act done in performance of a duty imposed by a State law which involves a distinction based on race that denies formal equality falls within s. 9(1). Such an act must be held to be unlawful and the State law that purports to command the doing of the act is invalid unless it satisfies the description of a special measure.

Distinctions, exclusions, restrictions and preferences based on race which deny formal equality before the law fall into two radically different categories: those which have the purpose of achieving effective and genuine equality by alleviating the conditions of a disadvantaged class and those which do not. Broadly stated, special measures are in the former category and outside the latter category.

(39) (1978) 438 U.S. 265, at pp. 307, 356, 369, 399, 407.
(40) (1978) 438 U.S., at p. 407.
(41) (1983) 153 C.L.R., at pp. 261-262.

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Part II of the *Racial Discrimination Act* applies only to the latter category. If the Land Rights Act were not a special measure, Pt II of the *Racial Discrimination Act* would apply to it. The former Act, as a matter of construction, formally effects racial inequality. The issue of a grant of title to the lands to Anangu Pitjantjatjaraku to be used and managed by Pitjantjatjaras and the resulting exclusion of non-Pitjantjatjaras from acquiring any proprietary, occupational or usufructuary rights in or over the lands is discriminatory. It involves a preference based on race, and it denies to non-Pitjantjatjaras equality before the law. Equally, the prohibition of entry by non-Pitjantjatjaras without a written permit is discriminatory. If the resolution of this case depended on no more than the construction of the Land Rights Act and of ss. 9 and 10 of the *Racial Discrimination Act*, s. 19 would fall on either of the two grounds earlier mentioned: first, it is ancillary to s. 15 which authorizes the doing of a discriminatory act that s. 9 of the *Racial Discrimination Act* would make unlawful, namely, the alienation of Crown lands to Anangu Pitjantjatjaraku to be held subject to the discriminatory provisions of the Land Rights Act. Secondly, the prohibition contained in s. 19 of the Land Rights Act is inconsistent with the operation that s. 10 of the *Racial Discrimination Act* would have on s. 18 of the Land Rights Act.

Although the Land Rights Act is a measure which effects formal discrimination, it may yet be a special measure to which Art. 1(4) applies. If it is such a measure, Pt II of the *Racial Discrimination Act* has no application. Article 1(4) provides:

> "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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

"Special measures", deemed not to be racial discrimination, are not the subject of the obligation imposed on States Parties by Art. 5 of the Convention "to prohibit and to eliminate racial discrimination in all its forms". Indeed, Art. 2(2) imposes an obligation on States Parties to take special measures. It provides as follows:

> "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to

> them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

The Convention does not use precisely the same words in Art. 1(4) and in Art. 2(2), but those provisions are complementary and their expressions should be consistently construed. A "special and concrete" measure taken by a State Party in performance of an obligation under Art. 2(2) is a "special measure" within the meaning of that term in Art. 1(4). The class to be benefited by a special measure must be a racial or ethnic group or individuals belonging to the group. The sole purpose of a special measure is to secure such "adequate advancement" or "adequate development and protection" of the benefited class as is necessary to ensure "equal enjoyment or exercise of human rights and fundamental freedoms". The occasion for taking a special measure is that the circumstances warrant the taking of the measure to guarantee that the members of the benefited class shall have "the full and equal enjoyment of human rights and fundamental freedoms". From these conceptions, the indicia of a special measure emerge. A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.

The first indicium: the beneficiaries of a special measure are natural persons, not a corporation. In the present case, the benefits conferred on Pitjantjatjaras by the Land Rights Act do not consist in the ownership of the lands but in the rights which Pitjantjatjaras are individually or collectively able to exercise over or in respect of the lands. Although the Pitjantjatjaras are enabled to use and manage the lands as they see fit and to treat the lands as their home, individual Pitjantjatjaras are denied the power to invite or to permit a non-Pitjantjatjara to come upon the lands. Does this feature of the scheme impair the human rights and fundamental freedoms of the Pitjantjatjaras the enjoyment of which a special measure is intended to protect? It is immaterial that individual Pitjantjatjaras are not the legal owners of the lands, for human rights and fundamental freedoms are not necessarily legal rights and freedoms. The right of

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a person to invite or to permit another to enter the home which he occupies seems to me to be an aspect of the right to freedom of peaceful association which is declared by Art. 20 of the Universal Declaration of Human Rights. Under the Land Rights Act, the right of an individual Pitjantjatjara appears to be impaired, for the power to permit entry is reposed exclusively in the Executive Board or its delegate.

The human right to invite or permit another to enter one's home is not unqualified. It can be regarded as an individual right when the individual alone occupies the home, but it is more a collective right when premises are the home of a group. At all events, where the enjoyment of the home might be prejudiced if the individual right were not foregone in favour of a collective right, it cannot be said that the human rights and fundamental freedoms of the household's members are impaired by their acceptance of membership on the terms that the right should be exercised collectively. Analogously, though the analogy is strained by the cumbersome requirements of s. 19, the human rights and fundamental freedoms of the Pitjantjatjaras are not impaired by their foregoing the individual right to invite or to permit another to enter the lands in favour of a group right exercisable by the Executive Board or its delegate. The vast area of the lands and perhaps some elements of tradition may explain why the cumbersome procedure was prescribed. A fear entertained by Pitjantjatjaras that individual Pitjantjatjaras could be improperly overborne by those who wish to gain entry to the lands for socially disruptive purposes or a need to retain close control on entry at times of Aboriginal ceremonies are possible explanations for what may appear at first sight to be serious impairment of individual rights. Having regard to the purpose of the measure, presently to be mentioned, I am unable to regard the absence of an individual power to permit entry as a ground for holding that s. 19 is inconsistent with the character of a special measure. The Land Rights Act satisfies the first indicium.

The second indicium: although Art. 1(4) refers to "racial or ethnic groups", it should be understood as referring to the several categories of race, colour, descent or national or ethnic origin mentioned in Art. 1(1) in order to make Art. 1(4) read symmetrically with Art. 1(1). The manifest purpose of Art. 1(4) is to exempt from the definition of "racial discrimination" those distinctions, exclusions, restrictions or preferences which are made for the sole purpose stated in that paragraph. It would not accord with the object of the Convention to construe the Art. 1(4) exemption as limited to distinctions, etc. based on race or ethnic origin and to leave within the definition of racial discrimination those distinctions,

etc. based on colour, descent or national origin. In the present case, for reasons earlier stated, the criterion of membership of the benefited class is racial.

The third indicium: the purpose of a legislative measure can be collected from its terms and from the operation which it has in the circumstances to which it applies, but international law does not require that these be regarded as the only sources from which the purpose of a measure can be collected: see Ramcharan, *International Law and Fact-Finding in the Field of Human Rights* (1982), Ch. III. Of course, not all special measures are legislative. Any fact which shows what the persons who took or who promoted the taking of a measure intended it to achieve casts light upon the purpose for which it was taken provided the measure is not patently incapable of achieving what was so intended. The intention of those persons is a matter of fact. The finding of facts in order to determine the scope or validity of a law raises a particular problem that does not arise on the finding of the facts in issue between litigating parties. It will be necessary presently to examine that problem but, for the moment, it suffices to say that the purpose of a measure may not be, or may not be merely, a question of construction.

A special measure must have the sole purpose of securing advancement, but what is "advancement"? To some extent, that is a matter of opinion formed with reference to the circumstances in which the measure is intended to operate. "Advancement" is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes. Such a grant would be a step towards apartheid. Even if the promoters of the measure had the purpose of promoting the interests of the residents of that land, the measure would deny the residents' human rights and fundamental freedoms: see pars. 128-131 of the *Namibia (S.W. Africa) Advisory Opinion* of the International Court

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of Justice (42). The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that a people exercise and enjoy equally with others their human rights and fundamental freedoms; apartheid destroys that possibility.

