HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

GEOFFREY JAMES BENNETT & ORS PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

Bennett v Commonwealth of Australia [2007] HCA 18
27 April 2007
S111/2006

ORDER

Questions reserved for the consideration of the Full Court answered as follows:

(1) Q Is s 3 of the Norfolk Island Amendment Act *2004 (Cth), in so far as it gives effect to:*

(a) Items 1, 3 and 4 in Part 1 of Schedule 1 to that Act; and

(b) Item 5 in Part 1 of Schedule 1 to that Act to the extent that that item inserts into the Principal Act the following new provisions:

(i) paragraph 39A(1)(b); and

(ii) paragraph 39A(2)(a); and

(iii) section 39C; and

(iv) the definition of "Returning Officer" in section 39D,

valid?

A Yes.

(2) Q Who should pay the costs in respect of the special case?

A The plaintiffs.

Representation

R J Ellicott QC with G R Kennett for the plaintiffs (instructed by Wright Stell)

D M J Bennett QC Solicitor-General of the Commonwealth of Australia with K L Eastman for the defendant (instructed by Australian Government Solicitor)

CATCHWORDS

Bennett v Commonwealth of Australia

Constitutional Law (Cth) – Powers of federal Parliament – Territories – Section 3 of the *Norfolk Island Amendment Act* 2004 (Cth) ("the Act") amended the *Norfolk Island Act* 1979 (Cth) so as to make Australian citizenship a necessary qualification for voting for, and standing for election to, the Legislative Assembly of Norfolk Island – Whether the provisions of the Act giving effect to the amendments were supported by s 122 of the Constitution.

Constitutional Law (Cth) – Territories – Whether the challenge to the validity of the Act presented a political question not amenable to judicial determination – Whether "laws for the government" of a territory, to be valid, must provide for a form of government appropriate to the circumstances of the particular territory.

Constitutional Law (Cth) – Territories – Territories "placed by the Queen under the authority of and accepted by the Commonwealth" – Territory granted institutions of representative government – Whether law enacted in reliance on s 122 may validly remove or curtail features of representative government so granted.

Norfolk Island Amendment Act 2004 (Cth), s 3, Sched 1.
Norfolk Island Act 1979 (Cth), ss 38-39D.

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The parties to these proceedings brought a special case raising questions of law which were reserved for the consideration of a Full Court. At issue is the validity of certain provisions of the *Norfolk Island Amendment Act* 2004 (Cth) ("the 2004 Act"), by which Australian citizenship was made a necessary qualification for voting for, and standing for election to, the Legislative Assembly of Norfolk Island.

2 Norfolk Island is a territory that was placed under the authority of and accepted by the Commonwealth, within s 122 of the Constitution. That occurred on 1 July 1914 in consequence of measures that will be described below. Section 122 provides that the Parliament may make laws for the government of such a territory.

Norfolk Island electoral laws

3 After its acceptance as a territory, Norfolk Island was governed pursuant to the *Norfolk Island Act* 1913 (Cth) (which came into effect on 1 July 1914), then pursuant to the *Norfolk Island Act* 1957 (Cth), then pursuant to the *Norfolk Island Act* 1963 (Cth), and, since 1979, pursuant to the *Norfolk Island Act* 1979 (Cth) ("the 1979 Act"). The 2004 Act amended the 1979 Act.

4 The 1979 Act conferred on Norfolk Island a substantial degree of self-government. The plaintiffs do not suggest that prior legislation providing for the government of the island, but not self-government, was invalid. The 1979 Act, by s 31, established a Legislative Assembly, consisting of nine members who are elected for a maximum term of three years. The Legislative Assembly has power, subject to certain exceptions, to make laws for the peace, order and good government of the Territory.

5 In 1979, the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act") by s 10 provided that, subject to exceptions, a person born in Australia after a certain date was an Australian citizen by birth. By definition (s 5(1)), "Australia" included the territories that were not trust territories. In 1979, a person born on Norfolk Island would ordinarily be an Australian citizen. By virtue of an amendment to the Citizenship Act in 1986, a person born on Norfolk Island after 1986 would be an Australian citizen if one parent was an Australian citizen or a permanent resident. It will be necessary to return to certain aspects of the history and composition of the people of Norfolk Island said to be relevant to the plaintiffs' argument. For the present, it is sufficient to note that the special case records that, at the time of a census in 2001, the island had a permanent population of 1574 persons, of whom 82.5% were Australian citizens, 14.1%

were New Zealand citizens, and 1.4% were citizens of the United Kingdom, with the remainder from other countries or not stated. Since 2002 Australia has not prohibited dual citizenship[1]. It was common ground that New Zealand citizens may have dual citizenship.

6 To return to the matters of membership of, and voting for, the Legislative Assembly, s 38 of the 1979 Act set out the qualifications to be a candidate for election. Subject to disqualifications provided for by s 39, a person was qualified to be a candidate if the person was an Australian citizen or otherwise had the status of a British subject and satisfied certain other requirements as to age, entitlement to vote, and residency. Section 38 was amended in 1985[2], and the requirement to be an Australian citizen or otherwise have the status of a British subject was removed.

7 Section 31 of the 1979 Act provided for the Legislative Assembly to enact laws relating to the election of members of the Legislative Assembly. An electoral roll was maintained pursuant to the Legislative Assembly Ordinance 1979 (NI). Section 6 set out the qualifications for enrolment. They included a requirement that a person be an Australian citizen or otherwise have the status of a British subject. In 1986, that requirement was removed[3].

8 The 2004 Act, which is the subject of these proceedings, amended the 1979 Act. The operative provision was s 3, which effected the amendments specified in a Schedule. The amendments altered s 38 of the 1979 Act, concerning qualifications for election to the Legislative Assembly and also introduced, for the first time in the Act, provisions dealing with qualifications to vote. The effect of the amendments was to make Australian citizenship a necessary qualification for voters and candidates. It is the validity of those amendments that is in question. Following the 2004 Act, the *Legislative Assembly (Amendment No 1) Act* 2004 (NI) amended the Norfolk Island legislation dealing with enrolment in such a way as to conform to the Commonwealth legislation's requirement of Australian citizenship as a qualification for enrolment.

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1 *Australian Citizenship Legislation Amendment Act* (2002) (Cth) Sched 1 Item 1.

2 *Statute Law (Miscellaneous Provisions) Act (No 1)* 1985 (Cth) (Sched 1).

3 *Statute Law Revision (Status) (No 3) Act* 1986 (NI). See also *Legislative Assembly Amendment Act* 1991 (NI).

9 The Commonwealth and the Norfolk Island legislation as to enrolment applied prospectively to persons applying for enrolment after a date in March 2004. The legislation did not take away the rights of persons who were enrolled before that date, and no person was disenfranchised.

The generality of s 122

10 In *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[4] it was pointed out that the territories, dealt with compendiously and briefly in s 122 of the Constitution, have differed greatly in size, population, and development. Some, such as Norfolk Island, the Coral Sea Islands, the Australian Antarctic Territory, the Ashmore and Cartier Islands, the Cocos (Keeling) Islands, Christmas Island, and the Heard and McDonald Islands, are external territories. Of those, some have no human inhabitants. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[5] this Court examined the history of the Territory of Papua (formerly British New Guinea) which was placed under the authority of the Commonwealth in 1905, and the Territory of New Guinea (a former German possession) which was placed under Australian administration in 1920. Those two territories later became a single territory, and in 1975 Papua New Guinea became an independent State. Other territories, such as the Australian Capital Territory, the Northern Territory, and Jervis Bay are internal, and the people and economies of those territories are, for most practical purposes, indistinguishable from those of the Australian States. The variety of circumstances to which s 122 must apply explains the generality of its language and, in particular, of the power to "make laws for the government of any territory".

Norfolk Island before 1914

11 Norfolk Island was discovered, and claimed as a British possession, by Captain Cook on 10 October 1774. At that time it was uninhabited. It is situated to the east of the Australian mainland, within the area bounded by the parallels 28 degrees 59 minutes and 29 degrees 9 minutes south latitude and the meridians 167 degrees 54 minutes and 168 degrees east longitude. It is about 1075 kilometres from Auckland, 835 kilometres from New Caledonia and 1675 kilometres from Sydney. It is on approximately the same latitude as

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4 (1999) 200 CLR 322 at 331 [7].

5 (2005) 222 CLR 439.

Brisbane. It has an area of about 3450 hectares. It was within the territory of New South Wales as defined by the Commission issued to Governor Phillip on 12 October 1786.

12 In 1788, Norfolk Island was occupied as a penal settlement. Between 1788 and 1814, some public buildings and houses were erected, jetties were constructed, and some land was cleared. The settlement was abandoned in 1814, and the island remained unoccupied until 1825. In 1825, convicts were again sent to Norfolk Island. Additional land was cleared. Buildings were constructed, and roads were extended. Animals, including cattle, horses, sheep, pigs and goats were introduced. Some wool was exported to New South Wales. The penal settlement came to an end in 1855[6].

13 By an Act of the Parliament of the United Kingdom of 1843[7] it was enacted that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to sever Norfolk Island from New South Wales, and to annex it to the Colony of Van Diemen's Land. Such severance and annexation were effected, from 29 September 1844, by letters patent dated 24 October 1843.

14 Before the convicts, their guards, and accompanying settlers evacuated Norfolk Island in 1855, it had been decided by the United Kingdom Government that, upon their departure, the island would be occupied by the inhabitants of Pitcairn. Pitcairn is a small island about midway between New Zealand and Chile. It was settled in 1790 by a small group of mutineers from HMAV *Bounty*, who were fugitives from justice, and some Polynesian men and women. On 8 June 1856, the inhabitants of Pitcairn Island arrived on Norfolk Island, having travelled there by arrangement with the Imperial authorities. Some of them later returned to Pitcairn, and something of their subsequent history appears from the recent decision of the Privy Council in *Christian v The Queen (The Pitcairn Islands)*[8]. The 1976 *Report of the Royal Commission into Matters Relating to*

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6 Commonwealth, *Report of the Royal Commission into Matters Relating to Norfolk Island*, October 1976 at 34-37, 101.

7 6 & 7 Vict c 35.

8 [2006] UKPC 47.

Norfolk Island[9] stated that "when the 194 Pitcairn Islanders arrived at Norfolk on 8 June 1856, they came ... as new tenants of an Island with valuable and significant developments in the form of roads, bridges, buildings, wharves of sorts and cleared arable land."

15 By the *Australian Waste Lands Act* 1855 (Imp)[10] it was provided that it should be lawful for Her Majesty at any time, by Order in Council, to separate Norfolk Island from the Colony of Van Diemen's Land and to make such provision for the Government of Norfolk Island as might seem expedient. In 1965, in *Newbery v The Queen*[11], Eggleston J, sitting as the Supreme Court of Norfolk Island, held that the 1855 Act authorised the creation of any form of government, representative or non-representative.

16 By an Order in Council dated 24 June 1856 it was ordered:

> "[Norfolk Island] shall be and the same is hereby separated from the said Colony of Van Diemen's Land (now called Tasmania); and that from [the date of proclamation] all power, authority, and jurisdiction of the Governor, Legislature, Courts of Justice, and Magistrates of Tasmania over the said island shall cease and determine.
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> ... [Norfolk Island] shall be a distinct and separate settlement; the affairs of which, until further Order is made in that behalf by Her Majesty, be administered by a Governor to be for that purpose appointed by Her Majesty, with the advice and consent of Her Privy Council."

17 The 1856 Order in Council provided that the Governor for the time being of New South Wales should also be the Governor of Norfolk Island. Royal Instructions issued to the Governor of Norfolk Island, dated 24 June 1856, referred to the framing of laws for inhabitants who "are chiefly emigrants from Pitcairn's Island in the Pacific Ocean".

18 On 14 October 1857, the Governor, Sir William Denison, declared and enacted the "Laws and Regulations for Norfolk Island" which are commonly

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9 *Report of the Royal Commission into Matters Relating to Norfolk Island*, October 1976 at 101.

10 (18 & 19 Vict c 56).

11 (1965) 7 FLR 34 at 40-41.

referred to as the "thirty-nine laws". They were based on the laws by which the families who had moved to Norfolk Island had governed themselves on Pitcairn. The population governed by those laws was fewer than 200. The laws provided for the election of a Chief Magistrate and Councillors. Every person who may have resided on the island for six months, who had attained the age of 20, and who was literate, could vote. The powers of the Chief Magistrate and Councillors were set out. There was provision for juries of Elders (males who had attained 25 years). Attendance of children at school was compulsory. Beer, wine, and spirituous liquor (except for medical purposes, to be administered by the Chaplain) were prohibited.

19 In 1856, it was the intention of the Imperial authorities that Norfolk Island should be reserved exclusively for the families from Pitcairn and their descendants. However, this policy was later relaxed. In 1864, there were about 260 people on Norfolk Island, with eight family names. By 1900, an increased number of family names reflected some degree of immigration[12]. The departure from the original intention to exclude outsiders and the acquisition of land by settlers not of Pitcairn descent was noted by several official visitors to the island[13]. In 1866, the Governor, acting under instructions from the Secretary of State for Colonies, granted land for the establishment of a Melanesian Mission Station. By 1899, the mission had 210 Melanesian students. The 1976 Royal Commission Report described the Mission as "the wedge which split apart ... the original policy of reserving Norfolk for the Pitcairners."[14]

20 Towards the end of the 19th century, it was decided that Norfolk Island would be placed under the control of the Government of New South Wales. This, according to an Order in Council of 15 January 1897, was "in prospect of the future annexation of [the] island to the colony of New South Wales, or to any federal body of which that colony may hereafter form part". The new Australian

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12 Varman, *The Bounty and Tahitian Genealogies of the Pitcairn Island Descendants on Norfolk Island* (1992) at viii.

13 Hoare, *Norfolk Island: A Revised and Enlarged History* 1774-1998, 5th ed (1999) at 81-82, 104-105.

14 *Report of the Royal Commission into Matters Relating to Norfolk Island*, October 1976 at 38. The Melanesian Mission had ceased its operations on the island by 1920 and had shifted its headquarters elsewhere: Treadgold, *Bounteous Bestowal: The Economic History of Norfolk Island* (1988) at 117.

Federation came into being on 1 January 1901, but it seems that at that time it had not been decided whether Norfolk Island would become a part of the State of New South Wales or whether it would become a territory under the authority of the Commonwealth. The Order in Council of 1897 recited that the 1856 Order in Council had been expressed to operate "until further order is made in that behalf by Her Majesty" and declared that Norfolk Island should be administered by the Governor of New South Wales who was empowered, by proclamation published in the New South Wales Government Gazette, to make laws for the peace, order and good government of the island subject to instructions from Her Majesty (ie from the Imperial Government). In *Newbery v The Queen*[15], Eggleston J said that the practical effect of the 1897 Order was to enable the Governor of New South Wales to legislate in that capacity rather than in his former capacity as Governor of Norfolk Island. The administration of Norfolk Island involved the expenditure of public funds. The provision of services, and infrastructure, could be expensive. The practical reality is reflected in a memorandum to the Governor of New South Wales from the Colonial Treasurer, Mr Reid, dated 13 October 1896, expressing a willingness to advance a certain sum. Mr Reid wrote:

> "We propose, therefore, that the Island should not be annexed formally to New South Wales, and that our services should be administrative only, legislation being conducted as formerly, or in such manner as may seem fit to Her Majesty's Government.
>
> It should be understood, however, the Island is, as part of the arrangement, secured to New South Wales, or the future Federal body, when it is found expedient to ask for its annexation.
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> This will be a tangible basis for an annual vote out of Colonial funds towards the expenses of the Island."

21 New South Wales assumed responsibility for financial management of Norfolk Island until it became a territory under the authority of the Commonwealth in 1914. The New South Wales Government provided the first regular shipping service to the island in 1898. The Government contracted with Burns, Philp & Co, which called at the island 12 times a year. It paid directly the greater part of the salary of the Chief Magistrate and the full salaries of the senior

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15 (1965) 7 FLR 34 at 37.

policeman (who was seconded from the New South Wales force) and three school teachers (seconded from the New South Wales Education Department)[16].

