

# The Franklin Dam

Case study

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# Introduction

## About the author and text

Dr Bryan Keon-Cohen AM KC is a retired Melbourne barrister who practised for decades at the Victorian Bar, specialising in constitutional law, Indigenous rights, and civil liberties.

He was counsel for the Tasmanian Wilderness Society in a pivotal constitutional and environmental case and later, alongside Ron Castan QC, represented Eddie Mabo, Rev. Dave Passi, Celuia Mapo Salee and Sam Passi in the historic Mabo case. A widely published academic and lecturer, he was appointed a Member of the Order of Australia in 2012 for his service to the law and advancement of Indigenous rights.

This document presents Dr Keon-Cohen's personal recollections of the Tasmanian Dam Case. Written from the perspective of a young barrister navigating high-stakes public interest litigation, it reflects on the legal strategy, courtroom experience, and broader implications of the case. It offers a unique and candid insight into a formative chapter in Australian legal history.

# The Franklin Dam Case

## Conflicting interests

### The proposed hydro-electric dam

In 1978, the Tasmanian Hydro-Electric Commission, then owned by the Tasmanian Government, proposed to construct a dam on the Gordon River below its junction with the Franklin River in the south-west wilderness park.

The dam would have flooded a large section of the Franklin, including two caves containing archeological deposits: the Kutikina and Deena Reena caves. These recorded 'human occupation dated to beyond 20,000 years ago (being) in historic times ... the most southerly dwelling human beings on earth.'<sup>1</sup>

### World Cultural and Natural Heritage Site

In 1982, this pristine wilderness in south-west Tasmania was declared a World Heritage Site under the World Heritage Convention.<sup>2</sup> Australia was a party to that convention, which imposed obligations on signatory countries – a crucial factor in the ultimate banning of this project.<sup>3</sup> Under Australian law, the mere listing of the wilderness as a World Heritage Site did not prevent construction, since protection under international law of itself had no legal effect within Australia. Domestic protection required a further step; the incorporation of the convention's protection into domestic law through legislation.

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1 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 459 (Gibbs CJ). ('Dam Case')

2 Three National Parks were declared: the Cradle Mountain-Lake St. Claire, the Franklin Lower Gordon Wild Rivers, and the South West. All three were entered into the World Heritage list in December 1982. UNESCO considered them to be 'of outstanding universal value.' *Dam Case*, at 458 (Gibbs CJ.)

3 See *Convention for the Protection of the World Cultural and Natural Heritage*, adopted by UNESCO on 16/11/1972; ratified by Australia on 22/8/1974; came into force on 17/12/1975. In 1983, 74 countries were parties to the convention. *Dam Case*, at 466 (Gibbs CJ.)

# Protests, Fraser and Hawke

## Tasmania continues and national protests

Also in 1982, the Tasmanian Liberal government led by Premier Robin Gray passed special laws to enable the Dam to proceed,<sup>4</sup> and the 'Hydro' began preliminary works at the site. A national controversy quickly arose with the Tasmanian Wilderness Society ('TWS') led by (later Senator) Dr. Bob Brown organising hundreds of protesters – students and others – at the construction site on the Gordon River.

Many confrontations arose between police, Hydro workers and protesters, and the controversy became a prominent national issue. About 2,500 people participated with around 1,400 protesters arrested, charged with offences, and processed at the Strahan Magistrates Court. About 600 were jailed – including Bob Brown.<sup>5</sup> At that time, the federal Liberal government led by Malcolm Fraser, declined to intervene.

## 1983 Federal Election and legislation

During the 1983 federal election campaign, the Labor Party led by Bob Hawke, promised to stop the dam by legislation, utilising (amongst others<sup>6</sup>) the 'external affairs' power in s 51(xxix) of the Constitution. Upon winning the election on 5 March 1983, the new Labor government passed the World Heritage Properties Conservation Act 1983 (Cth).

This new law, in conjunction with 1975 legislation,<sup>7</sup> empowered the Commonwealth to prohibit clearing, excavation and other activities within the Tasmanian Wilderness World Heritage Area.

## Hobart rejects Canberra

The Tasmanian government refused to halt construction, arguing that the Commonwealth lacked constitutional power to enact the Heritage Conservation Act, rendering it invalid and inoperative. The Hydro's construction and protests at the site continued, as did the national controversy.

## Legal proceedings initiated

On 4th April 1983, the Commonwealth commenced proceedings in the High Court. The Commonwealth sought declarations that it possessed the required legislative power to enact the Heritage Conservation Act, that it was a valid and enforceable law, that Tasmania's 1982 law<sup>8</sup> was in conflict with the federal law and thus invalid under Constitution s 109,<sup>9</sup> and injunctions to stop construction.