The degree of advancement which a special measure is intended to achieve is "adequate". The purpose of a special measure must not be to convert the beneficiaries from a disadvantaged class to a class that enjoys greater privileges than are necessary to ensure their "equal enjoyment of human rights and fundamental freedoms".

The purpose of the Land Rights Act can be collected from its terms, from the Report of the Pitjantjatjara Land Rights Working Party and from the speeches of the Ministers in charge of the Bill for the Act in the respective Chambers of the Parliament of South Australia. From those sources, its purpose appears to be the restoration to the Pitjantjatjaras of the use and management of the lands free from disturbance by others so that they may foster the traditional affiliations that Pitjantjatjaras have with the lands and discharge the traditional responsibilities to which they are subject in respect of the lands. The purpose is thus to restore to the Pitjantjatjaras the "hearth, home, the source and locus of life, and everlastingness of spirit" to which the late Professor Stanner referred in a passage which I quoted in *Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd.* (43). The conferring of legal rights on the Pitjantjatjaras and their corporation and the exclusion of non-Pitjantjatjaras from the lands are the means by which it is intended that the Pitjantjatjaras should be able to foster their traditional affiliation with the lands, to discharge their traditional responsibilities, and to build or buttress a sense of spiritual, cultural and social identity. A racial minority which wishes to preserve its own identity may need particular supports to preserve that identity, and it may need to preserve that identity if its members are not to be disadvantaged in the society of which it is a part. If such a racial minority is denied those supports, its members may not only lose their own sense of identity but be unable to adopt the standards and customs of the majority or to cope with the pressures which assimilation with the majority entails. In Australia, the phenomenon of landless, rootless Aboriginal peoples is sadly familiar. Many of them are incapable of enjoying and exercising "on an equal footing" the human rights and fundamental freedoms that are the birthright of all Australian citizens. I would conclude that the purpose of the

(42) [1971] I.C.J. R. 16, at pp. 56-57.

(43) (1982) 158 C.L.R. 326, at pp. 355-356.

Land Rights Act is to provide the support — undisturbed and full access to the Pitjantjatjaras' traditional country — with the intention of advancing the Pitjantjatjaras in order to ensure their ability to enjoy and exercise, equally with others, their human rights and fundamental freedoms. That is a purpose of the kind prescribed by Art. 1(4).

The fourth indicium: while the third indicium is concerned with the purpose of taking the measure, the fourth indicium is concerned with the need for the measure to be taken. The need must match the purpose. Is there a need to take the measure and does the measure secure no more than adequate advancement? A measure taken for the purpose mentioned in Art. 1(4) by the legislature of a State or a Territory or by an Executive Government (whether of the Commonwealth, a State or a Territory), is not a special measure if there is no occasion for taking a special measure. That is so although the branch of government that takes the measure has or, but for Pt II of the *Racial Discrimination Act*, would have the power or authority to do so. If a measure is taken when there is no occasion for taking a special measure, Pt II of the *Racial Discrimination Act* applies to or in relation to the measure.

The third and fourth indicia of a special measure involve questions of fact and opinion. Is the object which the measure is intended to secure "adequate advancement" of the kind mentioned in Art. 1(4) and is the protection given the beneficiaries "necessary in order to ensure [them] equal enjoyment or exercise of human rights and fundamental freedoms"? To determine whether the measure in question is intended to remove and is necessary to remove inequality in fact (as distinct from formal inequality), the circumstances affecting the political, economic, social, cultural and other aspects of the lives of the disadvantaged group must be known and an opinion must be formed as to whether the measure is necessary and likely to be effective to improve those circumstances. The objective circumstances affecting the disadvantaged group are matters of fact, capable of ascertainment albeit with difficulty. But once those circumstances are ascertained, an assessment must be made about a number of matters: what is "adequate advancement" of the beneficiaries in the circumstances? Do they require the protection given by the measure in order to enjoy and exercise their human rights and fundamental freedoms equally with others? Whether a measure is needed and is likely to alter the circumstances affecting a disadvantaged racial group in such a way that they will be able to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of society equally with others if they

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wish to do so is, at least in some respects, a political question. A court is ill-equipped to answer a political question.

In the first instance, of course, a political branch of government determines whether an occasion exists for taking a particular measure. An obligation to take a special measure "when the circumstances so warrant" is imposed by Art. 2(2) of the Convention. That is an obligation in international law, and no municipal court has jurisdiction to enforce that obligation, or to determine "when the circumstances so warrant". The obligation to take special measures falls to be performed by a political branch of government. If a political branch of government decides that a racial group is in need of advancement to ensure that they attain effective, genuine equality and that a particular measure is likely to secure the advancement needed and that the circumstances warrant the taking of the measure, a municipal court has no jurisdiction under international law to determine whether those decisions have been validly made and whether the measure therefore has the character of a special measure under the Convention. But when the legal rights and liabilities of individuals are in issue before a municipal court and those rights and liabilities turn on the character of the Land Rights Act as a special measure, the municipal court is bound to determine for the purposes of municipal law whether it bears that character. But the character of a special measure depends in part on a political assessment that advancement of a racial group is needed to ensure that the group attains effective, genuine equality and that the measure is likely to secure the advancement needed. When the character of a measure depends on such a political assessment, a municipal court must accept the assessment made by the political branch of government which takes the measure. It is the function of a political branch to make the assessment. It is not the function of a municipal court to decide, and there are no legal criteria available to decide, whether the political assessment is correct. The court can go no further than determining whether the political branch acted reasonably in making its assessment: cf. *United States v. Sandoval* (44). In *R. v. Poole; Ex parte Henry* [No. 2] (45) where the validity of a rule made to carry out and to give effect to the convention for the Regulation of Air Navigation was in issue, Starke J. said (46) that "within reason it is or at least should be for the discretion of the rule-making authority to determine, in the particular case, what are the appropriate and effective means of carrying out and giving effect to the Convention". To go further

(44) (1913) 231 U.S. 28, at p. 46.
(45) (1939) 61 C.L.R. 634.
(46) (1939) 61 C.L.R., at p. 648.

than deciding whether the assessment could reasonably be made would be to assume a function that is necessarily committed to another branch of government. In some cases, it may not be open to a court to act upon a political assessment made by another branch of government, but where it is open to a court to do so, the court does not itself undertake the making of the assessment. The jurisprudential foundation for that approach may be found in one or other of the features of a political question to which the Supreme Court of the United States referred in *Baker v. Carr* (47). Delivering the opinion of the court in that case, Brennan J. said (48):

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

It is not necessary to identify the foundation in the present case. It is enough that the court determines no more than this: could the political assessment inherent in the measure reasonably be made? If the political assessment could not have been made reasonably, the measure does not bear the character of a special measure and the court must so hold. As Brennan J. said (49), the courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power". The court does not have to decide a political question; at most it must decide the limits within which a political assessment might reasonably be made. To determine the matter, it is necessary to apply any relevant legal criteria, for example, that the wishes of the beneficiaries for the measure are of great importance in satisfying the element of advancement. It is also necessary to find, as matters of fact, the circumstances affecting the racial group and the effect which the special measure is likely to have on those circumstances.

A measure which satisfies the four indicia is not a special measure if the provisos in the latter part of Art. 1(4) apply. The measure must not "lead to the maintenance of separate rights for different racial groups" nor "be continued after the objectives for which [it was] taken have been achieved". These provisos are intended to

(47) (1962) 369 U.S. 186.
(48) (1962) 369 U.S., at p. 217.
(49) (1962) 369 U.S., at p. 217.