22 In 1902, a cable station for the Pacific cable commenced operation on the island; the cable ran from Vancouver and at Norfolk Island separated into two branches, one to Auckland and the other to Southport in Queensland. The station operated for 60 years[17].

23 By an Order in Council dated 18 October 1900, the Queen revoked the 1897 Order and ordered that the affairs of Norfolk Island should thenceforth, and until further Order should be made in that behalf by Her Majesty, be administered by the Governor for the time being of New South Wales. The 1900 Order provided that all laws, ordinances and regulations in force in Norfolk Island should continue until repealed or altered. The 1900 Order took effect on 1 January 1901, the date when New South Wales ceased to be a colony and became a State of the new federal union. Letters Patent dated 29 October 1900 described the boundaries of the State so as to exclude Norfolk Island.

24 Shortly after the establishment of the Commonwealth consideration was given to the annexation of Norfolk Island to the Commonwealth. Legislation was introduced into the Parliament in 1909, but did not proceed.

Norfolk Island from 1914

25 By an Order in Council dated 30 March 1914, which recited that the Commonwealth Parliament had in 1913 enacted legislation to provide for the acceptance of Norfolk Island as a territory under the authority of the Commonwealth, the King revoked the 1900 Order and ordered that Norfolk Island was placed under the authority of the Commonwealth of Australia. The 1914 Order took effect from 1 July 1914. That also was the date of commencement of the *Norfolk Island Act* 1913 (Cth) by which Norfolk Island was declared to be accepted by the Commonwealth as a territory under the authority of the Commonwealth. Norfolk Island has been governed by the Commonwealth, initially under the provisions of the 1913 Act, and subsequently

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16 Treadgold, *Bounteous Bestowal: The Economic History of Norfolk Island* (1988) at 106, 110.

17 Treadgold, *Bounteous Bestowal: The Economic History of Norfolk Island* (1988) at 107.

under the provisions of the *Norfolk Island Act* 1957, the *Norfolk Island Act* 1963, and the 1979 Act, the lastmentioned Act being the Act that was amended by the legislation under challenge in these proceedings.

26 An airfield was built on the island in 1942-1943. The decision to construct the airfield was taken by the Allied South Pacific Command. Survey work was done by Australian and American engineers, and construction was by the New South Wales Department of Main Roads. The airfield was built on land acquired and owned by the Commonwealth[18]. The airport was upgraded by the Commonwealth during the 1980s. Another major infrastructure project funded by the Commonwealth at about the same time was the construction of a new cable station[19].

27 The author of an economic history of the island wrote in 1988[20]:

> "[I]ncreased awareness of Norfolk Island at governmental level, and specifically in Canberra, must be attributed mainly to its strategic location in the hostilities with Japan, but it probably also reflected to some extent the islanders' record of war service and war-time changes in international and domestic (ie Australian) political attitudes to colonial territories in general. This increased awareness and an associated growth in concern with the welfare of the island community led to post-war Australian economic aid to the island eventually expanding to levels that dwarfed pre-war contributions. The aid included both technical and financial assistance. An increasing flow of experts and consultants visited the island to report and advise on matters that ranged from agriculture and forestry through conservation and the preservation of historic buildings to tourism and population policy."

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18 Treadgold, *Bounteous Bestowal: The Economic History of Norfolk Island* (1988) at 163-164; *Report of the Royal Commission into Matters Relating to Norfolk Island*, October 1976 at 288.

19 Treadgold, *Bounteous Bestowal: The Economic History of Norfolk Island* (1988) at 262.

20 Treadgold, *Bounteous Bestowal: The Economic History of Norfolk Island* (1988) at 180-181.

28 As the island became more accessible, especially by air, tourism developed. Norfolk Island had a special taxation status, and some of the activity that this brought to the island is exemplified in *Esquire Nominees Ltd v Federal Commissioner of Taxation*[21]. Over time, the mix of the population changed. The *Report of the Royal Commission into Matters Relating to Norfolk Island* stated that, at 30 June 1976, there were 859 persons on the Norfolk Island electoral roll[22]. Of these, 323 were descendants of people who transferred from Pitcairn in 1856. Of the other 536, nine were born on Norfolk Island, 199 were born in Australia, 196 in New Zealand, and 82 in England. The remainder came from other countries including India, Lithuania and Mauritius. According to the 2001 census, of the island's permanent population (1574), 48 per cent were of Pitcairn descent. Reference has been made earlier to the fact that, in 2001, 82.5 per cent of the permanent population were Australian citizens.

The validity of the legislation

29 The power conferred upon the Parliament of the Commonwealth by s 122 of the Constitution is a power to make laws for the government of any territory. We are not directly concerned with the further power to allow the representation of a territory in either House of the Parliament to the extent and on the terms which the Parliament thinks fit, although the plaintiffs argued that the nature of that additional power casts some light on the nature of the power presently in question.

30 In *Lamshed v Lake*[23], Kitto J said:

> "Section 122 ... confers on the legislative organ of the federation plenary power in respect of such areas as may be offered to and accepted by the federation so as to become territories to be governed by the federation ... Section 122 is a grant of power, not for the government of a community by a legislature established for it, but for the exercise of superior authority over a community by the legislature of another community ... Surely it means that a territory which has been accepted by the Australian Federation may be fitted into the Australian scene, so far as laws are

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21 (1973) 129 CLR 177.

22 at 66-67.

23 (1958) 99 CLR 132 at 153-154.

concerned, by the legislative activity of the Australian Parliament: that the entire legal situation of the territory, both internally and in relation to all parts of the Commonwealth, may be determined by or by the authority of Parliament."

31 It was accepted by the plaintiffs that there was, and is, no obligation upon the Parliament, in making a law for the government of Norfolk Island, to provide for self-government. In fact Norfolk Island did not have a substantial measure of self-government until 1979. A law which provided for the government of Norfolk Island by an administration based in Canberra might not now be regarded as a wise or effective law, but it would nonetheless be a law for the government of the Territory. The plaintiffs contended, however, that, in making provision for self-government of Norfolk Island, the Parliament was obliged to enact a law that provided for democratic representation and was not entitled to enact a law that "divide[d] the community by a criterion that has nothing to do with membership of that community." The concept of representation in the concluding words of s 122, though not presently of direct relevance, was said to reinforce this implied limitation upon the apparent generality of the opening words of s 122.

32 It is important to observe the difference between a political and a legal argument about s 122. No doubt, if the Parliament decides that the most appropriate form of government of a territory is democratic self-government, then the method by which it provides for representation of the people of the territory in the process of self-government will affect the acceptability, and ultimately the success, of the form of government established. While concepts such as self-government, representative government, and democratic process have a minimum content, standards as to their most appropriate forms of expression vary with time and place[24]. To establish a form of self-government that purported to be representative but that provided a system of representation that was manifestly unfair or idiosyncratic might have adverse political consequences within Norfolk Island, or within the wider Australian community. It might be bad administration. It might make the island more difficult to govern. There may be political or administrative arguments against a particular system of self-government, but we are concerned with a question of constitutional power.

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24 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 189-190 [10]. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 246-247, 267-268, where reference is made to the judgment of McLachlin CJ (then Chief Justice of British Columbia) in *Dixon v Attorney-General (British Columbia)* (1989) 59 DLR (4th) 247 at 262-263.

33 The political justification advanced in the Parliament for making Australian citizenship a requirement for participation in the democratic process on Norfolk Island was that this would bring Norfolk Island into line with other Australian legislatures. "The bill", Parliament was told, "removes the right for non-Australian citizens to enrol and stand for election to an Australian legislature. There can be no justification for the continuation of such an anomaly. The Government does not believe that non-Australian citizens should be able to decide what laws will apply to Australian citizens in an Australian community. The Government does not believe that Norfolk Island should, in this respect, be different from all other Australian legislatures."[25]

34 That political justification for the legislation appears to have provoked a substantial part of the argument for the plaintiffs, the difficulty being to find a legal foundation for such argument. Much emphasis was placed upon the status of Norfolk Island, in and after 1856, as a "distinct and separate settlement". That concept was formulated at a particular time in the island's history but, as a review of that history shows, circumstances, and government policies, have changed over the years. There was a tendency, at times, to identify "the island community" with the descendants of those who came from Pitcairn in 1856 but, again, the facts are more complex. Those descendants are a minority of the island's permanent population. However distinct and separate the people, or some of the people, of the island may have wanted to be, for more than a century, in matters of administration, including financial arrangements for the provision of the infrastructure necessary for their sustenance, they have been linked, first to New South Wales, then to the Commonwealth.

35 Part of the argument for the plaintiffs was directed towards demonstrating that Norfolk Island is not a part of Australia. In this respect, the Court was invited to disagree with what was said in *Berwick Ltd v Gray*[26]. There, Barwick CJ said that "Norfolk Island is part of the Commonwealth"[27]. Mason J, with whom McTiernan J and Murphy J agreed, said the same[28]. In *Capital Duplicators Pty Ltd v Australian Capital Territory*[29] Gaudron J cited *Berwick v*

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25 Australia, Senate, *Parliamentary Debates* (Hansard), 4 December 2003 at 19115.

26 (1976) 133 CLR 603.

27 (1976) 133 CLR 603 at 605.

28 (1976) 133 CLR 603 at 608.

29 (1992) 177 CLR 248 at 285-286.

Gray with apparent approval, but went on to say, with reference to some external territories such as Papua and New Guinea, that "mere acquisition of territory does not, of itself, make that territory a constituent part of the Commonwealth either in a political or in a geographic sense".

36 The answer to the question whether an external territory is "part of the Commonwealth" may depend upon the purpose for which the question is asked. There are different senses in which a place, or a community, or a body politic, may be said to be, or not to be, "a part of" another place, or community, or body politic. The political justification for the amending legislation appears to have provoked the dispute about whether the people of Norfolk Island are "an Australian community" or whether the Legislative Assembly of Norfolk Island is "an Australian legislature", but for the resolution of the legal challenge to the validity of the legislation what matters is that Norfolk Island is a territory under the authority of the Commonwealth. To take up what was said by Kitto J in the passage quoted earlier from *Lamshed v Lake*, the entire legal situation of the territory may be determined by the authority of the Parliament. If, in making that determination, the Parliament gives effect to a politically contestable view of what is appropriate, that of itself has no bearing on the validity of its legislation.

37 Reference was made to the observation in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[30] that the acquisition of an external territory by Australia involves the establishment of relations between Australia and the inhabitants of that territory, and that the kinds of relationship that may be appropriate are as various as the kinds of territory that may be acquired. It is difficult to see how that assists the plaintiffs. The observation was made in the context of the relationship that existed between Australia and the people of Papua and New Guinea. The variety of the kinds of relationship that may exist between Australia and the people of external territories is, no doubt, one of the reasons for the width of the power conferred by s 122.

38 The plaintiffs submitted that a law which adopts Australian citizenship as a criterion for the conferring of electoral rights in relation to the people of Norfolk Island is not a law for the government of the people of Norfolk Island because it selects as a criterion one which is not a defining characteristic a person must possess in order to be a member of the Norfolk Island community or one of the people of Norfolk Island; it excludes from electoral rights a substantial number of people who are part of the people of Norfolk Island. Once it is

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30 (2005) 222 CLR 439 at 457 [29].

accepted (as the plaintiffs accepted) that Parliament may make laws for the government of a territory that deny electoral rights to all of the people of the territory, it is difficult to understand why Parliament may not make laws that deny electoral rights to some of the people of the territory or, in particular, to a relatively small minority of the people who are not Australian citizens. Some forms of discrimination in the conferral or withholding of electoral rights may be unjust or unwise, or inconsistent with currently held democratic values. That does not necessarily mean they are unlawful. Other forms of discrimination are generally accepted. Fixing a minimum age for voting is one example. It is impossible to find in the text of s 122, or elsewhere in the Constitution, a prohibition against discriminating on the basis of Australian citizenship. There is nothing in the Constitution, or in the history or circumstances of Norfolk Island, which denies to the laws in question the quality of being laws for the government of Norfolk Island.

39 It was further submitted that "[t]he doctrine of representative government is embedded in the Constitution". The plaintiffs said: "The question arises whether, if Parliament decides to establish a form of locally based government for a territory, such as that provided by the 1979 Act (as distinct from direct administration by officers of the Commonwealth), it must do so in a way that ensures the creation and continuing existence of a legislature that is chosen by the people of the territory in accordance with principles of representative government".

40 The question as posed by the plaintiffs according to its terms arises only if Parliament decides to establish a form of locally based government for a territory. Implicit is the acknowledgment, made explicitly in oral argument, that a law for the government of a territory may provide for a government that is not locally based. If the principles of representative government referred to in the question are those generally accepted as applicable to "the people of [particular States]" or "the people of the Commonwealth" then, it should be noted, as was pointed out in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[31], that those references in the Constitution do not bind Australia to any particular form of relationship with all inhabitants of all external territories acquired by the Commonwealth, whatever the form and circumstances of such acquisition. Just as the plaintiffs acknowledge that locally based government might be inappropriate to an external territory, so also, depending on the circumstances, a locally based government constructed according to current

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31 (2005) 222 CLR 439 at 457 [30].

Australian standards of representative democracy may be inappropriate. Indeed, the very complaint of the plaintiffs in this case is that an Australian standard of qualification to participate in the democratic process has been imposed inappropriately on an island population whose distinctive character has not been given adequate recognition.

41 In *Kruger v The Commonwealth*[32], Dawson J said:

> "No system of government, elected or otherwise, is prescribed for the territories. Sovereign legislative power is conferred by s 122 upon the Commonwealth Parliament to make laws for the government of the territories but there need be no representation of a Territory in either House of the Parliament, nor is there any requirement that institutions of representative government exist within the territories."

42 Bearing in mind the diversity of territories, the Parliament, if it decides to establish institutions of representative government within a territory, is not bound to conform to any particular model of representative government. There is nothing in the Constitution, and there is nothing inherent in the concept of representative government, that requires the Parliament, if it chooses to legislate for self-government, to enfranchise residents of Norfolk Island who are not Australian citizens.

43 In *Spratt v Hermes*[33], Barwick CJ said:

> "Section 122 gives to the Parliament legislative power of a different order to those given by s 51. That power is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory – an expression condensed in s 122 to 'for the government of the Territory'. This is as large and universal a power of legislation as can be granted ...
>
> But this does not mean that the power is not controlled in any respect by other parts of the Constitution or that none of the provisions to

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32 (1997) 190 CLR 1 at 69-70.

33 (1965) 114 CLR 226 at 241-242; cf the reference to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 by Laws LJ in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at 1104.

be found in chapters other than Chap VI are applicable to the making of laws for the Territory or to its government. It must remain, in my opinion, a question of construction as the matter arises whether any particular provision has such an operation, the construction being resolved upon a consideration of the text and of the purpose of the Constitution as a whole."

44 Whether, upon such a question of construction, some provision made by the Parliament concerning the government of a territory might offend a requirement of the Constitution is a question that does not need to be decided in this case. The plaintiffs have been able to point to nothing in the Constitution that obliged the Parliament, when it decided to allow residents of Norfolk Island to vote for a Legislative Assembly, to confer a right to vote on all adult residents of Norfolk Island, including those who are not Australian citizens.

Conclusion

45 The questions reserved for the consideration of the Full Court should be answered as follows:

(1) Q Is s 3 of the *Norfolk Island Amendment Act* 2004 (Cth), in so far as it gives effect to:

(a) Items 1, 3 and 4 in Part 1 of Schedule 1 to that Act; and

(b) Item 5 in Part 1 of Schedule 1 to that Act to the extent that that item inserts into the Principal Act the following new provisions:

(i) paragraph 39A(1)(b); and

(ii) paragraph 39A(2)(a); and

(iii) section 39C; and

(iv) the definition of "Returning Officer" in section 39D,

valid?

A Yes.

(2) Q Who should pay the costs in respect of the special case?

A The plaintiffs.

46 KIRBY J. A special case[34] asks whether provisions of the *Norfolk Island Amendment Act* 2004 (Cth) ("the 2004 Act") are valid in accordance with s 122 of the Australian Constitution[35].