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<sup>4</sup> *Gordon River Hydro-Electric Power Development Act 1982* (Tas).

<sup>5</sup> M. J. Black, 'The Tasmanian Dam Case: An Advocate's Memoir' (2015) 24(1) *Griiffith Law Review* 22, at fn 8; Bob Brown, 'Why I am a Green', [http://www.bobbrown.org.au/why\\_i\\_am\\_a\\_green](http://www.bobbrown.org.au/why_i_am_a_green) (2012); <https://digital-classroom.nma.gov.au/defining-moments/franklin-dam-protests>

<sup>6</sup> Eg, the 'corporation power', s 51(xx), being a power to make laws with respect to 'foreign corporations and trading or financial corporations found within the limits of the Commonwealth.' See *Dam Case* at 480 (Gibbs CJ).

<sup>7</sup> See *National Parks and Wildlife Conservation Act 1975* (Cwth).

<sup>8</sup> See fn 4 above.

<sup>9</sup> *Constitution* s. 109 states, in short, that if state and commonwealth laws conflict, the commonwealth law prevails to the extent of that inconsistency.



The Franklin and Gordon Rivers - Shutterstock

## A trip worth remembering

### Rafting the Franklin River

Despite this controversy and continuing confrontations, during Easter 1983, several hiking friends and I rafted the Franklin River in two rubber duckies – a truly inspiring wilderness experience.

At that time, I was briefed with Michael Black QC<sup>10</sup> by Bob Brown's Tasmanian Wilderness Society (TWS) to represent it and seek to intervene<sup>11</sup> in the High Court litigation. The litigation had commenced just weeks before. I was to present submissions based on the TWS's extensive experience of the area and to support the Commonwealth.

During this week-long trip, I met some protesters. They were cold, wet and hungry, camped in the thick forest near the junction with the Gordon River. I told them of my involvement in their case, whereupon they instructed me:

'Tell those judges the trees are hurting: they're terrified of being drowned.'<sup>12</sup>

'O-kay, we'll make that submission – somehow,' I replied, somewhat astonished, and knowing full-well that this was not a persuasive 'constitutional' argument in a court of law – let alone the High Court!

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<sup>10</sup> Later appointed Chief Justice of the Federal Court. See M J Black, fnt 5 above.

<sup>11</sup> Ie, though not a party to the proceeding, seek the court's permission to present submissions.

<sup>12</sup> See my leader's account at M.J. Black, fnt 4 above, quoting *Dam Case*, High Court Transcript, 10/6/1983, p. 786.

# The hearing before the High Court

The case was heard over eight long days between 31 May and 10 June 1983.

Victoria and NSW ‘intervened,’ supporting the Commonwealth.<sup>13</sup> After listening to almost eight days of argument between the Commonwealth and its two supporting states against Tasmania and the Hydro we were given just ten minutes on 10 June to make our submissions.

Michael Black QC – an accomplished and highly regarded Victorian barrister – then addressed the court. As to the protesters’ plea about ‘suffering trees,’ we (after much cogitation) handed up a collection of beautiful photos of the Franklin River and surrounding wilderness areas, all under threat of flooding. Chief Justice Gibbs quipped:

‘Mr. Black, will these photos inflame our minds?’

Black, being quick-on-his-feet, replied: ‘They’re not that sort of photographs, your honour.’

The court promptly adjourned to consider its decision, without any ruling concerning whether the TWS was admitted to the proceedings, so that its submissions (including the photos of many terrified trees) could be taken into account.<sup>14</sup>

## Constitutional issues

The fundamental questions raised by Tasmania included: did the Commonwealth Parliament possess power under s 51(xxix) of the Australian Constitution – the ‘external affairs’ power – to legislate to protect the environment based on Australia’s obligations as a party to the World Heritage Convention (‘WHC’)? This convention obliges contracting states, including Australia, to identify and protect cultural sites of outstanding universal value.

Section 51, subsections (i) – (xxxi) deliver powers to the Commonwealth parliament to legislate on many topics – but not concerning the ‘environment’ or ‘wilderness,’ let alone ‘dams.’ However, s 51 (xxix) provides legislative power over ‘external affairs.’ According to precedent the scope of this power was unclear in early 1983.<sup>15</sup>

Thus, the questions arose: Did the Australian Parliament possess power to make laws to fulfil its obligations under international treaties such as the WHC? Did the WHC qualify as an ‘external affair’ within the meaning of s 51(xxix)? And if so, did its subject matter include obligations upon its parties to prevent the construction of dams across rivers in recognised wilderness areas?