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ensure that formal discrimination is not suffered to continue when protective measures to achieve effective and genuine equality are no longer necessary.

The terms in which the provisos are expressed require some exegesis. The first point is whether the temporal expression at the end of Art. 1(4) — "after the objectives . . . have been achieved" — relates to the maintenance of separate rights as well as to the continuation of the special measure. If the proviso prohibiting the maintenance of separate rights for different racial groups were to operate before the objectives of a special measure were achieved, formal equality before the law could not be suspended in order to provide effective, genuine equality. The Convention would entrench inequalities in fact by precluding any legislative distinction based on race. Clearly that is not the object of the Convention. The proviso relating to the maintenance of separate rights, like the proviso relating to the continuation of special measures, is intended to limit the period during which formal discrimination may be permitted.

The second point is whether the provisos deny the character of a special measure to a measure that does not, from its inception, define the time when it is to cease. The point is relevant to the Land Rights Act because the Act does not contain a "sunset" clause automatically bringing it to an end at some future time. What the provisos are concerned to avoid, however, is the maintenance of separate rights after the objectives have been achieved and the continuation of special measures after that time. The provisos are satisfied if, when that time arrives, separate rights are repealed and special measures are discontinued. As it is impossible to determine in advance when the objectives of a special measure will be achieved, the better construction of the provisos is that they contemplate that a State Party will keep its special measure under review, and that the measure will lose the character of a special measure at the time when its objectives have been achieved. But the provisos do not require the time for the operation of the special measure to be defined before the objectives of the special measure have been achieved. With the passage of time, circumstances may no longer warrant the continuation of some or all of those provisions of the Land Rights Act which provide for formal discrimination. If that time comes, a provision which creates an unsustainable formal discrimination will fall because Pt II of the *Racial Discrimination Act* will then apply to it. As Dixon J. said in *Australian Textiles Pty. Ltd. v. The Commonwealth* (50): "If a power applies to

(50) (1945) 71 C.L.R. 161, at p. 181.

authorize measures only to meet facts, the measure cannot outlast the facts as an operative law." If it was reasonable to make the assessment that the Land Rights Act was necessary to ensure effective and genuine equality when it was enacted, the maintenance of separate rights up to the present time could not be held to be unreasonable. The vesting of title to the lands in Anangu Pitjantjatjaraku without more does not achieve the objectives of the Land Rights Act. The advancement which the legislature thought "adequate" went beyond the vesting of title. The inalienability of title, the ability of the Pitjantjatjaras to control the use and management of the land, the primacy of the wishes and opinions of the traditional owners and the exclusion of non-Pitjantjatjaras without the written permission of the Executive Board or its delegate are elements of the continuing protection intended for the Pitjantjatjaras.

It remains to consider whether the legislature could reasonably have thought that the Land Rights Act was necessary to ensure the Pitjantjatjaras' equal enjoyment or exercise of human rights and fundamental freedoms. This question requires some understanding of the circumstances in which the Act is intended to operate. Matters of fact are involved, and the Court must ascertain some facts in order to determine what is a question of law: the validity of the Land Rights Act and the scope of Pt II of the *Racial Discrimination Act*.

Millhouse J. made no findings of fact. He decided the question whether s. 19 of the Land Rights Act was invalid or restricted in its operation by the *Racial Discrimination Act* by a process of construction. Although questions of law do not ordinarily involve considerations of any fact (or, at least, consideration of any fact that is not notorious and beyond dispute) the question of law raised in this case is an exception. Nevertheless, the question of the validity of the Land Rights Act and the question of the scope of Pt II of the *Racial Discrimination Act* remain, from first to last, questions of law, the answers to which are valid generally and not merely for the case in hand. A curial declaration of the law, once made, relieves the Court from the necessity of undertaking the same enquiry de novo and binds courts below it in the hierarchy.

There is a distinction between a judicial finding of a fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of the validity or scope of a law when its validity or scope turns on a matter of fact. When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The

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validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants. When the validity of a State law is attacked under s. 109 of the Constitution and the scope of the Commonwealth law with which it is thought to be inconsistent depends on matters of fact (which I shall call the statutory facts) the function of a court is analogous to its function in determining the constitutional validity of a law whose validity depends on matters of fact. In *Breen v. Sneddon* (51), Dixon C.J. said, pointing to the distinction between constitutional facts and facts in issue between the parties—

> "It is the distinction between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend. Matters of the latter description cannot and do not form issues between parties to be tried like the formal questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application by the Executive Government of State or Commonwealth of some power or authority it asserts."

Earlier, in *Commonwealth Freighters Pty. Ltd. v. Sneddon* (52), his Honour had observed that "if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity". The court may, of course, invite and receive assistance from the parties to ascertain the statutory facts, but it is free also to inform itself from other sources. Perhaps those sources should be public or authoritative, and perhaps the parties should be at liberty to supplement or controvert any factual material on which the court may propose to rely, but these matters of procedure can await consideration on another day. The court must ascertain the statutory facts "as best it can" and it is difficult and undesirable to impose an a priori restraint on the performance of that duty.

In the present case, although no evidence was tendered by either party as to the statutory facts, the Working Party Report and the Ministerial speeches in the Parliament were produced to the Court, and the Court may inform itself from those sources. Moreover, the courts of this country are familiar with the existence of traditional Aboriginal affiliations with, and responsibilities in respect of, land. The existence of such affiliations and responsibilities have been

(51) (1961) 106 C.L.R. 406, at p. 411.

(52) (1959) 102 C.L.R. 280, at p. 292.

recognized judicially on many occasions, and judges who sit in courts in areas where Aboriginal tradition remains strong are familiar, in varying degree, with the nature of the affiliations and responsibilities that exist in respect of the country in those areas. There is sufficient material from which the statutory facts required to decide the present case can be ascertained.

The first three indicia of a special measure are established chiefly by reference to the text of the Land Rights Act, supplemented by the passage earlier cited from the working party's Report. That Report shows that the working party believed that the Pitjantjatjaras needed protection of the kind given them by the Land Rights Act. The known facts are reasonably capable of supporting that assessment. Most of the area of the lands has been an Aboriginal reserve. By definition all Pitjantjatjaras have a traditional relationship with the lands or with some parts of the lands. It may be inferred that they have no other home. Homelessness is a disadvantage sadly suffered by people of all races, but Aborigines with traditional relationship with their country may reasonably be thought to need protection from an inundation of their culture and identity by those who embrace different values and who constitute a majority in Australian society. That may not be the view of all Australians, but it is a view that the Parliament of South Australia could reasonably hold. It is a view which might reasonably be held by a mature and humane society, desiring to respect the culture and identity of any peaceful minority group and to accord dignity to the members of that group. It is a view that a court could not hold to be unreasonable. The political assessments evidenced by the enactment of the Land Rights Act, being reasonably made, establish the indicia of a special measure. The Land Rights Act is a special measure and therefore it is not inconsistent with or affected by Pt II of the *Racial Discrimination Act*.

The appeal should be allowed and the question as reformulated during argument should be answered as follows:

> Is s. 19 of the *Pitjantjatjara Land Rights Act* 1981 invalid or restricted in its operation by reason of a law of the Commonwealth, and in particular, the *Racial Discrimination Act* 1975?
>
> Answer: No.