47 By s 122, the Parliament is empowered to "make laws for the government of any territory". The challenged laws, described elsewhere[36], concern the qualifications of candidates for election as members of the Legislative Assembly of Norfolk Island[37] ("NI"). They also provide for qualification to be an elector by enrolment on the electoral roll[38]. The purpose of the 2004 Act is, with prospective effect, to limit the eligibility to vote in, and stand for, elections for the NI Legislative Assembly, to persons who are Australian citizens[39].

48 On the face of things, a law made by the Parliament on the qualification of candidates and voters for elections for the Legislative Assembly of a territory of the Commonwealth is a law made "for the government of" that territory. Because NI is incontestably a "territory" within s 122, the 2004 Act thus appears to be valid in accordance with the Constitution. It is from the Constitution that this Court derives its powers[40]. It is bound to uphold the Constitution[41].

49 However, as these proceedings have demonstrated, the 2004 Act, imposing for the first time a universal requirement of Australian citizenship for participation in the representative political life of NI, has proved controversial amongst some of the population of that territory. The attempt to impose Australian citizenship in the ways stated was described by the plaintiffs' counsel as an endeavour to divide the "community" of NI in a way said to be impermissible under the Constitution and therefore invalid. In the face of the

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34 The special case was stated by consent of the parties on 4 September 2006.

35 No other source of constitutional power was propounded. Thus no reliance was placed on s 51(xix), (xxix) or (xxx).

36 Reasons of Callinan J at [167]-[170].

37 The 2004 Act, Sched 1 inserting ss 39A, 39B in *Norfolk Island Act* 1979 (Cth). Read with s 38(2)(da) *Norfolk Island Act* 1979 (Cth).

38 The 2004 Act, ss 39A, 39B.

39 Australia, Senate, Norfolk Island Amendment Bill 2003, Explanatory Memorandum at 2, set out in the reasons of Callinan J at [171].

40 Constitution, s 71.

41 See eg Constitution, ss 75(iii), 76(i).

broad grant of legislative power contained in s 122, reinforced by nearly a century of this Court's decisions, in which the power has been variously described as "ample"[42], "independent"[43] and "relevantly plenary"[44] and such as to "stand[] apart"[45], the plaintiffs obviously faced many obstacles in making good their contentions.

50 The concerns voiced in the proceedings are strongly held. In my view, the plaintiffs fail. However, out of respect for the arguments presented and the issues of principle that have been canvassed, I will state separately my reasons for being unable to accede to them.

The facts, history and legislation

51 *The facts*: The special case arises out of a statement of claim invoking the original jurisdiction of this Court. The status of the several plaintiffs should be noted because it gives an indication of the concerns that lie behind the proceedings. The Commonwealth did not contest the factual statements made in the statement of claim concerning the plaintiffs. Nor did the Commonwealth at any stage submit that the plaintiffs lacked standing to bring the proceedings or to tender the constitutional issue for decision[46].

52 According to the statement of claim, the first plaintiff, Mr Geoffrey Bennett, was born in New Zealand in 1943 and is a citizen of that country. He holds no other citizenship. He has resided continuously on NI since May 1968; was enrolled as an elector in 1972; served on the NI Council from 1976-79; was elected a member of the NI Legislative Assembly in May 1986, was re-elected on two occasions and held office as Minister for Finance until 4 July 1995.

53 The second plaintiff, Mr John Christian, was born in New Zealand in 1959. He too is a citizen of that country holding no other citizenship. He is a descendant of the settlers who moved to NI from Pitcairn Island in 1856. He has

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42 *Buchanan v The Commonwealth* (1913) 16 CLR 315 at 327 per Barton ACJ.

43 (1913) 16 CLR 315 at 335 per Isaacs J.

44 *New South Wales v The Commonwealth* (2006) 81 ALJR 34 at 137 [460]; 231 ALR 1 at 122.

45 (2006) 81 ALJR 34 at 137 [460]; 231 ALR 1 at 122.

46 cf *Croome v Tasmania* (1997) 191 CLR 119 at 126, 132-133, 138; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 528 [32]; *Combet v Commonwealth* (2005) 80 ALJR 247 at 312-313 [303]-[307]; 221 ALR 621 at 703-705.

resided in NI from 1979 to 1981, and continuously since 1999. He has been enrolled on the NI electoral roll continuously since 2002.

54 The third plaintiff, Mr Bruce Walker, was born in New Zealand in 1946. He is a citizen of that country and holds no other citizenship. In 1996, he became a "resident" under the *Immigration Act* 1980 (NI) and has been continuously enrolled as an elector since 1993. He served as a member of the Legislative Assembly from 2000 to 2001.

55 The fourth plaintiff, Mrs Ann Walker, was born in Scotland in 1947. She migrated to New Zealand in 1970 and was granted New Zealand citizenship in 1979. She is a citizen both of New Zealand and of the United Kingdom and holds no other citizenship. She married the third plaintiff in 1985 and has lived continuously on NI since 1990. She has been enrolled on the NI electoral roll since 1993.

56 The fifth plaintiff, Mr Richard Kleiner, was born in the United States of America in 1951. He is a United States citizen and holds no other citizenship. However, he is of Pitcairn descent, being the great-grandson of John Young, who was born on Pitcairn Island in 1852 and removed to NI in 1856. Mr Kleiner has resided continuously on NI since December 1997. He held a "temporary entry permit", and subsequently a "general entry permit" under the *Immigration Act* 1980 (NI), before becoming a "Resident" under that Act on 23 March 2006. He has been enrolled continuously on the NI electoral roll since 2001.

57 The sixth plaintiff is the Administration of Norfolk Island, a body politic constituted by s 5 of the *Norfolk Island Act* 1979 (Cth) ("the 1979 Act"). By that provision, the Administration is capable of suing. The Administration brings this constitutional challenge against the Commonwealth, it was said, because of the political opposition in NI to the challenged provisions of the 2004 Act.

58 The natural person plaintiffs assert that, but for the 2004 Act, they would be entitled to be candidates for election to the NI Legislative Assembly. Further, they assert that, if the Act is valid, they will not be so entitled. Instead, they will, if removed from the NI electoral roll, lose their entitlement to re-enrolment and to vote in elections for the NI Legislative Assembly. They object to the deprivation of these civil rights on the basis that it disturbs long-standing features of the entitlement of residents, like themselves, to participate in the political life and democratic, representative self-government of NI.

59 *History of acquisition of NI*: The special case annexes 29 items of historical material, comprising legal and historical records relating to NI, dating back to 1786. The first recorded description of NI was that of Commander James Cook during his exploratory voyage to the South Seas for the British Admiralty in 1774. At the time of the first encounter with European civilisation, NI was unoccupied. Its remoteness, possible strategic value and the utility of its tall

pines for ships' masts were noted in Cook's *A Voyage towards the South Pole*, which was published in England in 1777[47]. NI was included within the commission granted by George III to Captain Arthur Phillip upon his despatch to establish the British "territory called New South Wales"[48].

60 The decisions to establish NI as a penal settlement; to abandon that settlement in 1814; and later, in 1825, to re-establish it and to bring it within the Government of the Colony of Van Diemen's Land (now Tasmania), are described in other reasons[49]. So too is the decision taken by the Imperial Government to resettle the inhabitants of Pitcairn Island on NI in 1856. From that time, the Pitcairners comprised the majority of the population on NI. This fact, together with the geographical isolation of NI, its tiny population, the changes in its governmental arrangements, and its distinctiveness, led the Imperial Government to provide, by the *Waste Lands (Australia) Act* 1855 (Imp)[50], for the separation of NI from Van Diemen's Land. Such separation was effected by an Order in Council of 24 June 1856. This provided that, after a designated date, NI:

> "shall be a distinct and separate settlement; the affairs of which, until further Order is made in that behalf by Her Majesty, be administered by a Governor to be for that purpose appointed … and … the Governor and Commander-in-Chief … in … the Colony of New South Wales shall be constituted and appointed … Governor of the said island called Norfolk Island."

61 Amongst the other provisions of the Order in Council of 1856 was one permitting the Governor:

> "[T]o make grants of Waste Lands to Her Majesty belonging within the said island to private persons for their own behalf, or to any persons, bodies politic or corporate, in trust for the public use of Her subjects there resident, or any of them."

62 These measures coincided with moves to enhance representative government in the other Australian colonies, for which power was specifically

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47 Hoare, *Norfolk Island: An Outline of Its History 1774-1977*, 2nd ed (1978) at 1-3.

48 Governor Phillip's First Commission (12 October 1786), reproduced in *Historical Records of Australia, Series 1, Governors' Despatches to and from England*, vol 1 (1914) at 1.

49 Reasons of Gleeson CJ, Gummow, Hayne and Crennan JJ ("joint reasons") at [12]-[17]; reasons of Callinan J at [154]-[158].

50 18 & 19 Vict c 56.

given, or recognised, in the *Waste Lands (Australia) Act*. This was the context in which Royal Instructions were given to Sir William Denison (who was also Governor of New South Wales) to "have full power and authority to make laws for the order, peace, and good government of the said island", that is, NI. The Royal Instructions recited[51]:

> "… And whereas the inhabitants of the said island are chiefly emigrants from Pitcairn's Island in the Pacific Ocean, who have been established in Norfolk Island under our authority, and who have been accustomed in the territory from which they have removed to govern themselves by laws and usages adapted to their own state of society, you are, as far as practicable, … to preserve such laws and usages, and to adapt the authority vested in you … to their preservation and maintenance."

63 *The thirty-nine laws*: Pursuant to the foregoing Instructions, Governor Denison made "laws and regulations for Norfolk Island" on 14 October 1857[52]. These comprised the "thirty-nine laws". They included provision, as appropriate to the circumstances of the settlement, for a measure of representative democracy. This paralleled similar laws being made in other parts of the British Dominions, at least in colonies comprising European settlers mostly derived from the United Kingdom itself. Following the loss of the American colonies and settlements in the War of Independence of 1776, leading to the creation of the United States of America, the Imperial Government was generally sensitive, and amenable, to the aspirations for forms of representative government in the United Kingdom's settler colonies beyond the seas[53]. Governor Denison's "thirty-nine laws" for NI were simply one instance of these developments.

64 The thirty-nine laws included such provisions as:

> "2. The Executive Government of Norfolk Island, during the absence of the Governor, shall be vested in a Chief Magistrate and two Assistants or Councillors, to be elected annually by the community as hereinafter directed.
>
> 3. The Chief Magistrate must be resident on the Island; he must be in possession of a landed Estate therein; and he must have attained the age of twenty-eight years.

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51 Royal Instructions to His Excellency Sir William T Denison, Governor General, made 24 June 1856; entered 16 September 1857.

52 *Supplement to New South Wales Government Gazette*, 30 October 1857.

53 Maitland, *The Constitutional History of England* (1908) at 338-340 ("Maitland").

4. The Councillors must be resident on the Island, and must have attained the age of twenty-five years.

5. The election of the Chief Magistrate and Councillors shall take place on the day after Christmas Day in each year …

6. Every person who may have resided upon the Island for six months, who has attained the age of twenty years, and who can read and write, shall be entitled to vote at the election of the Chief Magistrate and Councillors.

…

14. Should it appear to the Chief Magistrate that any change in, or addition to the Laws or Regulations of the Island are required, he will first consult with his Councillors, and should it appear to the three, or to a majority of the three, that such a change or addition is advisable, notice will be given to the community of the intention of the Chief Magistrate to submit such change or such new rule for their consideration at a public meeting to be held within fourteen days of the date of the Notice.

15. At such public meeting, the nature of the proposed change or addition, and the reasons for it, will be explained to the meeting by the Magistrate and Councillors, and the people present will be invited to express their opinion upon it. After the explanation and discussion, the persons present will be called upon to vote for or against the proposition, and a list of the number in favour of or against the measure will be recorded on the minutes of the proceedings.

16. No repeal of any Law or Regulation will be valid, until confirmed by the Governor; but a new Law or Regulation may be acted on, when it has been approved of by a public meeting, without such confirmation, should it refer to a subject of immediate importance."

65 In some respects the thirty-nine laws were in advance of the times. They included provisions for conciliation of disputes[54]; a form of trial before a jury consisting of seven elders[55]; compulsory education of children to the age of

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54 Clause 17.

55 Clauses 19-30.

fourteen years[56]; the employment of a properly qualified schoolmaster[57]; and a prohibition on beer, wine or spirituous liquor save for medicinal purposes[58].

66 Commenting on the introduction of these laws in NI, Governor Denison pronounced himself[59]:

> "… convinced … that my duty was to allow them to be happy *in their own way*. We Englishmen are too apt to insist upon the adoption of our rules and habits in everything; we make up our mind upon matters of opinion, upon matters of practice, and having satisfied ourselves (very often, I must say, after a very cursory examination) that any given system is best for *us*, we jump at once to the conclusion that it is best for every one else, and we insist upon the adoption of it by others, without any thought that they may also have opinions of their own, with which they may be unwilling to part."

67 The Governor "left untouched" the law that gave the women, as well as the men, a vote in the annual election of the Chief Magistrate[60]. This universal franchise on NI was well in advance of the introduction of female suffrage elsewhere. It was not attained throughout Australia until after Federation[61] and in the United Kingdom and elsewhere, much later.

68 The thirty-nine laws continued in operation, with various amendments and additions until Governor Henry Brand, on 7 April 1897, pursuant to an Order in Council, revoked the earlier laws and, by Proclamation, made new laws for NI[62]. These laws continued the office of the Chief Magistrate in whom was vested the

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56 Clause 32.

57 Clause 34.

58 Clauses 35-36. Alcoholic Prohibition in the United States of America was first introduced in the State of Maine in 1851. That law eventually led to the adoption of the XVIIIth Amendment to the United States Constitution in 1919, which remained in force until its repeal by the XXIst Amendment in 1933.

59 Denison, *Varieties of Vice-Regal Life*, (1870), vol 1 at 410 ("Denison") (emphasis in original).

60 Denison, vol 1 at 411.

61 As contemplated by the Constitution, s 30.

62 Proclaimed and published in *Supplement to the New South Wales Government Gazette*, 7 April 1897 at 2564.

executive government of NI. However, he was thereafter appointed by the Governor from time to time[63].

69 Provision was made for a council of elders[64] with large powers, subject to the approval of the Chief Magistrate, to "make, amend, and repeal by-laws … [and] make suggestions to the chief magistrate as to any changes in the laws and regulations of the island which they may think desirable"[65]. The council of elders was to be elected on the first Tuesday in January of each year[66]. The members were to be "elders of the age of thirty years or upwards" but subject to disqualification. The Chief Magistrate was obliged to keep "a register of the names of the male natural born or naturalized subjects of Her Majesty of the age of twenty-five years and upwards, who have for the previous six months resided on the island". Those persons are referred to as "the elders"[67]. By the time of the 1897 Order in Council, the earlier provision for universal suffrage was replaced by a provision confining participation to the male population as defined[68]. Female suffrage and candidature were not restored until NI became a territory of the Commonwealth[69].

70 *Nationality status of British subject*: The developments that preceded, and followed, the establishment of the Commonwealth of Australia are described in other reasons[70]. They included the enactment of federal legislation for the acceptance of NI as a territory under the authority of the Commonwealth, and the Order in Council of 1914 by which George V placed NI under the authority of

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63 Clause 1.

64 Clause 8.

65 Clause 9(I) and 9(II).

66 Clause 11(I).

67 Clause 12.

68 *Laws, Rules and Regulations for the Government of Norfolk Island* 1897, published in the *Supplement to the New South Wales Government Gazette*, 7 April 1897 at 2567. See ss 11(I) and 12.

69 By Executive Council Ordinance 1915, ss 4 and 5, inserting new ss 2C and 6 in the Executive Council Law 1913. *Commonwealth Gazette*, 19 July 1915.

70 Joint reasons at [11]-[28]; reasons of Callinan J at [160]-[164].

the Commonwealth[71]. The successive NI electoral laws are described elsewhere[72].

71 As was normal during the 19th (and for most of the 20th) century, the nationality requirement for participation in the elected body of NI contemplated, after the Order in Council of 1897, conformity to the only notion of nationality then applicable in Australia and throughout the British Empire: that of being a natural born or naturalised British subject. This is also the only express requirement of nationality mentioned in the Constitution[73]. There were age and residence requirements and, for a short interval, a restored requirement of the male gender[74]. However, the common feature of the requirements for participation under electoral laws after 1897 was the nationality status of allegiance to the British Crown.