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<sup>13</sup> They, as states, were entitled to ‘intervene’ since constitutional issues were involved: see *Judiciary Act 1903* (Cth) s 78A. The TWS, a mere community group, enjoyed no such status.

<sup>14</sup> Gibbs CJ accepted our submissions as ‘said by an amicus curiae,’ ie by a ‘friend of the court,’ not a party. See *Dam Case*, p 51 (Gibbs CJ).

<sup>15</sup> The most recent High Court decision was *Koowarta v Bjelke-Petersen* (1982) 153 CLR 166.



# Arguments made and decision

## Argument before the High Court

Tasmania and the Hydro argued that the laws the Commonwealth relied upon<sup>16</sup> were beyond its constitutional powers and invalid. Amongst several arguments, it urged a restrictive view of the external affairs power and that the Commonwealth legislation amounted to acquisition of Tasmanian property without providing 'just terms' compensation, as required by Constitution s 51(xxxi).

The Commonwealth argued that it possessed constitutional power to enact its laws; that they were valid and enforceable; that the court should declare as much; and issue injunctions ordering the Hydro to stop all further construction and associated activities in the wilderness park area. The Commonwealth relied mainly on three powers:

1. the external affairs power,<sup>17</sup> triggered by Australia being a party to the UNESCO treaty and its obligations thereunder relating to both the natural wilderness areas and culturally significant areas, especially the two caves
2. the corporations power,<sup>18</sup> since the Hydro under its founding state legislation was a 'trading corporation;'
3. the race power,<sup>19</sup> in relation to areas of special significance to Tasmanian Aboriginal People, such as the two caves.

## The Court's decision

The court delivered its judgments quickly on 1 July 1983. By 4/3 majority, the court largely upheld the validity of the Commonwealth legislation as falling within the external affairs power, thus preventing any further construction.

For the first time in its history due to considerable public interest, the court issued a 'Statement' summarising the various judgements in language intended for non-lawyers. The release stressed that the decision was based upon the Constitution, not policy considerations, stating that the 'validity of ... Commonwealth acts ... (to prevent) ... the construction of the ... Dam ... are strictly legal questions. The court is (not) concerned ... whether (the Dam's construction) is desirable or undesirable.' Today, the court issues a statement with every decision.

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<sup>16</sup> *ie.*, the *National Parks and Wildlife Conservation Act 1975* (Cth); *World Heritage Properties Conservation Act 1983* (Cth) and *Regulations* thereunder.

<sup>17</sup> *Constitution* s. 51(xxix).

<sup>18</sup> *Ibid*, s 51(xx)

<sup>19</sup> *Ibid*, s 51(xxvi).



The Franklin Gordon Wilderness - Shutterstock

## Long-lasting impact

The decision not only saved the Franklin River, it significantly enlarged the Commonwealth's powers to make laws to protect the environment and triggered much legal debate over the 'external affairs' power.<sup>20</sup>

Since 1983, the High Court has decided several cases where the 'wide view' of s 51(xxix) prevailed.<sup>21</sup> In 2025, it is now firmly established that s. 51(xxix) vests the federal parliament with the power to enact legislation that is reasonably capable of being considered appropriate and adapted to fulfil Australia's international obligations.

Given the many international obligations Australia has assumed pursuant to such international treaties, the 'external affairs' power, provides the Commonwealth parliament with a wide constitutional power

to make laws on many subjects – including protecting the environment within Australia.

Since 1983, several new Commonwealth laws have been enacted to protect Australia's environmental heritage and biodiversity.<sup>22</sup> Today, many of Australia's national environmental laws, especially the Environment Protection and Biodiversity Conservation Act 1999 (Cwth) still depend for their constitutional validity on the Dam Case.

Areas and species thus now protected (in theory at least) under commonwealth and state legislation include world heritage properties, Ramsar wetlands, threatened species and ecological communities, and migratory species.<sup>23</sup>

<sup>20</sup> See eg. Several articles in (2013) *Griffith Law Review*.

<sup>21</sup> See <https://envlaw.com.au/tasmanian-dam-case/>

<sup>22</sup> Eg., *Environment Protection and Biodiversity Conservation Act 1999*; *Biosecurity Act 2015*; *Climate Change Act 2022*.

<sup>23</sup> See, eg, *EPBC Act s 209 re migratory species*; *Threatened Species Protection Act 1995 (Tas)*; *Biodiversity Conservation Act 2016 (NSW)*.