DEANE J. The respondent Robert John Brown stands charged before a special magistrate at Oodnadatta with an offence under s. 19(1) of the *Pitjantjatjara Land Rights Act* 1981 (S.A) ("the State Act"). It is alleged against him that, "not being a Pitjantjatjara", he

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entered the lands to which the State Act applies ("the lands") without having obtained the prior permission of the statutory corporation known as "Anangu Pitjantjatjaraku". The sole question raised by this appeal is whether the provisions of s. 19 creating the offence with which Mr. Brown has been charged are invalid or restricted in their operation by reason of the provisions of s. 9 or s. 10 of the *Racial Discrimination Act* 1975 (Cth) ("the Commonwealth Act"). The relevant provisions of Commonwealth and State legislation and the International Convention on the Elimination of All Forms of Racial Discrimination ("the Convention") are set out in other judgments and I shall endeavour to refrain from unnecessary repetition.

Both s. 9 and s. 10 of the Commonwealth Act are in Pt II which deals with "Prohibition of Racial Discrimination". Subject to presently irrelevant exceptions, that Part "does not apply to, or in relation to the application of, special measures" to which Art. 1(4) of the Convention "applies": Commonwealth Act, s. 8(1). It is common ground that, if they qualify as such "special measures", the provisions of s. 19 of the State Act are not invalidated or restricted in their operation by reason of the provisions of the Commonwealth Act. That being so, there is much to be said for the view that the logical starting point of the case is the consideration of the question whether the provisions of s. 19 bear the character of such "special measures". On the other hand, there would appear to be little point in considering the (for me) more complicated question whether the provisions of s. 19 of the State Act do bear that character if they are not relevantly affected by the provisions of Pt II of the Commonwealth Act in any event. Moreover, the existence and extent of "racial discrimination" of the type which the Convention was intended generally to prohibit are not irrelevant to the question whether particular provisions do fall under the umbrella of such "special measures". The argument before the Court proceeded on the basis that the first question to be determined was whether, putting to one side the provisions of s. 8 relating to "special measures", the provisions of s. 19 of the State Act were prima facie invalid or restricted in their operation by reason of the provisions of s. 9 or s. 10 of the Commonwealth Act. I propose to approach the matter in that way.

Is Section 19(1) *Prima Facie Invalid*?

The combined effect of the definition of "Pitjantjatjara" and "traditional owner" in s. 4 of the State Act is that a person is a Pitjantjatjara for the purposes of the State Act if he or she is both "a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara

people" and "an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them". At least as a general matter, both membership of a particular Aboriginal people and affiliation with, and responsibility for, ancestral lands under applicable Aboriginal tradition are primarily based on descent or ethnic origin. That being so, it would be quite unrealistic to conclude otherwise than that the distinction which the State Act draws between a person who is a Pitjantjatjara and a person who is not comes squarely within the ambit of the reference in both the Convention (Art. 1(1)) and the Commonwealth Act (s. 9(1)) to a "distinction . . . based on race, colour, descent or national or ethnic origin". I shall, for convenience, refer to such a distinction as "a racial distinction" and to those identified by reference to that particular racial distinction as "the Pitjantjatjaras".

Viewed in the context of the whole of the State of South Australia, the lands would obviously be of greater comparative importance to the cartographer than to the economist. It is nonetheless relevant for the purposes of the present case that they represent a significant part of the land area of that State. If s. 19 of the State Act is valid, its effect is that the racial distinction between non-Pitjantjatjara and Pitjantjatjara is incorporated in the law of South Australia as the basis of a prohibition upon access to more than one-tenth of the State. That prohibition is qualified by certain special exceptions and may be relaxed by discretionary decision of the statutory corporation. Otherwise, it is, in the case of a person who is not a Pitjantjatjara, complete. The exclusion or restriction of entry by a non-Pitjantjatjara which it involves is not the mere result of some general provision of the civil law defining the attributes or consequences of prior ownership of land. It is imposed independently of vesting or ownership of particular areas of the designated land: see the definition of "the lands" in s. 4 of, and the description in the First Schedule to, the State Act. It is imposed as part of the criminal law. Plainly, the imposition of that exclusion or restriction impairs the recognition, enjoyment or exercise, on an equal footing, of one of the rights specifically mentioned in Art. 5 of the Convention, namely, the "right to freedom of movement and residence within the border of the State": Art. 5(d)(i). In summary, the operation of s. 19 of the State Act, if the section be valid, is to incorporate within the law of South Australia a distinction and an exclusion or restriction based on race, descent or ethnic origin which has the effect of impairing the recognition, enjoyment or exercise, on an equal footing, of the above-mentioned "right to freedom of movement and residence".

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Subject to the question of "special measures" which will be considered subsequently, s. 9 of the Commonwealth Act makes unlawful the doing of certain acts which the Convention identifies as "racial discrimination". At times in the course of argument, it appeared to be assumed that any invalidating effect of s. 9 of the Commonwealth Act was restricted to particular acts of persons which could be identified as being of the kind which the provisions of the section rendered unlawful. This led to attempts to identify particular acts relating to the enactment or application of s. 19 of the State Act which might be rendered unlawful by s. 9 of the Commonwealth Act. In my view however, any such assumption was ill-founded for the reason that comparison of the provisions of s. 9 of the Commonwealth Act and s. 19 of the State Act discloses a prima facie general inconsistency of a type which would, apart from any question of "special measures", necessarily involve invalidity of the provisions of s. 19 of the State Act under s. 109 of the Constitution. I shall endeavour briefly to explain why that is so.

Among the acts which s. 9 of the Commonwealth Act, where applicable, makes it unlawful for any person to do is an act involving a distinction, exclusion or restriction based on race, descent or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom. In conflict with that prima facie operation of s. 9 of the Commonwealth Act, s. 19 of the State Act operates, as has been seen, to incorporate such a distinction, exclusion or restriction into the general law of South Australia. In other words, s. 19 of the State Act establishes as the legal justification for action, including action by courts (e.g., imposition of a penalty, issue of a writ of ejectment or grant of an injunction) and other law enforcement agencies (e.g., preventing a proscribed entry or removing an entrant), a distinction, exclusion or restriction which s. 9 of the Commonwealth Act, if applicable, expressly states will render any act of a person unlawful. The way in which the respective sets of provisions would, if s. 9(1) of the Commonwealth Act is applicable and s. 19 of the State Act is invalid, operate in a case such as the present provides a ready illustration: s. 19 would operate to make lawful, under State law, acts which were based upon or intended to enforce the restriction or exclusion from the lands by reference to the racial distinction that a person is not a Pitjantjatjara whereas s. 9(1) of the Commonwealth Act would render unlawful, under Commonwealth law, any such acts by reason of the very fact that such a restriction or exclusion by reference to such a racial distinction was involved in them. In my view, there is fundamental and pervading inconsistency between the

two provisions unless, as is contended by those who would uphold the validity of the provisions of the State Act, the preclusive provisions of s. 8 of the Commonwealth Act operate to keep the relevant provisions of the State Act outside the field of application of s. 9 of the Commonwealth Act on the ground that they are "special measures to which paragraph 4 of Article 1 of the Convention applies".

The conclusion that, unless they qualify as "special measures", the provisions of s. 19 of the State Act are invalid by reason of inconsistency with s. 9 of the Commonwealth Act makes it unnecessary to consider whether the provisions of s. 19, if they do not so qualify, are also invalidated or otherwise restricted by reason of the provisions of s. 10 of the Commonwealth Act. Plainly, there is much to be said for the view that, if s. 10 of the Commonwealth Act applies to the State Act, it would have the effect of conferring a right of access to the land upon a person who is not a Pitjantjatjara with the consequence that the provisions of s. 19 of the State Act forbidding such access without permission would be invalid by reason of inconsistency with that operation of s. 10. Like s. 9 however, s. 10 will not apply to, or in relation to the application of, s. 19 of the State Act if the provisions of s. 19 are "special measures" to which par. 4 of Art. 1 of the Convention applies. It follows that, regardless of whether reliance is placed upon s. 9 or s. 10 of the Commonwealth Act, the provisions of s. 19 of the State Act will be valid if they are such "special measures".