72 When NI became a territory of the Commonwealth, this feature caused no discordance with Australian electoral laws. This was because the same principle was applied throughout Australia[75]. Australian citizenship, as such, was not provided for by legislation until the *Nationality and Citizenship Act* 1948 (Cth)[76]. In 1981, for the first time, the *Commonwealth Electoral Act* 1918 (Cth) ("Commonwealth Electoral Act") was amended to confer the entitlement to enrol and vote on "Australian citizens" as such[77]. However, the entitlement (and obligation[78]) to vote in Australian elections continued to apply to British subjects whose names were on the roll immediately before 26 January 1984[79]. Indeed, such persons remain on the Australian electoral roll, unless otherwise lawfully removed. However, since 1984, persons who are not Australian citizens and

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71 Within the Constitution, s 122.

72 Joint reasons at [3]-[4], [6]-[9].

73 See eg the Constitution, ss 42, 44(i). See also s 117.

74 *Laws, Rules and Regulations for the Government of Norfolk Island* 1897, published in the *Supplement to the New South Wales Government Gazette*, 7 April 1897 at 2567. See ss 11(I) and 12.

75 *Commonwealth Electoral Act* 1918 (Cth), s 93(1)(b)(ii).

76 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

77 *Statute Law (Miscellaneous Amendments) Act* 1981 (Cth), s 32.

78 Commonwealth Electoral Act, s 245(1).

79 Commonwealth Electoral Act, s 93(1)(b)(ii).

whose names were not on the electoral roll immediately before 26 January 1984, may not have their names added to the Commonwealth electoral roll. This is now the case even if those persons are British subjects lawfully resident in Australia.

73 *Successive representative bodies*: The representative organ of government of NI underwent several changes during the 20th century. The council of elders was abolished in July 1903. It was replaced by an Executive Council, elected by the "Elders"[80]. That Council was enlarged in 1913, although only two of the seven members were then elected by the "Elders"[81]. The Executive Council so established was continued by the *Norfolk Island Act* 1913 (Cth), subject to alteration or abolition by Ordinance made under that Act.

74 By the Executive Council Ordinance 1915, the former Executive Council was abolished and replaced by an Executive Council of 12, six of whom were elected and six appointed by the Administrator[82]. The Administrator, in turn, was appointed by the Governor-General[83]. Eligibility for election was open to any person entitled to vote at elections of members of the Executive Council[84]. Eligibility to vote at elections extended to any person, male or female, who was a natural born or naturalised subject of the King, 21 years of age or over, who met specified residency requirements and was not subject to disqualifying criminal convictions[85].

75 The foregoing provisions were repealed in 1925[86]. A new Council was established along generally similar lines. A like change occurred in 1935 providing for the Advisory Council of NI. This comprised eight members,

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80 *Law to make better Provision for a Council at Norfolk Island to be called "The Executive Council"*, 1903, ss 1, 2, 3. *Supplement to the New South Wales Government Gazette*, 3 July 1903.

81 *Norfolk Island Act* 1913 (Cth) s 4; Executive Council Law 1913, ss 2, 6. *New South Wales Government Gazette*, 24 December 1913.

82 Executive Council Ordinance 1915, s 5.

83 Administration Law 1913, s 3(1). *New South Wales Government Gazette*, 24 December 1913.

84 Executive Council Law 1913, s 6; cf Executive Council Ordinance 1915, s 5.

85 Executive Council Ordinance 1915, s 4 inserting ss 2C and 3 in Executive Council Law 1913.

86 Executive Council Ordinance 1925, s 3. *Commonwealth Gazette*, 23 April 1925.

elected annually[87]. That provision was, in turn, replaced in 1960 by the establishment of the Norfolk Island Council comprising eight elected councillors[88]. In 1968, the franchise for voting for the NI Council was expanded to include persons holding temporary immigration permits who had been resident on NI for the preceding 12 months[89]. By the same provision, eligibility for election to the Council was limited to those who had lived on NI for the five years preceding nomination for election[90].

76 New residency requirements for voting for the Council were introduced in 1970[91] to amend further the residency requirements by excluding temporary entry permit holders from the franchise. That was the position when a Royal Commission into matters relating to NI was established by the Commonwealth. The report of the Royal Commissioner (The Hon Sir John Nimmo) was published in October 1976[92]. The report recommended that, except in special cases, all laws that applied to other parts of Australia generally should also apply to NI[93].

77 *Self-government of NI*: In a policy statement made in May 1978 the Australian Government set out its response to the Royal Commissioner's report[94]. After consultations with the NI community, the Minister made it clear that the recommendation of assimilation of laws had been rejected:

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87 *Norfolk Island Act* 1935 (Cth); Advisory Council Ordinance 1935, ss 5, 6. *Commonwealth Gazette*, 27 June 1935.

88 *Norfolk Island Act* 1957 (Cth), s 11; Norfolk Island Council Ordinance 1960, s 6.

89 Norfolk Island Council Ordinance 1968, s 3 amending s 12 of Norfolk Island Council Ordinance 1960.

90 Norfolk Island Council Ordinance 1968, s 2 amending s 8 of Norfolk Island Council Ordinance 1960.

91 Norfolk Island Council Ordinance 1970, s 4 amending s 12 of Norfolk Island Council Ordinance 1960.

92 Australia, Royal Commission Into Matters Relating to Norfolk Island, *Report*, October 1976.

93 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1978 at 2251.

94 Policy on Norfolk Island in Australia. See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1978 at 2251-2253.

> "… [T]he Government recognises the special situation of Norfolk Island, including the special relationship of the Pitcairn descendants with the Island, its traditions and culture. It is prepared, over a period, to move towards a substantial measure of self government for the Island. It is also of the view that, although Norfolk Island is part of Australia and will remain so, this does not require Norfolk Island to be regulated by the same laws as regulate other parts of Australia. … [T]he Government has decided … to allow the present situation to continue under which laws of the Australian Parliament only apply to this Island if special provision is made in the particular law … The Government's … objective has been to provide for the development of a responsible form of self-government for Norfolk Island."

78 This was the background to the enactment of the 1979 Act. It was that Act that provided for a Legislative Assembly of nine members, to be elected as provided[95]. In order to be eligible to stand as a candidate for election, and to vote, a person was required to be an Australian citizen, or otherwise to have the status of a British subject; to be 18 years or over; and to be a resident of NI or a holder of an entry permit other than a temporary entry permit and to be capable of satisfying specified residency requirements[96]. There were also disqualifications for certain criminal convictions[97]. The residency requirements for enrolment were subsequently amended.

79 By the *Statute Law (Miscellaneous Provisions) Act (No 1)* 1985 (Cth) the requirements for nationality were deleted from the electoral provisions of the 1979 Act[98]. From 1897 until 1985 it had been a precondition both for candidature and voting, that a person should have the nationality status that was common to natural-born or naturalised electors of the Commonwealth of Australia. However, for reasons that are undisclosed, after nearly a century of its operation, this requirement was abolished. The laws challenged in these proceedings restore a nationality requirement. But they do so in terms confined to Australian citizenship, with no continuing reference to the formerly qualifying status of British subject, and no preservation of the entitlements of those of other nationalities based on residency qualifications alone (save for the continuing right to vote of those already on the NI electoral roll).

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95 The 1979 Act, s 31.

96 s 38.

97 s 39(1)(b).

98 s 3 and Sched 1.

The issues

80 The central issue in these proceedings is whether the laws that the plaintiffs challenge are supported by s 122 of the Constitution. On the face of things, they appear to be. To consider the contentions to the contrary, it is necessary to address a number of issues that emerged during argument before this Court:

(1) *Political merits issue*: Is the question presented by the plaintiffs essentially a political one[99], in the sense that they complain of the imposition by the Australian Parliament of a universal requirement of Australian citizenship for effective participation in the representative democracy of NI? If so, is the complaint one that is outside this Court's function to declare and uphold the law irrespective of its merits? Or is this an instance where, as in much constitutional decision-making, contested political issues merge with legal ones?

(2) *Textual limitation issue*: Does the fact that s 122 of the Constitution includes the express provision permitting "representation of such territory in either House of the Parliament", indicate that any "laws for the government" of a territory such as NI, must provide in a way appropriate to the particular circumstances of the territory, here NI? Given the substantial numbers of non-Australian citizens resident on NI, who have hitherto enjoyed such entitlements, does the attempted alteration of the 2004 Act fail the test of being a "law for the government" of NI?

(3) *Placement under authority issue*: Does the special character of NI as a territory "placed by the Queen under the authority of and accepted by the Commonwealth" carry with it particular constitutional features that support the plaintiffs' objection to the challenged laws, especially given the long history of representative government in the territory that I have outlined?

(4) *Assumption about territories issue*: Do the particular features of the several "territories" of the Commonwealth import into s 122 an assumption concerning the nature of laws that may be made for the government of each territory? Specifically, in the case of NI, having regard to its long-established history as a "distinct and separate settlement" and to the enduring provision for a representative law-making body, does a law enacted by the Australian Parliament that diminishes the representative character of the NI Legislative Assembly, by confining

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99 cf joint reasons at [32].

participation in it to Australian citizens, breach an assumption, inherent in the constitutional grant of power in s 122?

(5) *Implied limitation on laws issue*: If the foregoing questions are answered adversely to the plaintiffs, should this Court, nonetheless, read into the power to make laws for the government of a territory in s 122, an implied limitation restricting the removal of the qualification to participate in the franchise or to be a candidate for election to the Legislative Assembly, from persons who are subjects of the Queen, otherwise than as Australian citizens?

(6) *International law issue*: Is there any applicable provision of international law which, as a matter of context or otherwise, casts light on the resolution of the foregoing issues affecting the relationship between Australia and NI, or any of them?

Political questions and constitutional issues

81 *An imperfect dichotomy*: In a broad sense, all constitutional questions involve political questions[100]. It is this feature that caused A V Dicey to declare[101]:

> "That a federal system … can flourish only among communities imbued with a legal spirit and trained to reverence the law is as certain as can be any conclusion of political speculation. Federalism substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law … Hence the citizens become a people of constitutionalists, and matters which excite the strongest popular feeling, as, for instance, the right of Chinese to settle in the country, are determined by the judicial Bench, and the decision of the Bench is acquiesced in by the people … One may well doubt whether there are many states to be found where the mass of the people would leave so much political influence to the courts."

82 In the history of this nation, as of the United States and other federations, many important questions of large political moment have been decided as legal questions, the outcome being determined by the opinion of this Court (sometimes

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100 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82 per Dixon J.

101 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 179-180.

by a majority) as to the requirements of the Constitution[102]. In such matters, judges of this Court and, as Dicey pointed out, "every judge throughout the land"[103] decide political questions because they are tendered in a justiciable form. In such cases, judges enjoy no privilege to refrain from giving answers. The fact that the questions are political, or have political connotations or consequences, affords no excuse for inaction.

83 From time to time, this Court must give meaning to constitutional words that require reference to what may be broadly called "political" values. Thus, in *Cheatle v The Queen*[104], the Court unanimously concluded that "the exclusion of women and unpropertied persons" from the jury, required to try indictable federal crimes prosecuted on indictment, was unacceptable to fulfil the "truly representative" character of an Australian jury as contemplated by s 80 of the Constitution "in the more enlightened climate of 1993". Whilst the historical unanimity in the jury's verdict was constitutionally required[105], the exclusion of women and unpropertied persons was forbidden. So much was a consequence of constitutional adjudication. There are many other relevant instances[106].

84 It follows that giving effect to constitutional requirements in a federation will often, as Dicey recognised, involve political judgments in the broad sense. Indeed, it is difficult to see how arguments relating to the constitutional validity of laws affecting election to the representative institutions of a territory could be discussed without postulating some political characteristics about the polity against which the parties' arguments could be measured[107].

85 Nevertheless, judges must obviously be alert to the distinction between deciding whether power exists to enact a law and deciding whether they consider a law, once enacted, is desirable, wise, just or in keeping with historical values or

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102 See eg Lee and Winterton, *Australian Constitutional Landmarks* (2003); *New South Wales v The Commonwealth* (2006) 81 ALJR 34; 231 ALR 1 is the most recent such decision.

103 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 177.

104 (1993) 177 CLR 541 at 560-561.

105 (1993) 177 CLR 541 at 562.

106 See eg *Sue v Hill* (1999) 199 CLR 462 at 503 [96], 528 [173], where it was held that the disqualifying expression "subject or a citizen of a foreign power" in s 44(i) of the Constitution now includes a citizen of the United Kingdom.

107 cf *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 607-608 [186].

conceptions of basic civil rights. *Singh v The Commonwealth*[108] was a case involving the removal from Australia of a girl aged seven who was born here to parents of Indian nationality and who knew no other country. In my reasons in *Singh* I observed that, if I were a legislator, I would not favour such a course[109]. However, the duty of a judge, in giving meaning to constitutional concepts, expressed in the basic law of a nation, is to give effect to the meaning of the text as it is understood from its language, history, context and function.

86 Over the past 30 years and more, debates have occurred in the Australian Parliament, in the NI Legislative Assembly and elsewhere concerning the extent to which NI and its laws should be assimilated into the Australian Commonwealth or allowed to retain the "distinct and separate" features out of respect for its geographical isolation, history, and population. In 1974 the Royal Commission report favoured closer legal assimilation. However, as I have observed, the Australian Government and Parliament adopted a different course. The 1979 Act was enacted to give effect to that course.

87 Amongst the preambular paragraphs contained in that Act, the following words still appear on the Australian statute book:

> "AND WHEREAS the residents of Norfolk Island include descendants of the settlers from Pitcairn Island:
>
> AND WHEREAS the Parliament recognises the special relationship of the said descendants with Norfolk Island and their desire to preserve their traditions and culture:
>
> AND WHEREAS the Parliament considers it to be desirable and to be the wish of the people of Norfolk Island that Norfolk Island achieve, over a period of time, internal self-government as a Territory under the authority of the Commonwealth and, to that end, to provide, among other things, for the establishment of a representative Legislative Assembly and of other separate political and administrative institutions on Norfolk Island:
>
> AND WHEREAS the Parliament intends that within a period of 5 years after the coming into operation of this Act consideration will be given to extending the powers conferred by or under this Act on the Legislative Assembly and the other political and administrative institutions of Norfolk Island, and that provision be made in this Act to enable the results of such consideration to be implemented …"

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108 (2004) 222 CLR 322 at 411 [243].

109 See also *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 422 [159].

88 Later, the 2004 Act was enacted, with provisions (challenged in these proceedings) that, in certain respects, reflect a change of direction.

89 *Justiciable politics*: The history preceding the enactment of the 2004 Act demonstrates the political issues that, from the time of the earliest settlement of NI, have been illustrated in its government and administration. It could hardly be otherwise. This Court, in these proceedings, cannot avoid a decision, just because what it decides will have political implications.

90 The arguments for the plaintiffs emphasised the importance of preserving the distinctive features of what their counsel called the "community" of NI, a concept never precisely defined. The arguments for the Commonwealth emphasised the importance of upholding the rights of all Australian citizens, ordinarily resident in a territory of the Commonwealth, to the exclusion of non-citizens, to vote in elections for the Legislative Assembly of that territory and to be candidates for such election. The fact that the issues are political does not afford this Court a reason for declining a constitutional answer. Yet it does oblige the Court, so far as it can, to proffer an answer that conforms as closely as possible to the constitutional text, read in the light of history, identified matters of context and the decisional authority that casts light on the meaning of s 122 as it applies to NI.

Textual argument: the government of the territory

91 *The argument stated*: The plaintiffs recognised the difficulty they faced because of the generality of the language of s 122 of the Constitution. Self-evidently, the provisions in the section empowering the Parliament to "make laws for the government of any territory" are expressed in extremely broad terms.