Are the Provisions of Section 19 *"Special Measures"*?

The Convention is framed in words that are, no doubt intentionally, both general and vague. Its provisions are arguably inappropriate to be incorporated, by reference, in domestic legislation where a greater degree of precision and certainty is ordinarily desirable than is often attainable or advisable in international conventions defining the obligations of nations in relation to both external and domestic affairs. The provisions of Art. 1(4), which s. 8(1) of the Commonwealth Act incorporates by reference, are no exception.

Article 1(4) and Art. 2(2) must be read together. Article 2(2) imposes upon States Parties to the Convention a positive obligation, when the circumstances so warrant, to "take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms". Article 1(4) is complementary to Art. 2(2) in that it exempts "special measures" of the kind which it

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describes from the positive prohibitions which the Convention imposes upon "racial discrimination". At least for a domestic court required to determine its applicability to local legislative provisions, Art. 1(4) poses some difficulties which go beyond the possibly unavoidable vagueness of words such as "adequate" and concepts such as "human rights" and "fundamental freedoms". Thus, quite apart from the difficulty involved in characterizing a legislative provision by reference to its having been "taken" for a "sole purpose", there is an element of ambiguity about the reference point of the words "such" and "as" (where first occurring in the paragraph) while the words "shall not be deemed" would seem to be more appropriate to preclude the operation of a deeming clause than to provide that what is within a definition is to be deemed not to be within it. The general purport of Art. 1(4), read in the context of Art. 2(2), is, however, clear enough. Subject to the proviso to which reference will subsequently be made, the term "racial discrimination" shall not, for the purposes of the Convention, encompass "special measures taken for the sole purpose" of securing the development and protection of disadvantaged racial or ethnic groups or individuals belonging to them to the extent necessary to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.

The question whether particular actions or provisions constitute "special measures" of the type excluded from the definition of "racial discrimination" in the Convention and, by reference in s. 8(1) of the Commonwealth Act, from the application of Pt II of the Commonwealth Act is essentially a question of characterization. Such characterization must necessarily be in a factual context. It involves, among other things, the identification of the particular racial ethnic groups or groups which require or whose individuals require special and positive measures to enable equal enjoyment or exercise of human rights and fundamental freedoms and the resolution of the question whether the particular actions or provisions satisfy the requirement that they be "taken for the sole purpose of securing" an objective of the kind described in Art. 1(4).

Whatever may be the position before an international forum such as the Committee on the Elimination of Racial Discrimination established by Art. 8 of the Convention, the question whether provisions of Commonwealth or State legislation satisfy a requirement that they be "taken" for a designated "sole purpose" is different from the question whether the particular provisions will in fact achieve that purpose. On the other hand, that question cannot be resolved by reference to the variety of subjective purposes which may have led individual members of the relevant Parliament to have

voted in favour of the passage of the particular legislation. What is necessary for characterization of legislative provisions as having been "taken" for a "sole purpose" is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the Court is not concerned to determine whether the provisions are *the* appropriate ones to achieve, or whether they will in fact achieve, the particular purpose.

It would seem that the Aboriginal people had inhabited this country for at least forty milleniums before the arrival of the first white settlers less than 200 years ago. To the extent that one can generalize, their society was not institutionalized and drew no clear distinction between the spiritual and the temporal. The core of existence was the relationship with and the responsibility for their homelands which neither individual nor clan "owned" in a European sense but which provided identity of both in a way which the European settlers did not trouble to comprehend and which the imposed law, based on an assertion of terrae nullius, failed completely to acknowledge, let alone protect. The almost two centuries that have elapsed since white settlement have seen the extinction of some Aboriginal clans and the dispersal, with consequent loss of identity and tradition, of others. Particularly where the clan has survived as a unit living on ancestral lands however, the relationship between the Aboriginal people and their land remains unobliterated. Yet, almost two centuries on, the generally accepted view remains that the common law is ignorant of any communal native title or other legal claim of the Aboriginal clans or peoples even to ancestral tribal lands on which they still live: see *Milirrpum v. Nabalco Pty. Ltd.* (53). If that view of the law be correct, and I do not suggest that it is not, the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J., in *Johnson v. McIntosh* (54), accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the "original inhabitants" should be recognized as having "a legal as well as just claim" to retain the occupancy of their traditional lands. It is in this context that one must approach the question whether the

(53) (1971) 17 F.L.R. 141.

(54) (1823) 8 Wheaton 543, at p. 574.

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provisions of s. 19 of the State Act are, or are included in, "special measures" of the kind referred to in Art. 1(4) of the Convention.

The central provisions of the State Act include: (i) the establishment of the statutory corporation (Anangu Pitjantjatjaraku) of which all Pitjantjatjaras are members, and of its Executive Board; (ii) provisions for the vesting of the lands in the statutory corporation; (iii) identification of the functions of the statutory corporation as including the administration of the land vested in it and the protection of the interests of traditional owners in relation to the management, use and control of the lands; and (iv) provision that all Pitjantjatjaras shall have unrestricted rights of access to the lands. Those central provisions were, plainly enough, special measures taken for the purpose of adjusting the law of South Australia to grant legal recognition and protection of the claims of the Pitjantjatjaras to the traditional homelands on which they live. Until those special measures were enacted, the doctrine that this continent was terrae nullius at the times when British sovereignty was imposed had combined with the narrowness of the notions of ownership and occupation under the imported law to make the Pitjantjatjaras a disadvantaged racial or ethnic group as regards one of the "human rights" which the Convention specifically identifies, namely, the "right to own property alone as well as in association with others": Art. 5(d)(v). That "right to own property" extends to what Art. 11 of Convention No. 107 of the International Labour Organization identified as the "right of ownership, collective or individual, of the members of [indigenous and other tribal and semi-tribal populations] over the lands which [those] populations traditionally occupy". It embraces the right to preserve such lands as homelands upon which sacred sites may be safeguarded and traditional customs and ways of life may be pursued in accordance with the ordinary law. In my view, those central provisions are special measures of the kind referred to in Art. 1(4) in that they are, for the purposes of that paragraph, "special measures taken for the sole purpose of securing adequate advancement" of a racial or ethnic group "requiring such protection as may be necessary in order to ensure" that group "equal enjoyment or exercise of human rights and fundamental freedoms".

The right to exclude strangers is an ordinary incident of ownership of land. If s. 19 of the State Act had been confined to providing procedures by which the statutory corporation could enforce the right to exclude strangers which is implicit in the vesting of the lands and the conferral of powers of management and control, there would be no difficulty at all in identifying the section as part of the "special measures" which s. 8(1) of the Commonwealth Act protects

from the application of ss. 9 and 10. The provisions of s. 19 are not however so confined and cannot be so readily explained or preserved. They operate independently of the vesting of the lands. They erect around the lands a barrier against the entry of non-Pitjantjatjaras in the form of a prohibition enforceable by criminal sanction. That barrier against entry does not extend to exclude the police and others acting in the performance of their public duties, members of parliament and genuine parliamentary candidates and their staff, entry in case of emergency and some others with special interests or in pursuit of particular activities: see State Act, s. 19(8) and Divs. III, IV and VI of Pt III. Otherwise, it can be lifted only by discretionary decision of the statutory corporation given pursuant to a cumbersome procedure involving a written application setting out purpose, period, time and place of the desired entry and the grant of conditional or unconditional permission to enter "by instrument in writing": see State Act, s. 19(3), (5).

One cannot but be conscious of the diversity of the views that have been expressed about the identification, extent and resolution of the problems involved in the mitigation of the effects which almost two centuries of alien settlement have had on the lives and culture of the Australian Aboriginals. Even among men and women of goodwill there is no obvious consensus about ultimate objectives. At most, there is a degree of consensus about some abstract generalized propositions: that, within limits, the Aboriginals are entitled to justice in respect of their homelands; that, within limits, those Aboriginals who wish to be assimilated within the ordinary community should be assisted in their pursuit of that wish; that, within limits, those Aboriginals who desire separately to pursue and develop their traditional culture and lifestyle upon their ancestral homelands should be encouraged, assisted and protected in that pursuit and development. It is in the identification and resolution of the problems involved in determining "the limits" that consensus breaks down and that the greatest difficulties lie. The cause of the Aboriginal peoples will not be advanced if those difficulties are ignored. To the contrary, the difficulties will only be exacerbated.

It is inevitable that the provisions of the State Act will effectively set aside approximately one-tenth of South Australia as a separate and distinct area within the State. The Pitjantjatjaras and other residents of that area will be free to leave it. Non-Pitjantjatjaras will be excluded from it unless they can show some particular entitlement or obtain permission to enter. To some extent, this position existed before the State Act was enacted. It is, in any event, a necessary consequence of the legal recognition and protection of the claims of the Pitjantjatjaras to their traditional lands and of their

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entitlement, within the law, to pursue and develop their traditional culture and way of life upon those lands. The problem with s. 19 is that the rigid formalities which it requires to be satisfied before a non-Pitjantjatjara can be given permission to enter the lands and the criminal sanctions which enforce them seem likely to create an over-isolated enclave within South Australia entrenched behind what amounts to a type of passport system. The evidence before the Court neither explains the need for those rigid formalities and criminal sanctions nor indicates the extent of separation of the Pitjantjatjaras which is likely to result in fact from the establishment or maintenance of such an enclave. Nor does the evidence provide a basis for anything more than speculation about the identity or resolution of possible problems involved in that establishment or maintenance. There is no information before the Court about the constitution or the proposed constitution of the statutory corporation. There is no information about the means by and extent to which it is proposed that the ordinary criminal law of South Australia will be enforced within the lands. Nor is there any information before the Court about the existence or extent of any conflict between traditional customs and the ordinary law of South Australia either on extreme matters such as enforcement of promised marriage and ritual killing and spearing or on more mundane matters such as marriage, maintenance and inheritance. There is no information about relationships, status and needs between and within particular groups of the Pitjantjatjaras: the young and the old, the female and the male, the weak and the strong, the sick and the healthy. There is no information about what exists or is proposed in the way of facilities for needs such as education and health. The facts in the present case illustrate that, under s. 19, not even a group of elders of the Pitjantjatjara people is entitled to invite a non-Pitjantjatjara, be he Aboriginal or not, upon the lands. One is left to speculate about the danger that, particularly for the female and the weak, the difference between separate development and segregation might become more theoretical than real.

If the matter were solely for my decision, I would incline to the view that the case should be remitted to the learned special magistrate to allow the factual material to be supplemented. Sitting as a member of a Full Court however, I feel it encumbent upon me to deal with the matter on the material presently before the Court, inadequate though I consider that material to be. If the relevant question were whether it had been shown that the rigid formality of s. 19 of the State Act is necessary to achieve a purpose of the kind referred to in Art. 1(4) of the Convention, I would be of the view

that it had not been shown that it was. As has been seen however, a finding that a provision was "taken" for a "sole purpose" of that kind will not be precluded unless it appears that the provision is not capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Approaching the matter on that basis, the conclusion to which I have, on balance, come is that the provisions of s. 19 of the State Act should be accepted as constituting part of the "special measures" of the kind referred to in Art. 1(4) of the Convention and as therefore enjoying the protection of s. 8(1) of the Commonwealth Act.

The provisions of s. 19 must be viewed in the context of the overall legislative scheme which was enacted for the purpose of adapting the law of South Australia to recognize and protect the claims of the Pitjantjatjaras to their homelands. The factual material which is before the Court tends to support the conclusion that the section was truly enacted as part of that overall legislative scheme. In particular, it appears that the provisions of the State Act emerged from long discussions and negotiations between representatives of the Government of South Australia and representatives of the Pitjantjatjaras on the subject of the Pitjantjatjaras' claim to the lands. While the formality of the only procedure by which a stranger can obtain permission to enter the lands appears to me to be undesirable from the viewpoint of all or at least some of the Pitjantjatjaras themselves as well, of course, as from the viewpoint of others, including other Aboriginals, it must be acknowledged that the formality involved may prove, in fact, to be no more burdensome than that which has been thought appropriate and acceptable in other parts of Australia and in other parts of the world in provisions acknowledging and protecting the land rights of native inhabitants. It can be argued that some such strict and formal procedure is essential to protect individual Pitjantjatjaras from being overborne by others or, more important, to ensure that particularly sacred areas of the traditional lands are protected and held inviolate. In the circumstances, while the material before the Court does not persuade me of the need for or desirability of the provisions of s. 19, I can see no proper grounds for doubting that they were enacted in good faith for the same purpose as that which characterizes the central provisions of the State Act.

There remains to be considered the argument that the provisions of the State Act were not special measures within Art. 1(4) of the Convention for the reason that they came within the terms of the proviso to that paragraph. That proviso must be construed both in its context in Art. 1(4) and with reference to the similar proviso contained in Art. 2(2) which imposes a positive obligation upon

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States Parties to take special measures. When the proviso is so construed, it appears that its final words ("after the objectives for which they were taken have been achieved") should be read as qualifying both of its previous limbs with the result that the proviso excludes from the "special measures" to which Art. 1(4) applies only measures which, "as a consequence", lead to the maintenance of separate rights for different racial groups after the time when the objectives for which they were taken have been achieved or which are continued after that time. It was argued that the proviso would prevent provisions from being "special measures" to which Art. 1(4) applied unless the provisions themselves contained some qualification which would automatically deprive them of operative force if they were continued or if they led to the maintenance of separate rights for different racial groups after the objectives for which they were "taken" had been achieved. That argument must be rejected. There is nothing at all in the proviso to par. 4 of Art. 1 which justifies the requirement of any such qualification. All that the proviso does is to deprive "special measures" of the protection of Art. 1(4) if and when the circumstances referred to in the proviso have come about. Plainly those circumstances have not come about in the present case.

I would allow the appeal and would answer in the negative the question whether s. 19 of the State Act is invalid or restricted in its operation by reason of the Commonwealth Act.

DAWSON J. The question which falls to be determined in this appeal is whether s. 19 of the *Pitjantjatjara Land Rights Act* 1981 (S.A.) is inconsistent with s. 9 or s. 10 of the *Racial Discrimination Act* 1975 (Cth) and, for that reason, inoperative under s. 109 of the Constitution.

The long title of the South Australian legislation describes it as an Act to provide for the vesting of title to certain lands in the people known as Anangu Pitjantjatjaraku and for other purposes. In fact, Anangu Pitjantjatjaraku is incorporated by the Act and it is provided that all Pitjantjatjaras are members of the corporate body so created. "Pitjantjatjara" is defined to mean a person who is a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people and a traditional owner of certain specified lands ("the lands"), or part of them. "Traditional owner" in relation to the lands is defined to mean an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them. It is to be noted, although it is not crucial in this case, that the definition of "Pitjantjatjara" excludes persons who are members of the three

peoples mentioned and are not at the same time traditional owners of the lands or a part of them and also persons who are traditional owners of the lands or a part of them but are not members of the three peoples mentioned. Whether or not there are any persons in existence who are excluded in this way is not established upon the materials before us.