92 They are not stated (as the powers of the Parliament contained in ss 51 and 52 are) to be "subject to this Constitution". Nevertheless, being themselves part of the Constitution, it is inherent from the context, that they will be so read. The usual words of a grant of power to make laws "for the peace, order and good government of the Commonwealth" are also missing. However, this Court has repeatedly held that those words are not words of limitation. They do not mean that laws that are arguably unjust or contrary to basic rights may be disallowed or read down[110]. The grant in s 122 is not expressed as a "power" to make laws "with respect to" particular and specified subject matters. Instead, the subject of permissible law-making is nothing less than "laws for the government of any territory". Because of its language and purpose, the width of that power has been

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110 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 408-409 [9], 424-425 [55]; cf *R (Bancoult) v Foreign Secretary* [2001] QB 1067 at 1102-1104 [53]-[56].

repeatedly described as very broad. Thus in *Teori Tau v The Commonwealth*[111], which survived a challenge to its authority in *Newcrest Mining (WA) Ltd v The Commonwealth*[112], the whole Court said[113]:

> "Section 122 of the Constitution of the Commonwealth of Australia is the source of power to make laws for the government of the territories of the Commonwealth. In terms, it is general and unqualified … The grant of legislative power by s 122 is plenary in quality and unlimited and unqualified in point of subject matter."

These words have been repeated many times[114].

93 Nevertheless, the power is not completely uncontrolled. Limits exist in the language of the grant (eg in the power to make laws "for" the government of the "territories of the Commonwealth"). The "territories" are themselves geographically identified.

94 In *Capital Duplicators Pty Ltd v Australian Capital Territory*[115], Brennan, Deane and Toohey JJ point to the fact that s 122 is found in Ch VI of the Constitution ("New States"), a part of the Constitution which (in ss 123 and 124) envisages not only "territories" that are part of existing States but also "such colonies or territories as may be admitted into or established by the Commonwealth as States"[116]. Their Honours go on[117]:

> "In the Convention Debates, the forerunner of s 122 was seen primarily, though not necessarily, as designed to provide for the provisional government of territories as they moved towards Statehood. When the Commonwealth was established there were no Commonwealth territories.

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111 (1969) 119 CLR 564.

112 (1997) 190 CLR 513.

113 (1969) 119 CLR 564 at 570 per Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ.

114 See eg *Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 6; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 269 per Brennan, Deane and Toohey JJ.

115 (1992) 177 CLR 248 at 271.

116 Constitution, covering cl 6.

117 (1992) 177 CLR 248 at 271 (footnotes omitted).

> At that time the territories which were foreseen as possible territories of the Commonwealth included not only the northern territory of South Australia but also the Fiji Islands and British New Guinea. The possibility of territories of magnitude and importance being admitted to the Commonwealth as new States after a period of political development must have been contemplated."

95 It was on this footing that, in *Berwick Ltd v Gray*, the Court upheld the power of the Australian Parliament "to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus"[118]. Once such a power is acknowledged, the provision of laws to govern the conduct of elections for such institutions becomes essential. And that was how the Commonwealth characterised the laws that the plaintiffs challenge in these proceedings.

96 *The textual contentions*: The plaintiffs latched onto two features of the language of s 122 in order to mount their argument that the impugned provisions of the 2004 Act were beyond the power to make laws "for the government of" NI. First, they argued that the "territory", for the government of which such laws might be made, imported, in each case, the character of the particular "territory" concerned.

97 In part, this argument was founded on the variety of ways in which a "territory" could become such under the Constitution. Thus, it may be "surrendered by any State to and accepted by the Commonwealth". Within this category is the Northern Territory of Australia (surrendered by South Australia[119]) and the Australian Capital Territory and Jervis Bay Territory (surrendered by New South Wales)[120]. Then there are territories "placed by the Queen under the authority of and accepted by the Commonwealth". NI is a territory in this class as, earlier, was Papua, which (by the name British New Guinea) was placed under the authority of the Commonwealth by Letters Patent issued by Edward VII dated 18 March 1902 and accepted by the *Papua Act* 1905 (Cth)[121]. Finally, there is the third class of "territory" being those "otherwise

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118 (1976) 133 CLR 603 at 607 per Mason J. See *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 266, 272.

119 Constitution, s 111; *Northern Territory Acceptance Act* 1910 (Cth); cf *Svikart v Stewart* (1994) 181 CLR 548 at 565.

120 *Seat of Government Acceptance Act* 1909 (Cth); *Jervis Bay Territory Acceptance Act* 1915 (Cth). See *The Commonwealth v Woodhill* (1917) 23 CLR 482 at 486-487.

121 *Re Minister for Immigration and Multicultural Affairs; Ex parte Ame* (2005) 222 CLR 439 at 446-447 [5].

acquired by the Commonwealth", amongst which, arguably, was the mandated (later trusteeship) territory of New Guinea (formerly German New Guinea)[122].

98 The plaintiffs submitted that the variety of ways in which "territories" could be created, and thus come under the control of the Commonwealth within the contemplation of s 122, indicated that "territories", of their respective origins, needs, locations, ethnic composition, population (if any) and history, were likely to be different. On the face of the Constitution, it was argued, "laws for the government" of such "territories" would necessarily adjust in their permissible content so as to meet the "governmental" requirements of each territory concerned.

99 In support of this proposition, the plaintiffs pointed to the different ways in which this Court had approached the rights of the inhabitants of some territories as against those of others. They emphasised what was said in the joint reasons of the Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*, a case concerned with the termination of Australian "citizenship" rights previously extended to the indigenous people of Papua[123]:

> "[Section 122] covers both internal and external Territories, including territories 'otherwise acquired by the Commonwealth'. It was pointed out in *Fishwick v Cleland*[124] that, in the context, acquisition is a broad and flexible term covering developing conceptions of the authority of the Crown in right of Australia over external territories. In that case it was held to cover authority over the territory of Papua New Guinea. The variety of circumstances and conditions that could apply to territories within the contemplation of s 122 was considered in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman.*"

100 The passage referred to in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[125] lists the "disparate nature" and variety of the territories of the Commonwealth. It concludes[126]:

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122 *Fishwick v Cleland* (1960) 106 CLR 186 at 197.

123 (2005) 222 CLR 439 at 456-457 [27].

124 (1960) 106 CLR 186 at 197-198.

125 (1999) 200 CLR 322 at 331 [7].

126 (1999) 200 CLR 322 at 331 [7].

> "There have been various circumstances in which external territories have come to be under the authority of the Commonwealth. In *R v Bernasconi*, for example, Isaacs J referred to 'recently conquered territories' with German and Polynesian populations[127]. The territories have been, still are, and will probably continue to be, greatly different in size, population, and development. Yet they are all dealt with, compendiously and briefly, in s 122."

101 From this suggested recognition of the necessity to adapt s 122 to the particular needs of individual territories, the plaintiffs argued that "laws for the government of" a territory, such as NI, were inherently required to conform to the governmental circumstances appropriate to such a territory. The relevant features of geography, population, history, representative institutions and distinctiveness were, so it was argued, incorporated into the Constitution by the recognition in s 122 itself of the distinctive features of different territories of the Commonwealth.

102 This argument was then reinforced by a second one. Although the Parliament might validly decide to make no laws at all for the establishment of an elected representative institution for a territory such as NI, if it were to do so it was bound to provide a form of representative institution that was harmonious with the peculiar and unique needs of the community living in that territory. In support of this argument, the plaintiffs relied on two textual considerations.

103 The first appears in the closing words of s 122. Those words are additional to the power to make laws for "the government of any territory". But they supplement that power and provide:

> "… and [the Parliament] may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

104 In respect of the territories of the Commonwealth, different provisions have been enacted since 1974 for the representation in the Australian Parliament of electors in such territories. So far as concerns the two internal self-governing territories (the Australian Capital Territory and the Northern Territory of Australia), provisions have been enacted, and upheld by this Court, for their representation in the Senate[128] and in the House of Representatives[129]. In respect of electors on NI also, a complicated provision exists in s 95AA of the

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127 *The King v Bernasconi* (1915) 19 CLR 629 at 638.

128 *Western Australia v The Commonwealth* (1975) 134 CLR 201.

129 *Queensland v The Commonwealth* (1977) 139 CLR 585.

Commonwealth Electoral Act permitting a "'qualified' Norfolk Islander" to be enrolled for an electoral subdivision within Australia or a one-territory division, as the case may be.

105 The plaintiffs submitted that the specific contemplation of representation of electors resident in the territories (without express precondition as to their nationality), and the inclusion of s 122 in the Constitution containing many detailed provisions for democratic, representative and responsible government, meant that the apparently plenary language empowering the Parliament to "make laws for the government of any territory" had to be read in a particular way. In short, if any law on the subject were to be made, it had to be a law compatible with the fundamental postulate that the law-making body so created would be truly accountable to, and representative of, the community that existed in the territory. It could not be accountable to, and representative of, part only of that community. Nor could it impose conditions that excluded a significant proportion of the people of the territory on grounds of their nationality. Neither could it impose conditions requiring acquisition of a different nationality, which a significant number of members of that community might not wish to do.

106 *Textual incapacity*: The textual argument advanced for the plaintiffs cannot succeed. Whilst it is true that the "territories", contemplated as falling within s 122 of the Constitution, varied in their geographical connection with the Australian mainland; historical links with its governance; population size; ethnic similarity or dissimilarity to the Australian people; and cultural and economic needs, there still remain fundamental commonalities. For such fundamentals, a single criterion for Australian federal laws is provided. The word "territory" in s 122 of the Constitution must be afforded a meaning, large and broad enough to cover all applicable territories in all reasonably imaginable circumstances. This is why the phrase "laws for the government of any territory" cannot, as a textual matter, be read down so as to import limiting notions derived from history.

107 A more attractive argument for the plaintiffs was that which invoked the closing words of s 122, and the postulate of representation in either House of the Australian Parliament, to cast suggested light on the meaning to be given to the phrase "laws for the government of any territory" appearing earlier in the section. The postulate can be tested thus. If the Australian Parliament enacted a law restricting participation in elections in NI to male residents only (of a kind that was temporarily restored when, after 1897, NI reverted to an all-male electorate of "Elders"), it is doubtful that such a provision would now be upheld by this Court as a valid law of the Australian Parliament. Because a territory such as NI is contemplated by s 122 as being one in respect of which "representation" in the Australian Parliament might be allowed, any form of representative government enacted by federal law and practised in NI would have to be such as rendered the

territory potentially suitable for representation in the kind of Parliament created for the Commonwealth[130].

108 However, when the laws challenged in these proceedings are considered, they make no such impermissible distinction. They exclude non-Australian citizens from election to the Legislative Assembly of NI. As *Sue v Hill*[131] found, s 44(i) of the Constitution is now to be read as requiring Australian citizenship as a precondition to being eligible for election to the Australian Parliament. Moreover, so far as electors of the Commonwealth are concerned[132], whilst a residual category of electors (still quite large) entitled to participate in voting for the House of Representatives and the Senate comprises British subjects who are permanent residents but not Australian citizens, that category was closed with the electors of this description whose names were on the Australian electoral roll immediately before 26 January 1984[133]. Accordingly, the introduction of the Australian citizenship requirement for NI is no more than one way of bringing the electoral requirements in that territory of the Commonwealth into harmony with the requirements now operating elsewhere in that polity.

109 It is true that the natural person plaintiffs are not presently Australian citizens. It is also true that, at the last census of Norfolk Island, 17.7% of the ordinarily resident population were New Zealand citizens and 0.9% citizens of the United Kingdom[134]. In such a small cohort of adult people (1863 in all) the potential impact of the exclusion of non-Australian citizens on voter eligibility is comparatively large. In effect, it may coerce those so excluded to secure Australian citizenship, which they might not otherwise desire. On the other hand, NI is a territory of Australia. The imposition of the requirement of Australian citizenship has been a common feature of several recent Australian laws and of decisions of this Court[135]. It cannot therefore be said that, in this respect, the "community" of NI has been singled out for unfair discrimination.

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130 An argument by analogy with *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

131 *Sue v Hill* (1999) 199 CLR 462.

132 The expression "elector" is used in the Constitution. See eg ss 8, 30, 128.

133 Commonwealth Electoral Act, s 93(1)(b)(ii). See *Re Patterson* (2001) 207 CLR 391 at 487 [288].

134 Norfolk Island, *Census of Population and Housing*, 8 August 2006 at 24.

135 See eg *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Singh v The Commonwealth* (2004) 222 CLR 322; cf *Re Patterson* (2001) 207 CLR 391.

110 Further, recent amendments to Australian citizenship law, in company with similar changes in other countries, permit dual citizenship, removing the sometimes painful obligation to lose one nationality in order to acquire another[136]. And it is not unusual for participation in the electoral process within a nation state to be conditioned on nationality.

111 *Conclusion: amplitude of s 122*: It follows that, on the face of things, the answer to the textual arguments advanced for the plaintiffs must be analogous to that given in *Singh v The Commonwealth*[137]. So long as NI is, and remains, a territory of the Commonwealth, it is open to the Australian Parliament to conclude that the imposition of requirements of Australian citizenship for candidature for election to the NI Legislative Assembly created by that Parliament, and for future voters wishing to be enrolled to elect that Assembly, is a law "for the government of" that territory. Moreover, having regard to concurrent legal developments of recent years, it is a law harmonious with the requirements of representative government under the Constitution as it is now understood and applied. Such laws do not exceed the provisions of s 122. Nor do they offend the general character of the Constitution so far as it provides for elected representative governmental institutions.

Acquisition does not import a limitation

112 *A possible argument*: But can it be said that the mode of acquisition of this particular territory, so that it became a territory of the Commonwealth, brought with it unexpressed features that render it constitutionally impermissible for the Australian Parliament potentially to deprive more than 18% of the population from participation in the representative institution by which many of the territory's laws are made? Is this just a political complaint, about which this Court can do nothing? Or does it invoke a justiciable legal norm?

113 *Crown fiduciary duty?*: Two conceivable foundations exist for the argument. The first can be quickly dismissed. It rests on a suggestion that the Crown owes the people resident on NI a duty, in the nature of a fiduciary obligation that it would breach if it failed to ensure that the Australian Parliament continued to recognise the right of participation of residents in the elected representative body of NI, as had been enjoyed since at least Governor Denison's proclamation of the thirty-nine laws in 1857.

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136 *Australian Citizenship Legislation Amendment Act* 2002 (Cth), Sched 1, Item 1. See *Sue v Hill* (1999) 199 CLR 462 at 529 [176].

137 (2004) 222 CLR 322.

114 It is true that there are some features of the historical material referred to in the Special Case that suggest the recognition of particular obligations on the part of the Crown to the inhabitants of NI. These include the unusual history of settlement; its abandonment and resettlement; and the removal to NI of most of the settlers from Pitcairn Island, another Crown possession. The successive arrangements by the Crown to connect NI with other British possessions, culminating in the action of the King in placing NI under the authority of the Commonwealth, might be thought to reflect a developing sense of Imperial obligation. The Order in Council of 24 June 1856 specifically talks of the grant of land "in trust for the public use" of subjects of the Crown resident on NI. So is there a trust obligation more generally which defends the right of residents such as the plaintiffs to partake in the representative institution of NI? Is it legally enforceable?

115 In Canada, the courts have recognised the existence of a fiduciary duty with respect to the lands and rights of indigenous peoples[138]. Land surrendered to the Crown by indigenous groups has been treated as subject to a trust-like relationship. Indeed, it has been concluded that the Crown has a broader responsibility to act in a fiduciary way towards indigenous peoples arising out of its historical powers over, and assumption of responsibility towards, such peoples within its protection. This duty has been held to have passed from the Crown in right of the United Kingdom to the modern government of Canada[139]. These authorities broadly follow decisions of the Supreme Court of the United States on the same subject matter[140]. If, because of their vulnerability and dependency, such a relationship might be established with indigenous peoples, it would not be hard to imagine the creation of a similar relationship with the resident population of NI, having regard to its history, isolation, small numbers, and economic as well as cultural dependency.

116 The plaintiffs did not expressly rely on such an argument. In the context of Australia, the argument draws little support from the cases on the rights of

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138 *Guerin v The Queen* [1984] 2 SCR 335 at 375-376.

139 *R v Sparrow* [1990] 1 SCR 1075 at 1108. The provisions of s 35(1) of the Canadian Constitution were held to be relevant; cf *Semiahmoo Indian Band v Canada* (1997) 148 DLR (4th) 523 at 536-537 but see *Breen v Williams* (1996) 186 CLR 71 at 82, 92-93, and 106-107.