Anangu Pitjantjatjaraku is given the function of administering the lands, which amount to some 10 per cent of the total area of the State of South Australia. It is to perform this function for the protection of the interests of the traditional owners, having ascertained their wishes and opinions. An Executive Board of Anangu Pitjantjatjaraku, comprising a chairman and ten other members, is to be elected at an annual general meeting of Anangu Pitjantjatjaraku and has the function of carrying out its resolutions.

All Pitjantjatjaras have, under the Act, unrestricted rights of access to the lands but, save for certain special categories of persons, a person (not being a Pitjantjatjara) who enters the lands without the permission of Anangu Pitjantjatjaraku is, under s. 19, guilty of an offence for which penalties are prescribed. An application for permission to enter the lands must be in writing and lodged with the Executive Board and must set out the purpose for which the applicant seeks to enter the lands, the period for which the applicant seeks to be upon the lands, the time at which the applicant seeks to enter the lands and the place at which he intends to make his entry. By an instrument in writing, Anangu Pitjantjatjaraku may grant permission to enter the lands unconditionally or subject to conditions or may refuse permission.

There are special provisions relating to mining upon the lands with the permission of Anangu Pitjantjatjaraku and the exploitation of an area known as the Mintabie precious stones field, but it is unnecessary to go into these in any detail.

The Act provides for the Governor to issue a land grant in fee simple of the lands to Anangu Pitjantjatjaraku and it appears that such a grant has been made. The constitution of Anangu Pitjantjatjaraku and the restriction of rights of access to the lands of persons other than Pitjantjatjaras is not, however, dependent upon the vesting of the lands in Anangu Pitjantjatjaraku.

The Commonwealth legislation, the *Racial Discrimination Act*, was intended to give effect to the International Convention on the Elimination of All Forms of Racial Discrimination and it was held in *Koowarta v. Bjelke-Petersen* (55) that the legislative power of the Commonwealth extended to the implementation of the Convention.

(55) (1982) 153 C.L.R. 168.

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Subsequently, in *Viskauskas v. Niland* (56), it was held that the Commonwealth Act was "intended as a complete statement of the law for Australia relating to racial discrimination". I shall have something to say in a moment about the extent of these two decisions, but before doing so it is necessary to go to the relevant provisions of the *Racial Discrimination Act* and of the Convention to which it purports to give effect.

"Racial discrimination" is defined by par. 1 of Art. 1 of the Convention to 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". Paragraph 4 of Art. 1, however, qualifies par. 1 by providing that 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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

It is, I think, relevant to observe that the existence of par. 4 of Art. 1 was predicated upon, and drafted after, par. 2 of Art. 2, which provides that States Parties to the Convention shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. The paragraph goes on to provide that these measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved: see International Convention on the Elimination of All Forms of Racial Discrimination: Travaux Preparatoires pars. 90-91, p. 26.

Paragraph 1 of Art. 2 contains the fundamental obligations which are imposed upon States Parties to eliminate racial discrimination and Art. 5 of the Convention goes on to note particular rights in relation to which States Parties undertake these obligations. Those

(56) (1983) 153 C.L.R., at p. 292.

which may be considered relevant in the context of the present case are the right to freedom of movement and residence within the border of the State, the right to marriage and choice of spouse and the right to freedom of association.

This is a sufficient reference to the terms of the Convention for it to appear that it is not an instrument in such a form that its implementation is possible by the simple enactment of its provisions as domestic law. To a large extent it is a statement of policy requiring specific measures to be devised and taken by the States Parties in order to give effect to the declared policy. The supervision of this process is entrusted to the Committee on the Elimination of Racial Discrimination which is established under Art. 8 of the Convention and provision is made in Art. 12 for the appointment of ad hoc Conciliation Commissions to solve disputes.

Nevertheless the Commonwealth Parliament, in enacting the *Racial Discrimination Act*, chose in s. 9, which is the basic provision in the Act prohibiting racial discrimination, to adopt the wording of the Convention by repeating the definition of racial discrimination which is contained in par. 1 of Art. 1 of the Convention. Section 9(1) provides that 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 or cultural or any other field of public life.

It may be questioned whether the term "human right" or "fundamental freedom" has any meaning in our system of law which, at least hitherto, has not recognized any such classification of rights or freedoms. The implementation of the Convention may require something more than a mere repetition of those expressions in order to translate into domestic law the concepts which they describe. Nor will it necessarily be sufficient to say that they bear the same meaning as that which they bear in the Convention or in international law for it is sufficiently clear from what I have already said that both the Convention and international law may ascribe to them no fixed meaning and may assume that their translation into domestic law, at least in a common law system, requires their evaluation and expression in terms of specific rights and duties. It is no doubt for this reason, amongst others, that the process is subjected to the guidance and supervision of the appropriate agencies of the United Nations.

But whatever the mode of progress in the international arena, this Court cannot abdicate its function of deciding the validity of

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legislation which purports to be passed pursuant to powers conferred by the Constitution. The Commonwealth Parliament does not, under s. 51(xxix) of the Constitution, have power to legislate with respect to the subject-matter of any treaty to which Australia is a party. As Mason J. said in the *Tasmanian Dam Case* (57):

> "I reject the notion that once Australia enters into a treaty Parliament may legislate with respect to the subject matter of the treaty as if that subject matter were a new and independent head of Commonwealth legislative power".

The power which the Commonwealth Parliament does have is to perform such obligations as are imposed upon it and where a treaty leaves to the States Parties the selection of the appropriate legal means to achieve the policy which it lays down, as does the Convention on the Elimination of All Forms of Racial Discrimination, it may not be an implementation of the treaty merely to enact as domestic law provisions which are couched in terms of the international obligations: see the discussion of the authorities by Gibbs C.J. in the *Tasmanian Dam Case* (58).

For reasons which will appear, it is unnecessary to pursue this aspect of the matter further in this case, but I would add that, for my part, I do not regard the question as closed whether s. 9 of the *Racial Discrimination Act* is a valid implementation of any obligation imposed by the relevant Convention. A concession to that effect was made by the State of Queensland in *Koowarta v. Bjelke-Petersen* and relied upon by the majority in that case in reaching their conclusion, despite argument to the contrary by the intervening States of Victoria and Western Australia, but, in my view, such a concession is not capable of concluding the issue: see *Koowarta v. Bjelke-Petersen* (59).

I am, however, prepared to assume for the purpose of this case that s. 9 of the *Racial Discrimination Act* validly enacts a treaty obligation and that the rights relied upon by the respondent are capable of being described as human rights or fundamental freedoms within the meaning of that section. I am also prepared to assume that s. 10 of the *Racial Discrimination Act*, which is the other section relied upon by the respondent, constitutes the implementation of an obligation imposed by the Convention. Sub-section (1) of that section provides that if, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a

(57) (1983) 158 C.L.R. 1, at p. 131; see pp. 100-102, 171-172, 198-199, 231-232, 259-260, 311-313.

(58) (1983) 158 C.L.R., at pp. 100-107.

(59) (1982) 153 C.L.R., at pp. 221, 235, 241-242, 261.

right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of the section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

Section 8(1) of the *Racial Discrimination Act* provides, with an exception which is not relevant for present purposes, that Pt II of the Act (which is the Part in which ss. 9 and 10 are to be found) does not apply to, or in relation to, the application of special measures to which par. 4 of Art. 1 of the Convention applies. The sub-section proceeds upon the basis that special measures are sufficiently identified by par. 4 of Art. 1 so as to enable the ambit of Pt II of the Act and, in particular, ss. 9 and 10, to be cut down by reference to that paragraph. There is, however, some difficulty about that, in that the special measures to which par. 4 of Art. 1 refers are those which have actually been taken pursuant to par. 2 of Art. 2 in furtherance of the objectives or policy there set out. Although the latter paragraph provides, together with the external affairs power, a potential source of Commonwealth legislative power, we were not referred to any exercise of that power or to any special measures taken by the Commonwealth.

To construe s. 8(1) literally would be to confine its application to such special measures as have been taken, so that Pt II of the Act would preclude the taking of further special measures (which need not be in the form of legislation) required to be taken under par. 2 of Art. 2 of the Convention when the circumstances so warrant. If that were the intention, the Act would be in breach of a positive obligation imposed by that paragraph of the Convention and, at least to that extent, would not be by way of implementation of its provisions.

However, s. 8(1) of the Act quite obviously treats par. 4 of Art. 1 of the Convention as descriptive of the type of special measures to which Pt II of the Act is to have no application. Nor can it be thought that the special measures so described are measures to be taken by the Commonwealth alone for, notwithstanding the legislative power derived by the Commonwealth from the obligation to take special measures which the Convention imposes upon it, it would be exceeding the scope of the Convention and of that legislative power for the Commonwealth, in the absence of legislation of its own, to prevent the taking of special measures by the States for the advancement of particular racial or ethnic groups or individuals.

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Thus the statement in *Viskauskas v. Niland* (60), that the Commonwealth Act was intended as a complete statement of the law for Australia relating to racial discrimination must, in the present context, be qualified by the observation that it was not intended to preclude the taking of special measures within the meaning of s. 8(1) of the Act by the States as well as the Commonwealth.

To proceed thus far is, however, not to solve all of the problems for what is a special measure within the meaning of s. 8(1) of the Act must still be determined. That sub-section merely defines special measures by reference to par. 4 of Art. 1 of the Convention and there are some further difficulties which arise from that means of definition.

Whilst par. 4 of Art. 1 in one sense describes special measures, its function goes beyond that. It excepts from the definition of "racial discrimination" special measures taken pursuant to the obligation imposed by par. 2 of Art. 2 and does so to a large extent by repeating the language used in par. 2 of Art. 2 to define the obligation. Paragraph 4 of Art. 1 adds an additional qualification, namely, that special measures must be taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring protection and this addition has the effect of further confining the special measures which may be taken under the Convention pursuant to par. 2 of Art. 2.

The fact that par. 4 of Art. 1 of the Convention refers to special measures in terms of the content of the obligation which it imposes to take those measures creates difficulties when that paragraph is used, as it is, to confine the scope of Pt II of the *Racial Discrimination Act*. It is the obligation imposed by the Convention which gives rise to the legislative power on the part of the Commonwealth to enact special measures, but the limitations imposed by par. 4 of Art. 1 or par. 2 of Art. 2 upon the manner in which, or the purpose for which, special measures which may be taken in conformity with the Convention are not the same thing as limitations upon the subject-matter of that legislative power. Indeed, to my mind, the limitations which are imposed by par. 4 of Art. 1 and par. 2 of Art. 2 upon the special measures which might be taken go beyond the definition of the subject-matter. They require an examination and evaluation of purpose, not necessarily confined to the terms in which the special measures are expressed. They require either the prediction of the consequences of the special measures in order to determine whether they will lead to the maintenance of

(60) (1983) 153 C.L.R., at p. 292.

separate rights for different racial groups or will be continued after the objectives for which they have been taken have been achieved, or, alternatively, they require the termination of the special measures or some provision to be made for their termination in those circumstances.

These limitations are entirely understandable in the context of the Convention, which envisages that the issues raised may be adjudicated by the Committee or the Conciliation Commissions for which the Convention provides. As a means of marking out the scope of Pt II of the *Racial Discrimination Act* for the purposes of the application of s. 109 of the Constitution, they afford little or no assistance. The subject-matter of the legislative power which the Commonwealth derives from the obligation imposed by the Convention upon it to take special measures is, in the context of s. 109, something different from the manner in which, or the purpose for which, the Convention requires the Commonwealth to exercise that power. That is of significance for it must be borne in mind that, except to the extent that the Commonwealth has exercised its legislative power with respect to that subject-matter, the exercise by the States of their legislative powers with respect to the same subject-matter has no relevant limits and is not subject to any of the requirements of the Convention.

The subject-matter which s. 8(1) of the *Racial Discrimination Act* excludes from the operation of Pt II of that Act can, in my view, be defined no more precisely than as the subject-matter of special measures having the object of the advancement of particular racial or ethnic groups or individuals requiring protection. It is that subject-matter upon which Pt II of the *Racial Discrimination Act* does not operate and it is that subject-matter upon which the States may legislate consistently with the Commonwealth legislation.

There can, I think, be no doubt that the *Pitjantjatjara Land Rights Act* is a special measure the object of which is the advancement of certain racial or ethnic groups. The groups concerned are those peoples identified by the definition of 'Pitjantjatjara" who, because they must be traditional owners of the lands or part of them, must be Aboriginal persons. The vesting of the lands in Anangu Pitjantjatjaraku can only be viewed as being for the advancement of those peoples. The administration of the lands when vested is entrusted by the Act to Anangu Pitjantjatjaraku, which has the function of protecting the interests of the traditional owners in relation to the management, use and control of the lands. This provision can also only be viewed as being for the advancement of the Pitjantjatjaras. The question whether the Pitjantjatjaras are a racial or ethnic group requiring protection

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must ultimately be a matter for the legislature and, provided that they are capable of being so regarded, then it is not for this Court to inquire further. From the terms of the Act and those facts which, upon the evidence or otherwise, the Court is entitled to take into account, I am of the view that it is a conclusion which the legislature might properly have reached.

It follows that, in my view, the *Pitjantjatjara Land Rights Act* is a special measure to which Pt II of the *Racial Discrimination Act* does not apply and that there is no inconsistency between its provisions and those of the Commonwealth legislation. That conclusion renders it unnecessary for me to consider whether s. 19 of the *Pitjantjatjara Land Rights Act* involves racial discrimination within the meaning of s. 9 of the *Racial Discrimination Act* or the denial of rights to equality before the law under s. 10 of that Act. I would answer in the negative the question posed by this appeal.

Appeal allowed.

Set aside the judgment of Mr. Justice Millhouse dated 21 *July* 1983 *and in lieu thereof answer the questions in the special case stated, as amended by this Court, as follows:*

1. *Is s.* 19 *of the* Pitjantjatjara Land Rights Act 1981 *(S.A.) invalid or restricted in its operation by reason of the Racial Discrimination Act* 1975 *(Cth)?*
   Answer: No.
2. *If the answer to Question* 1 *is that the Pitjantjatjara Land Rights Act is restricted in its operation, does the complaint herein fall within the area of valid operation of the Act?*
   Answer: Unnecessary to answer.

Order by consent that the appellant pay the respondent's costs of the appeal.

Remit the proceedings to the Supreme Court of South Australia.

Solicitor for the appellants, *C. M. Branson*, Crown Solicitor for the State of South Australia.

Solicitors for the respondent, *Genders, Wilson & Partners.*

Solicitor for the Attorney-General for the Commonwealth, *Australian Government Solicitor.*

Solicitor for the Anangu Pitjantjatjaraku, *R. Bradshaw.*

R.A.S.