140 *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 31 US 515 (1832); *United States v Kagama* 118 US 375 at 383-384 (1886); *Seminole Nation v United States* 316 US 286 at 296-297 (1942); *United States v Mitchell* 463 US 206 at 225 (1983).

indigenous peoples. In *Mabo v Queensland [No 2]*[141], Toohey J alone found a fiduciary relationship between the Crown and Australian Aboriginals. Although, in my opinion, the issue is still an open one, there are many impediments in the way of constructing from it a legally enforceable barrier to the enactment of the laws challenged in these proceedings.

117 Whatever duties the Crown might have in its various manifestations, they are necessarily subject to any laws made by the Crown in Parliament. The Constitution was originally enacted as such a law[142]. Section 122 of the Constitution, thus enacted, expressly contemplated and authorised the placement of a territory by the Queen under the authority of the Commonwealth, once that placement was accepted by it. This was duly accomplished in the case of NI. Thereafter, any obligation of the Crown or of the Commonwealth to the residents of NI was subject to laws validly made "for the government of" the territory. Neither expressly nor impliedly are any fiduciary duties owed by the Crown to the territory or its people preserved so as to disable the Australian Parliament from the full enjoyment of its express constitutional law-making powers. Because the point was not taken further and has been described as one of "fundamental importance"[143], it should not be determined in the abstract. I will not pursue it further.

118 *Obligations to a settled colony?*: Can it be said, alternatively, that the challenged laws offend a basic principle of British constitutional law that, once a form of self-government is given to a colony of the Crown, acquired by settlement, it cannot be taken away? Words to that effect may be found in respected texts on constitutional law and history. Thus, Maitland, in *The Constitutional History of England*[144], records the differences between territories acquired by colonisation, on the one hand, and by cession or conquest, on the other. In some circumstances, Maitland states:

> "The king … may grant … representative institutions of their own – may establish in them legislative assemblies – and when such a grant has been made he cannot revoke it."

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141 (1992) 175 CLR 1 at 203.

142 *Commonwealth of Australia Constitution Act* 1900 (Imp) 63 & 64 Vict c 12.

143 *Northern Land Council v The Commonwealth [No 2]* (1987) 61 ALJR 616 at 620; 75 ALR 210 at 215.

144 Maitland at 337.

119 However, there are both factual and legal difficulties in the way of importing any such doctrine to support the plaintiffs' arguments in this case.

120 As to the facts, whatever the classification of NI (and it was probably by 1857, a "settled" colony), it cannot really be said to have received a relevant measure of self-government before the 1979 Act and then from the Australian Parliament. The earlier laws for various kinds of representative body, whilst undoubtedly participatory and in certain ways in advance of developments elsewhere, could not qualify as establishing representative institutions of government. They were, for the most part, advisory to the Governor or Administrator as the case might be.

121 In any case, in all but the 19 years before the 2004 Act[145], a nationality requirement for participation was expressly provided. For most of those years, it was the common nationality status of British subject. As the review of legislation that I have set out above demonstrates, a qualification based relevantly on residence on NI only existed in the earliest years (when British nationality could be assumed) or in the years between 1985 and 2004 (when a nationality requirement was temporarily removed). It follows, on the evidence, that the absence of a nationality requirement cannot be portrayed as a longstanding or established (still less ancient) feature of NI's governance, such that it has been imprinted on the text of s 122 of the Constitution, between the lines as it were.

122 In any case, there are insuperable legal difficulties for any such contention. The rule against the revocation of representative assemblies, once granted, appears to have related only to those resident in territories conquered by the King's armies or ceded by a foreign power[146]. In the times of Empire, settlers knew that they were ultimately "subordinate unto, and dependent upon the Imperial Crown and Parliament of Great Britain"[147]. This, as Maitland points out, was the complaint of the American colonies; not that the British Parliament lacked power to legislate for them but that it had wrongly exercised its power[148].

123 Secondly, whereas the King might in some circumstances have been unable to revoke grants of representative institutions, once made[149], this

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145 Since the amendments effected by the *Statute Law (Miscellaneous Provisions) Act (No 1)* 1985 (Cth).

146 Maitland at 337. See *Sammut v Strickland* [1938] AC 678 at 702.

147 See 6 Geo III c 12 (1765).

148 Maitland at 338.

149 *Campbell v Hall* (1774) 1 Cowp 204 at 208 [98 ER 1045 at 1047] per Lord Mansfield, delivering the reasons of the Court.

incapacity did not extend to an Act of the British Parliament, at least before the *Statute of Westminster* 1931, adopted after the Imperial Conferences held in 1926 and 1930[150]. At the time of the enactment of the *Commonwealth of Australia Constitution Act*, there was no *legal* impediment to the United Kingdom Parliament's providing as it saw fit in respect of any representative institution previously granted by the Crown or established by or under earlier legislation.

124 Thirdly, in so far as the successive representative institutions for NI were concerned, as made in the 19th century by or under Orders in Council, such Orders invariably reserved the Royal Prerogative to issue new and different Orders in Council in the future. Thus, in the paragraph of the Order in Council of 24 June 1856, in which it was "ordered and declared" that NI was "a distinct and separate settlement", the ensuing orders made for that purpose were expressly declared to exist "until further Order"[151]. The Order in Council that placed NI under the authority of the Commonwealth pursuant to s 122 of the Constitution was one such "further order".

125 Fourthly, and in any case, once placed under the authority of the Commonwealth, and accepted by it, there was a new legal beginning. The law-making source then took its validity from the Constitution itself. The ultimate foundation for that Constitution is the acceptance of its requirement by the Australian people[152]. This fact directs attention to the language and purpose of s 122 of the Constitution. Such considerations, appearing as they do in a constitutional grant of power to make further laws, support the most ample construction of the power thus afforded. This is the construction that this Court has repeatedly given to s 122.

126 *The decision in Newbery*: Many of the foregoing issues were considered by the Supreme Court of Norfolk Island in 1965 in *Newbery v The Queen*[153]. In that case, the appellant applied for leave to appeal against his conviction for failing to apply for enrolment on the NI Council electoral roll, contrary to s 11(2) of the Norfolk Island Council Ordinance 1960. The challenge was based on the argument that the Ordinance was invalid and that the only valid electoral law of

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150 Adopted for Australia by the *Statute of Westminster Adoption Act* 1942 (Cth).

151 Order in Council, 24 June 1856, entered and recorded 16 September 1857.

152 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 441-442; *Breavington v Godleman* (1988) 169 CLR 41 at 123; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485-486; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; and *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

153 (1965) 7 FLR 34.

NI was that contained in the thirty-nine laws of 1857. That argument was, in turn, founded on the proposition that the 1857 laws had the effect of granting to the settlement of NI a constitution and a legislature, which could not thereafter be revoked or amended by the Crown nor ignored by the conduct of the Crown in placing NI under the authority of the Commonwealth so as to attract s 122 of the Constitution. The argument was dismissed by Eggleston J.

127 His Honour found that the successive Orders in Council made for the government of NI between 1856 and 1900 were fully effective within the powers granted to the Crown by the *Waste Lands (Australia) Act* and successively reserved in the Orders made from time to time[154]. As well, Eggleston J noted that the thirty-nine laws of 1857 were not made directly by Orders in Council in the United Kingdom but by the Governor of New South Wales, acting under such authority. The Order in Council of 1914, placing the territory of NI under the authority of the Commonwealth, was also held to be within the power granted by the *Waste Lands (Australia) Act* to "make provision for the government" of NI. The similarity between that Imperial grant and the grant of governmental power expressed in s 122 of the Constitution, pursuant to which the territory of NI was accepted by the Commonwealth, is striking. The analysis of Eggleston J is compelling. No error has been shown in it.

128 *Conclusion: no legal objection*: It follows that any pre-existing rule of the Royal Prerogative or of the obligations of the Crown, by common law or equity, that applied before NI became a territory of the Commonwealth cannot diminish the power and authority granted to the Australian Parliament by s 122 of the Constitution. Any complaint about the alteration of the representative arrangements for the "community" on NI is thus not a legal one. It is one addressed to the political wisdom and justice of the 2004 Act. They are considerations that this Court has no authority to adjudicate.

129 In the result, neither an argument based on any suggested fiduciary duty of, or disqualification attaching to, the Crown (assuming such duty or disqualification to have existed) can be invoked in this case to diminish the ample constitutional power and authority of the Australian Parliament under the Constitution to make laws for the government of NI. Any contention to the contrary must be rejected.

No shared assumption or implied restriction is found

130 *Assumptions and implications*: The plaintiffs preferred to put their arguments concerning the limitations on the law-making power of the Australian Parliament on the basis that they amounted to an "unexpressed assumption"

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154 (1965) 7 FLR 34 at 41.

within s 122 rather than a limitation to be grafted onto the constitutional language. The distinction between these two concepts was noted by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*, where his Honour said[155]:

> "It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument. Thus, the founders assumed that the Senate would protect the States but in the result it did not do so. On the other hand, the principle of responsible government – the system of government by which the executive is responsible to the legislature – is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution."

131 When the plaintiffs were confronted with the difficulty of deriving an implied limitation from the very broad language of s 122 of the Constitution, they suggested that such a difficulty was not significant because the word "territory" was written in that context upon a footing which imported the variety of territorial conditions and their several needs for representative government. In this sense, so it was put, the limitation relevant to representation of the "community" of NI was inherent in the very grant of power to "make laws for the government of" such a "territory".

132 For the reasons already given, there are insuperable factual and legal difficulties in the way of accepting this argument. It should be rejected.

133 *An implied limitation?*: But can an implication be grafted onto the words in s 122 of the Constitution because of the general character of the Constitution as a charter for representative government that adapts to the conditions of the State or Territory concerned? Is the implication effectively imported by the very variety of territories, contemplated on the face of the Constitution and revealed by its operation? Is an implication protective of the right of all long-term residents on NI, regardless of their nationality, inherent in such a small population and in the contextual reference in s 122, to "the representation of such territory in either House of the Parliament"?

134 The difficulty facing the plaintiffs in importing any such implied limitation arises not only out of the generality of the plain words of s 122 but also from the purpose of the section as one granting a power to make laws for all

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155 (1992) 177 CLR 106 at 135 (footnotes omitted).

future needs of the government of every variety of territory that becomes a governmental responsibility of the Commonwealth. The language and context militate strongly against the super-imposition of a limitation by implication, such as the plaintiffs suggested.

135 As well, in a number of recent decisions, this Court has emphasised the restraints that exist on drawing implications from the Constitution that are not based on its actual terms or structure[156]. The criterion commonly adopted is necessity to give effect to other constitutional provisions[157]. Such necessity may be "logical or practical" or "implicit in the federal structure"[158]. Considerations of appropriateness or the avoidance of discrimination or arguable injustice will not ordinarily be sufficient, of themselves, to justify imposition of an implied limitation on the constitutional text[159]. The difficulty of amending the Constitution is one reason for caution in importing such implications[160].

136 Care also has to be exercised in converting verbal explanations for decisions in one case into rigid universal criteria[161]. As well, Windeyer J in *Victoria v The Commonwealth*[162] reminded us that "implications have a place in the interpretation of the Constitution". He recalled Dixon J's declaration: "I do not see why we should be fearful about making implications"[163]. This was something Dixon J did with great effect in the *Communist Party Case*[164]. The Court also upheld implications based on the structure of the Constitution in the

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156 *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169.

157 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 152.

158 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14].

159 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 432 [76]-[77].

160 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 485 [470].

161 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453-454 [389].

162 (1971) 122 CLR 353 at 401.

163 *Australian National Airlines Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85.

164 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

Boilermakers' Case[165] and many others. In recent years, this Court has rejected various suggested constitutional implications, making only one significant exception in *Austin v The Commonwealth*[166], protective of State judicial pensions. They were protected on the ground, found by the majority, that a federal income tax law of general application placed a particular disability or burden on the operations and activities of the States concerned[167].

137 *An implied prohibition?*: When the 2004 Act is examined, it does not in my view, suggest the existence of an implied prohibition, or limitation, on the generality of the language in s 122 of the Constitution, special to a territory such as NI. At no stage did the plaintiffs formulate with precision any such implied limitation. Nor could they demonstrate its necessity or inherent likelihood, compatibly with the language and purpose of s 122.

138 Moreover, it is not only legal doctrine that weighs against finding an implied limitation in s 122 relevant to these proceedings. The facts themselves do not support a need for it. The provision of a requirement of nationality to vote in NI elections, and to be a candidate, lasted for most of the history of NI before 1985. Given the change in Australia and elsewhere of the applicability of the status of British subject and the introduction from 1984 of the requirement that new voters in federal elections must be Australian citizens, it was open to the Australian Parliament to conclude that a similar provision for elections in NI represented a "law for the government of" a territory.

139 The supervening intervention of the facility for dual nationality, and the fact that all but 2% of the population of NI who are not already Australian citizens are citizens of New Zealand or the United Kingdom (for whom acquiring Australian citizenship ordinarily constitutes no special burden) sustains the conclusion that the imposition of that requirement was a choice validly open to the Australian Parliament within its powers under s 122 of the Constitution[168]. To adapt what was said by Gleeson CJ and Heydon J in *APLA Ltd v Legal*

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165 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270. However, Williams, Webb and Taylor JJ each dissented and the precise ambit of the implication remains controversial. See *The Queen v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 90, 102.

166 (2003) 215 CLR 185. Contrast *New South Wales v The Commonwealth* (2006) 81 ALJR 34 at 90 [194], 141 [471]-[472]; 231 ALR 1 at 58-59, 127-128.

167 Applying the implied prohibition described by Dixon J in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79.

168 cf *Sue v Hill* (1999) 199 CLR 462 at 529 [176] per Gaudron J.

Services Commissioner (NSW)[169], there is nothing in the text or structure of the Constitution, or in the nature of the territories power, that requires that candidates or voters must be able to participate in territory elections, including NI elections, although non-citizens of Australia whose Constitution applies to that territory. "It may or may not be thought desirable, but it is not necessary"[170]. The topic is one[171]:

> "… on which the Constitution has nothing to say in express terms. If it is said to be a matter of implication, then it is necessary to identify, with reasonable precision, the suggested implication. This has not been done."

140 Such a conclusion may be reached without venturing upon the question, agitated by the plaintiffs, as to whether NI is, or is not, "part of the Commonwealth". I agree with the joint reasons that the answer to that question depends on the purpose for which the question is asked[172].

141 Nor, in the light of the foregoing, is it necessary to define with greater precision than the plaintiffs did who precisely constitute the NI "community". There is no apparent magic in any of the residency requirements that have been adopted under successive NI laws in this regard. Least of all do any of the varying requirements for residency qualifications to be a candidate or voter in elections on NI suggest a necessary provision that constitutes an implied constitutional precondition upon the power stated in s 122.

142 *Conclusion: No assumption or implication*: It follows that no inherent assumption or implied limitation can be recognised to immunise the undefined "community" of NI from the requirements now adopted by the Australian Parliament that candidates and future voters for elections on NI must be Australian citizens. The provisions of the 2004 Act to that effect are valid laws of the Australian Parliament. They are fully sustained by s 122 of the Constitution.

International law suggests no different outcome

143 *The status of international law*: In this Court, a controversy exists concerning the extent to which it is permissible, or appropriate, to have regard to international law, including the international law of universal human rights, in

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169 (2005) 224 CLR 322 at 352 [33].

170 (2005) 224 CLR 322 at 352 [33].

171 (2005) 224 CLR 322 at 352 [32].

172 Joint reasons at [36].

interpreting the provisions of the Constitution. In a number of decisions, I have concluded that regard may now be had to such considerations, where relevant, as part of the legal context in which the Constitution now operates, and must be understood[173]. In his reasons in *Al-Kateb v Godwin*[174], McHugh J expressed the opinion that in Australian constitutional interpretation, international law is irrelevant. This is not a case in which to continue that debate.

144 *Human rights and elections*: Nevertheless, as in *Attorney-General (WA) v Marquet*[175], it may be observed that the conclusion reached as to the meaning and application of s 122 of the Constitution, in the respect challenged by the plaintiffs in these proceedings, does no offence to the requirement of universal principles of human rights adopted by the international community.

145 In the *Universal Declaration of Human Rights*[176], Art 21 expresses principles which, although not in the form of a binding treaty, have greatly influenced subsequent developments of international law. Although stated in terms (as most of the articles are) addressed to the rights of "everyone", in the case of democratic participation, the principle is limited to application to the person's own country:

"21.1 Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

…

21.3 The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

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173 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 617-630 [152]-[193]. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 658. As to State Constitutions, see *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 602-608 [172]-[188].

174 *Al-Kateb* (2004) 219 CLR 562 at 589-595 [62]-[74].

175 (2003) 217 CLR 545 at 603-606 [173]-[181].

176 The *Universal Declaration of Human Rights* was adopted and proclaimed by the General Assembly of the United Nations, Resolution 217A(III) of 10 December 1948.

146 In the later elaboration of these human rights in the *International Covenant on Civil and Political Rights* ("ICCPR")[177], the qualification "of his country" has been made still clearer by restricting the right of democratic participation to citizens. Art 25 provides[178]:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> …".

147 The forbidden distinctions in Art 2 of the ICCPR are described as being "of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". In reconciling the forbidden distinction of "national … origin" with the pre-condition of citizenship stated in Art 25, it is clear that unreasonable impediments to attaining citizenship because of "national origin" are forbidden. However, the requirement of citizenship for the enjoyment of the rights to vote and to be elected to a representative governmental body are recognised in the civil rights adopted by the international community.

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177 The ICCPR was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December 1966. It entered into force 23 March 1976 in accordance with Art 49. It entered into force in Australia on 13 November 1980 [1980 ATS 23]. The First Optional Protocol to the ICCPR entered into force generally on 23 March 1976 in accordance with Art 9 and in Australia on 25 December 1991 [1991] ATS 39.

178 Unsurprisingly, in consequence of the language of Art 25 of the ICCPR, the decisions of the United Nations Human Rights Committee are expressed in terms of the rights of citizens. See *General Comment 25* of the Committee on Art 25(b), noted in Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, (2004) at 659; cf *Gillot et al v France* (UNHCR 932/2000) (voting in the French colony of New Caledonia subject to residency restrictions was upheld as appropriate to the exercise of a right to self-determination under Art 1 of the ICCPR). See Joseph, Schultz and Castan at 660 [22.22].

148 In most parts of the world, the pre-condition of citizenship is taken for granted. If there have been exceptions in Australia, New Zealand, the United Kingdom and NI in the past, it is only because of the universal notion of the nationality of British subjects, which proved so durable. That was a feature of the electoral law of Australia and NI until the 1980s. It lingers on to some extent for those already on the electoral roll before the pre-condition of Australian citizenship was substituted. But it is now treated by the Parliament as an historical anomaly. It is now being generally replaced by requirements of Australian citizenship.

149 *Conclusion: no offence*: In the result, there is no offence to international human rights law in the language and meaning of s 122 of the Constitution, as interpreted by this Court, in upholding the validity of the 2004 Act provisions mandating Australian citizenship for participation in future NI elections. The latter provision is not incompatible with international law as stated in the ICCPR or with the standards adopted by other civilised countries. No demonstrated departure from international law in this respect suggests a need to re-examine the outcome that is now derived from the application of Australian municipal law.

150 Although during submissions some mention was made of other provisions of international law[179], these were not elaborated in argument. I will not therefore pursue them.

Outcome and orders

151 All of the plaintiffs' challenges to the validity of the 2004 Act having failed, the questions reserved for the consideration of the Full Court should be answered in the manner proposed in the joint reasons.

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179 *The Charter of the United Nations*, Art 73 and the common first articles to ICCPR and *The International Covenant on Economic, Social and Cultural Rights* (concerning self-determination of peoples) were mentioned.

152 CALLINAN J. The question in this case is whether Commonwealth laws, requiring Australian citizenship to vote for, and to be a member of, the Legislative Assembly of Norfolk Island, are a valid exercise of the territories power conferred by s 122 of the Constitution[180].

The facts

153 The plaintiffs and the defendant are agreed as to the relevant facts.

154 Norfolk Island was discovered and claimed as a British possession on 10 October 1774. It was included within the territory of New South Wales, as defined by the Commission issued to Governor Phillip on 12 October 1786, to be administered by him. It was occupied, primarily as a penal settlement, first from 1788 to 1814 and later from 1825 to 1856.

155 On 24 October 1843, by Letters Patent[181], the Queen appointed that from and after 29 September 1844 Norfolk Island was to be severed from the government of New South Wales and annexed to the government and Colony of Van Diemen's Land.

156 Pitcairn Island is remote both geographically and socially from the rest of the world. It was occupied in 1790 by a group of mutineers from HMAV *Bounty* and some Polynesian men and women[182]. As fugitives, the former had deliberately chosen the island for its remoteness[183]. It was not an ideally hospitable place for permanent settlement. In consequence, on 8 June 1856, the inhabitants of Pitcairn Island, wholly or mainly the descendants of the original settlers, chose to travel to Norfolk Island on the *Morayshire*, a vessel provided

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180 Section 122 provides:

> "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

181 These were lawful following the enactment, during the previous year, of *An Act to amend so much of an Act of the last Session, for the Government of New South Wales and Van Diemen's Land, as relates to Norfolk Island* 1843 (Imp) (6 & 7 Vict c 35).

182 See *Christian v The Queen* [2006] UKPC 47 at [2] per Lord Hoffmann.

183 *Christian v The Queen* [2006] UKPC 47 at [59] per Lord Hope of Craighead.

for them by the Imperial authorities, and to settle on the island. It is of no significance to this case that later some returned to resettle on Pitcairn Island.

157 On 24 June 1856, by Order in Council[184] ("the 1856 Order"), Norfolk Island was severed from the government and Colony of Van Diemen's Land and made a "distinct and separate settlement". The Order in Council provided:

> " … [Norfolk Island] shall be a distinct and separate settlement; the affairs of which, until further Order is made in that behalf by Her Majesty, be administered by a Governor to be for that purpose appointed by Her Majesty, with the advice and consent of Her Privy Council."

158 The 1856 Order appointed the Governor of New South Wales the Governor of Norfolk Island for the time being. The Royal Instructions that were issued to him included these recitals and directions:

> "And whereas the inhabitants of the said island are chiefly emigrants from Pitcairn's Island in the Pacific Ocean, who have been established in Norfolk Island under our authority, and who have been accustomed in the territory from which they have removed to govern themselves by laws and usages adapted to their own state of society, you are, as far as practicable, and as far as may be consistent with the regulation next preceding, to preserve such laws and usages, and to adapt the authority vested in you by the said recited Order in Council to their preservation and maintenance.
>
> And whereas you are further authorized by the said recited Order in Council to make grants of Waste Lands in the said island in our name and in our behalf, subject nevertheless to such Rules and Regulations as aforesaid: Now we do hereby further enjoin you to exercise the authority so vested in you, as far as you may find it practicable in conformity with such laws and usages as aforesaid which you may find established among the inhabitants in question, in relation to the possession, use, and enjoyment of land.

159 On 14 October 1857, pursuant to the Royal Instructions, the Governor of New South Wales, Sir William Denison, compiled, declared and enacted the "Laws and Regulations for Norfolk Island", referred to as "the thirty-nine laws". These were based largely, but not entirely, upon the laws by which the Pitcairners had been accustomed to govern themselves on Pitcairn Island. They were described by Lord Hoffmann in *Christian v The Queen*[185] as "rudimentary".

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184 This was lawful following the enactment the previous year of the *Australian Waste Lands Act* 1855 (Imp).

185 [2006] UKPC 47 at [2].

It is not surprising therefore that it was contemplated that they might need to be, and were, adapted as appropriate.

160 On 14 November 1896, the Governor of New South Wales, Sir Henry Brand, proclaimed that all laws and regulations in force within Norfolk Island were repealed and annulled. An Order in Council dated 15 January 1897 ("the 1897 Order") revoked the 1856 Order and ordered that the affairs of Norfolk Island should thenceforth *and until further Order* be made in that behalf by Her Majesty, be administered by the Governor and Commander-in-Chief for the time being of the Colony of New South Wales and its Dependencies. It expressly ordered, among other things, that all "laws, ordinances, and regulations in force in Norfolk Island ... shall continue in force until repealed or altered by competent authority".

161 On 11 August 1897 a collection of documents was presented to the Parliament of New South Wales. It consisted of correspondence between Imperial and Colonial officials concerning the transfer of authority over the Island that was effected by the 1897 Order. The collection was presented to the Imperial Parliament in February 1897.

162 By an Order in Council dated 18 October 1900 ("the 1900 Order"), the Queen revoked the 1897 Order and ordered that the affairs of Norfolk Island should thenceforth, *and until further Order* made in that behalf by Her Majesty, be administered by the Governor for the time being of the State of New South Wales and its Dependencies. The 1900 Order provided, among other things, that all "Laws, Ordinances, and Regulations in force in Norfolk Island ... shall continue in force *until repealed or altered by competent authority*" (emphasis added).

163 Even by 1900 the community was a small and isolated one. It had, as appears from what I have so far summarized, had a long association with the colonies of Australia. It had never been identified internationally as a nation or polity, let alone a wholly self-governing one. It had a particular utility and relevance to Australia by reason of a proposal for the junction of an undersea Pacific cable to Australia. The material before the Court also shows that New South Wales from time to time had provided considerable financial sustenance to the community. Obviously there were doubts about the capacity of the community to be self-sustaining. None of this is to say that the islanders themselves would have wished to forgo any rights that they may have possessed to control their own affairs in so far as that was possible. The history and realities which I have summarized, however, made this entirely impractical, and, without further Imperial intervention, legally impossible.

164 After federation therefore, consideration, not surprisingly, came to be given by the new Australian polity to the annexation of Norfolk Island to the

Commonwealth. The Secretary of the Attorney-General's Department, Mr Garran, prepared an advice to deal with the future legal status of the island[186]:

> "The possible modes of annexing Norfolk Island to the Commonwealth appear to be:
>
> (1) to make it a territory placed by the Queen under the control of and accepted by the Commonwealth – or otherwise acquired by the Commonwealth (Constitution, section 122);
>
> (2) to place it within the limits of a State of the Commonwealth (Constitution, section 123);
>
> (3) to admit it as a new State of the Commonwealth subject to such terms and conditions as Parliament imposes (Constitution, section 121).
>
> The Island could apparently be made a territory under the control of the Commonwealth by the joint operation of an Imperial Order in Council and a Commonwealth Act. The effect of this would be that the Parliament could make laws for its government, and that it would be a dependency of the Commonwealth, not a part of the Commonwealth itself, and the general laws of the Commonwealth would not be in force in the Island to any further extent than the Parliament thought fit to provide – nor would it necessarily be within the Commonwealth tariff fence. In other words, it would be in the same relation to the Commonwealth as British New Guinea will be if the Papua Bill[187] is passed.
>
> The Island could be placed within the limits of a State by the procedure provided by section 123 of the Constitution – in conjunction with an Imperial Order in Council – and the effect would be that it would become part of the State and of the Commonwealth."

165 On 30 March 1914, by Order in Council ("the 1914 Order"), the King, after reciting that the Commonwealth Parliament had passed an Act[188] providing for the acceptance of Norfolk Island, ordered that Norfolk Island be placed under

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186 Attorney-General's Department, *Opinions of Attorneys-General of the Commonwealth of Australia with opinions of Solicitors-General and the Attorney-General's Department*, vol 1 (1981) at 268.

187 Enacted as the *Papua Act* 1905 (Cth).

188 *An Act to provide for the acceptance of Norfolk Island as a territory under the authority of the Commonwealth, and for the government thereof* 1913 (Cth).

the authority of the Commonwealth, and revoked the 1900 Order. On 1 July 1914 the *Norfolk Island Act* 1913 (Cth) (enacted in anticipation of the 1914 Order) commenced, by which Norfolk Island was declared to be accepted by the Commonwealth as a territory under its authority.

166 A census of Norfolk Island was conducted in 2001[189]. It revealed that the island had a permanent population of 1574 people, and an ordinarily resident population of 2037 people. Of the former, 82.5 per cent were Australian citizens, 14.1 per cent were New Zealand citizens, and 1.4 per cent were citizens of the United Kingdom. The remainder were not designated as citizens of any particular country. Of the permanent population, 36.7 per cent were born on Norfolk Island, 33.4 per cent were born in Australia, 20.7 per cent were born in New Zealand, and 3.8 per cent were born in the United Kingdom. Of the ordinarily resident population, 77.4 per cent were Australian citizens, 18.8 per cent were New Zealand citizens, and 1.7 per cent were citizens of the United Kingdom. And, of the ordinarily resident population, 28.6 per cent were born on Norfolk Island, 38.1 per cent were born in Australia, 23.6 per cent were born in New Zealand, and 4.1 per cent were born in the United Kingdom.

The challenged legislation

167 The current Commonwealth Act which provides for Norfolk Island is the *Norfolk Island Act* 1979 (Cth) ("the Act"). In 2004, the Commonwealth enacted the *Norfolk Island Amendment Act* 2004 (Cth) ("the Amending Act"), Sched 1 cl 1 of which creates a new s 38(ba) of the Act, requiring Australian citizenship as a qualification for election as a member of the Norfolk Island Legislative Assembly. Section 38 provides:

> "**Qualifications for election**
>
> Subject to section 39, a person is qualified to be a candidate for election as a member of the Legislative Assembly if, at the date of nomination:
>
> (b) he or she has attained the age of 18 years; and
>
> (ba) he or she is an Australian citizen; and
>
> (c) he or she is entitled, or qualified to become entitled, to vote at elections of members of the Legislative Assembly; and
>
> (d) he or she has such qualifications relating to residence as are prescribed by enactment for the purposes of this paragraph or, if no

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189 Norfolk Island, *Census of Population and Housing: Statistical Report on Characteristics of Population and Dwellings*, (2001).

such enactment is in force, he or she has been ordinarily resident within the Territory for a period of 5 years immediately preceding the date of nomination."

168 Section 39 of the Act, to which s 38 is expressed as being subject, and which has been amended by Sched 1 cl 3 of the Amending Act, includes a new sub-s (2)(da), which is as follows:

"**Disqualifications for membership of Legislative Assembly**

...

(2) A member of the Legislative Assembly vacates his or her office if:

...

(da) he or she ceases to be an Australian citizen".

169 Section 39(2)(da) applies, however, only to a person who is elected as a Member of the Legislative Assembly on or after the commencement of the Amending Act: Sched 1 cl 4.

170 The Amending Act also, by Sched 1 cl 5, inserts a new Div 1A (Qualifications of Electors) into Pt V of the Act. Under the new Div 1A in Pt V, in order to be enrolled as a voter on the Island a person must be an Australian citizen[190]. Further, a voter's name must be removed from the electoral roll if he or she ceases to be an Australian citizen[191].

171 The objects of the Amending Act were summarized in its Explanatory Memorandum in this way[192]:

"The Norfolk Island Amendment Bill 2003 will amend the *Norfolk Island Act 1979* to align electoral arrangements in Norfolk Island more closely with other Australian Parliaments (including those of the other self-governing Territories). In summary, it will:

- extend the right to vote in Legislative Assembly elections to all Australian citizens 'ordinarily resident' on Norfolk Island;

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190 Section 39A(1) and (2) of the Act.

191 Section 39C(1) of the Act.

192 Australia, Senate, Norfolk Island Amendment Bill 2003, Explanatory Memorandum at 2.

- introduce an 'ordinarily resident' qualifying period of 6 months for enrolment on the electoral roll;

- establish Australian citizenship as a qualification for enrolment and for election to the Legislative Assembly;

- ensure consistency in the calculation of the 'residency period' and, in particular, preserve the existing enrolment rights of persons under the age of 25 who are absent from the Island for education-related purposes; and

- preserve the existing enrolment rights of those non-Australian citizens on the electoral roll."

The question for this Court

172 The specific question for the Court is whether s 3 of the Amending Act is a valid enactment of the Commonwealth Parliament, in so far as it gives effect to:

(a) cll 1, 3[193] and 4 in Pt 1 of Sched 1 to the Amending Act; and

(b) cl 5 in Pt 1 of Sched 1 to the Amending Act, to the extent that cl 5 inserts into the Act ss 39A(1)(b), 39A(2)(a), 39C and the definition of "Returning Officer" in s 39D.

The territories power

173 Section 122 of the Constitution confers power on the Commonwealth Parliament to make laws "for the government" of three different kinds of territory: territory surrendered by a State and accepted by the Commonwealth; territory placed by the Queen under the authority of and accepted by the Commonwealth; and, territory otherwise acquired by the Commonwealth[194]. Norfolk Island is a territory of the second kind.

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193 Clause 3 is as follows:

"After paragraph 39(2)(d)

Insert:

(da) he or she ceases to be an Australian citizen".

194 cf the discussion of different types of colonies, settled, conquered or ceded in the speech of Lord Hope of Craighead in *Christian v The Queen* [2006] UKPC 47 at [47].

174 At this point it is relevant to recall that the island was uninhabited at the time of its discovery by Captain Cook. Thereafter, until its acceptance by Australia, everyone who came to reside there, whether involuntarily as convicts, voluntarily as free people, or as Pitcairners seeking an apparently more attractive and comfortable habitat, did so only with the assistance or support of the Imperial authorities or a colony of Australia, or both. The significance of this is that questions which might perhaps have arisen with respect to any concession by the Imperial authorities of self-government, rights exercisable by Royal Prerogative, or rights generally of continuing or perpetual self-government, do not arise[195].

The plaintiffs' submissions

175 The real question is whether any conditions or limitations should be regarded as attaching to the authority of the Commonwealth over the territory of Norfolk Island. The plaintiffs submit that it is not open to the Commonwealth Parliament to prescribe that legislators in the Territory be confined to a particular subset of people in the Territory, and that the capacity to choose and to be chosen as a legislator be limited to members of that subset. Alternatively, they submit that the acceptance of authority by Australia under s 122 of the Constitution in respect of Norfolk Island as an external territory necessarily involves the establishment of relations between Australia and the community or inhabitants of that Territory.

176 In support of the alternative submission the plaintiffs refer to the joint judgment in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[196]:

> "The acquisition of an external Territory by Australia, as contemplated by s 122, involves the establishment of relations between Australia and the inhabitants of that Territory. There is no single form of relationship that is necessary or appropriate. The kinds of relationship that may be regarded by Parliament as appropriate are as various as the kinds of Territory that may be acquired, and the forms of acquisition that may be adopted. Just as acquisition of a Territory ordinarily involves the creation of relationships, the relinquishment of a Territory involves the alteration or termination of relationships. The steps that may be taken for the purpose of such alteration or termination are also various."

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195 See the discussion by Eggleston J in *Newbery v The Queen* (1965) 7 FLR 34 at 39-40, and the cases referred to by his Honour.

196 (2005) 222 CLR 439 at 457 [29] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

177 The balance of the plaintiffs' submissions are heavily, if not to say exclusively, based upon the premise of the alternative submission. In summary they are these. The nature of the relationship between an external territory and Australia is not fixed. The circumstances in which authority over a territory was accepted, including the status and characteristics of the territory at that time, are relevant. The relations that may exist between Australia and the inhabitants of an external territory are not necessarily identical with those that apply to the people of the Commonwealth[197]. On acceptance by Australia, Norfolk Island was a Crown possession or dependency which had been established as a distinct and separate settlement for occupation by Pitcairners and their descendants, and others admitted to their community. Norfolk Island did not on its acceptance by Australia, nor has it since, become part of Australia, geographically or politically. Statements to the contrary in *Berwick Ltd v Gray*[198] are wrong. Its community is not, and has never been, part of the Australian community. Australian citizenship has never been a determining factor in identifying the community of the Island. A law which requires Australian citizenship for voting and election in Norfolk Island is not a law "for the government" of Norfolk Island because it selects a relevant criterion which is not a defining characteristic a person must possess for membership of the community of Norfolk Island, or of "the people" of Norfolk Island. Such a law is inconsistent with the status of the island as a distinct and separate settlement, and with the basis upon which the community was established and has continued in existence. In consequence, the challenged provisions would disenfranchise many of the people of Norfolk Island. The people of Norfolk Island have never been part of "the community constituting the Australian body politic"[199]. Even if a correct characterization of the people of Norfolk Island who are not Australian citizens be as "aliens", they, as a substantial proportion of the people of Norfolk Island, should not be stripped of electoral rights. Their entitlement to vote flows from the fact that they are part of "the people of [a] Territory" to whom substantial self-government has been granted, and who, in accordance with ordinary and basic notions of responsible government embodied in the Constitution, should be entitled to vote.

Disposition of the case

178 There are several reasons why the plaintiffs' submissions should be rejected.

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197 eg in covering cll 3 and 5 of the Constitution and s 24.

198 (1976) 133 CLR 603.

199 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 189 per Gaudron J.

179 Whilst it is true that by the 1856 Order (the force of which is not questioned) it was ordered that the Island be made a "distinct and separate settlement", a reservation of the possibility of change by further order was expressly made in it. Accordingly, the Pitcairners who had then only so recently arrived on Norfolk Island should not have had expectations, let alone rights, of any form of permanent self-governing status.

180 That, as subsequent history until federation shows, the Governors of New South Wales, exercising delegated Imperial authority, although not absolutely bound to do so, were generally content to adopt a great deal of the customary law of the Pitcairners as they and visiting admiralty officers[200] had formulated it on Pitcairn Island, and as contemplated by the 1856 Order, does not mean that the inhabitants or residents became entitled to a permanent right of self-government.

181 It does not matter for present purposes how the Island or the community of the Island was to be regarded in 1900, whether as a settlement, a colony, a territory, a province, a provincial territory of a colony, a colonial territory, or otherwise; hard and fast definitions of claimed lands and seas and clear international rules of law applicable to them, in those times of competing Imperial expansion, were evolving. The community on the island was, on any view, then a community of people who owed their presence there to the monarch, and had no legal right to self-government, except to the extent, if any, that the monarch or the monarch's delegate, not irrevocably, may have conferred it. The last Order in Council before federation was entirely consistent with the earlier ones in not conferring it, but by making provision for the continuation in force of the current law, subject to repeal or alteration by "competent authority".

182 Repeal and alteration by competent authority or authorities was exactly what did in fact occur. The first relevant occurrence was legislation of a higher order than Letters Patent or Order in Council, that is, enactment, by the Imperial Parliament, of s 122 of the *Commonwealth of Australia Constitution Act* in 1900. That section in terms confers on the Parliament the power to make laws for the government of territories, including those placed by the monarch under the authority of, and accepted by, the Commonwealth. Events to produce such a result, of placement and acceptance of Norfolk Island by Australia, ensued some 13 or so years later by way of an Imperial Order in Council in 1914, following the Act of the Commonwealth Parliament of 1913 which anticipated that Order.

183 It is impossible, in my view, to regard the challenged provisions, concerned as they were with the qualifications of electors and their representatives, as other than laws for the government of Norfolk Island. The plaintiffs' proposition is, effectively, that every law must accept or adopt the

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200 See *Christian v The Queen* [2006] UKPC 47 at [2] per Lord Hoffmann.

franchise for which the legislature of the island, itself elected according to that franchise, has made provision. The truth is that territories subject, or becoming subject, to the Australian Constitution have never possessed the same assured rights as the people of the States, and the States themselves, have. This follows, not only from the history which I have summarized, but also from the implication to which ss 107 and 108 of the Constitution give rise[201]. The Constitution, whilst making provision for the continuation of every power of a Colony becoming a State and (subject to the exercise of valid federal power) of Colonial laws, and the acceptance of a territory by the Commonwealth, is silent, intentionally so, it may be inferred, as to the continuation of the powers and laws of a territory. The special and quite different status of the new States, and their differentiation from the territories is explained by Kitto J in *Spratt v Hermes*[202] in passages[203] which I will quote when I discuss the relevant cases.

Cases considering s 122

184 It is to those cases that I now turn. There is no decision of the Court which supports the plaintiffs' submissions. Indeed the contrary is generally the position. Repeatedly the cases emphasize the amplitude of the territories power, even though other provisions of the Constitution have at times been held to apply to the territories.

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201 Sections 107 and 108 provide:

> "107 Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.
>
> 108 Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State."

202 (1965) 114 CLR 226 at 250-251.

203 At [191] below.

185 In *Buchanan v The Commonwealth*[204], *R v Bernasconi*[205] and *Porter v The King; Ex parte Yee*[206], the Court was asked to read s 122 of the Constitution as subject to ss 55, 80 and 71 of the Constitution respectively, but in each case refused to do so.

186 In *Jolley v Mainka*[207], the Court considered the Commonwealth's power over the Territory of New Guinea, which was governed by Australia pursuant to a mandate of the League of Nations. Starke J was of the view that New Guinea was territory "otherwise acquired [that is**,** not, as here, 'accepted'] by the Commonwealth"[208]. His Honour said that the Commonwealth had acquired "plenary control of the territory, subject to and during the subsistence of the mandate"[209]. Dixon J[210], with whom Rich J agreed[211], said however that the King's acceptance of the mandate on behalf of the Commonwealth made it territory "placed by the [King] under the authority of and accepted by the Commonwealth" in accordance with s 122 of the Constitution. Evatt J held[212] that s 122 of the Constitution had not been engaged: instead, the external affairs power, conferred by s 51(xxix) of the Constitution, empowered the Commonwealth to govern the Territory. Starke J was the only Justice therefore to express an opinion about the possibility of any limitations upon s 122 when engaged.

187 In *Ffrost v Stevenson*[213], a case concerning extradition from New South Wales to the Territory of New Guinea, Latham CJ said that s 122, not s 51(xxix), was the source of the authority to make laws for the Territory[214]. To hold

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204 (1913) 16 CLR 315.

205 (1915) 19 CLR 629.

206 (1926) 37 CLR 432.

207 (1933) 49 CLR 242.

208 (1933) 49 CLR 242 at 250.

209 (1933) 49 CLR 242 at 250.

210 (1933) 49 CLR 242 at 256.

211 (1933) 49 CLR 242 at 247.

212 (1933) 49 CLR 242 at 278-279, 289.

213 (1937) 58 CLR 528.

214 (1937) 58 CLR 528 at 556.

otherwise would, in the opinion of his Honour, undermine the plenary nature of s 122[215]:

> "If the legislative power of the Commonwealth with respect to the territories were held to depend upon the provisions of sec 51(xxix) it would follow that sec 55 would be applicable to laws passed under that power – contrary to *Buchanan's Case*[216] – that trial upon indictment of any offence must be by jury – contrary to *Bernasconi's Case*[217] – and that the judges of courts in the territories must have a life tenure – contrary to *Porter's Case*[218]."

Dixon J made similar observations to Latham CJ, and added this[219]:

> "[I]t may possibly be said that sec 122 implies that none of the other powers conferred on the parliament by the Constitution is to be taken to authorize the government or control of territories outside the Commonwealth; in other words, that it alone is the source of power to govern territories."

Neither of those Justices in *Ffrost v Stevenson* admitted of any limits on the exercise of power over the mandated territory.

188 In *Lamshed v Lake*[220], a majority of the Court (Dixon CJ, Webb, Kitto and Taylor JJ, McTiernan and Williams JJ dissenting) held that laws sufficiently connected to a territory were valid under s 122 of the Constitution wherever *territorially* the Commonwealth had legislative competence. Dixon CJ[221] (with whom Webb J agreed[222]) emphasized that each territory is a territory of Australia, not a "*quasi* foreign country", and that the Commonwealth may legislate for the

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215 (1937) 58 CLR 528 at 556.

216 *Buchanan v The Commonwealth* (1913) 16 CLR 315.

217 *R v Bernasconi* (1915) 19 CLR 629.

218 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432.

219 (1937) 58 CLR 528 at 566.

220 (1958) 99 CLR 132.

221 (1958) 99 CLR 132 at 144.

222 (1958) 99 CLR 132 at 152.

government of territories "as part of its legislative power operating throughout its jurisdiction". His Honour then went on[223]:

> "The contrary view seems to lead to many absurdities and incongruities. Take for example the legislative power over trade and commerce with other countries and among the States. Under that power it could hardly be doubted that the Commonwealth Parliament could provide in effect upon what conditions this or that commodity might be shipped to New Zealand or to Tasmania without other restraint. Any law of South Australia at variance with the enactment would be void; see *O'Sullivan v Noarlunga Meat Ltd*[224]. Is it to be supposed that a law to the same effect with respect to a federal territory is outside the competence of the federal Parliament?"

Kitto J reasoned similarly to Dixon CJ. His Honour said of s 122[225]:

> "[T]he section cannot fairly be read as meaning that the national Parliament, when it turns to deal with a territory which has come under the nation's authority, shall shed its major character and take on the lesser role of a local legislature for the territory, concerned only to regulate the local law. *Surely it means that a territory which has been accepted by the Australian Federation may be fitted into the Australian scene, so far as laws are concerned, by the legislative activity of the Australian Parliament: that the entire legal situation of the territory, both internally and in relation to all parts of the Commonwealth, may be determined by or by the authority of Parliament.*" (emphasis added)

189 The dissentients in *Lamshed v Lake* published brief reasons for judgment. McTiernan J was of the view that a law passed under s 122 restraining the States' powers over trade and commerce "would clearly violate the federal nature of the Constitution and being contrary to it would be invalid"[226]. Williams J said that legislation passed under s 122 could not have extra-territorial operation so as to bind a State[227], and that s 51(i) was insufficient to fill any "hiatus" because a territory is not another country, nor a State[228].

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223 (1958) 99 CLR 132 at 144.

224 (1954) 92 CLR 565; on appeal (1956) 95 CLR 177, [1957] AC 1.

225 (1958) 99 CLR 132 at 154.

226 (1958) 99 CLR 132 at 150.

227 (1958) 99 CLR 132 at 150.

228 (1958) 99 CLR 132 at 152.

190 By the time *Fishwick v Cleland*[229] was heard, Australia, pursuant to a Trusteeship Agreement between it and the recently created United Nations, held a mandate for the government of the Territory of Papua and New Guinea. There, the Court was asked whether the exercise of Commonwealth legislative power, pursuant either to the external affairs power in s 51(xxix) or the territories power in s 122 of the Constitution, was required to be consistent with the terms of the Trusteeship Agreement and the Articles of the Charter of the United Nations. On the reasoning of Starke J in *Jolley v Mainka*, s 122 would arguably be limited by the terms of the Agreement[230]. In *Fishwick v Cleland* the Court (Dixon CJ, McTiernan, Fullagar, Kitto, Menzies and Windeyer JJ) concluded that there was no limitation on the Commonwealth's power because there were no inconsistencies between the Trusteeship Agreement and the relevant Commonwealth enactment[231]. That would have been sufficient to resolve the case, but the Court went on to say that "if any such inconsistency could be found we should not think that it went to the legislative validity of the enactment considered as a matter of municipal law"[232]. The Court continued[233]:

> "Australia possesses a federal form of government and that of course involves a distribution of legislative powers between States and Commonwealth. A difficulty has been felt in saying under which of the enumerated powers of the Commonwealth Parliament fell the authority to legislate for the government of a mandated territory and of course whatever difficulty has been felt as to a mandate will be felt as to a trust territory. But that is a matter of the constitutional law of Australia, a municipal or domestic matter, and is not, we think, determined by reference to the provisions of the Trusteeship Agreement or of the Charter of the United Nations. It was suggested by the Attorney-General that the 'status' of the Territory of New Guinea was not for the judicial power to determine but rather to be ascertained for judicial purposes by inquiry from the Executive Government. We need not pursue the suggestion for we think that it is clear upon the documents and information before us that the Territory is subject to the legislative power of the Commonwealth Parliament. It is the very object of the trusteeship system to place a trust territory under the governmental authority of the State which undertakes to administer the territory in accordance with a Trusteeship Agreement. In

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229 (1960) 106 CLR 186.

230 See (1933) 49 CLR 242 at 250.

231 (1960) 106 CLR 186 at 194-196.

232 (1960) 106 CLR 186 at 196.

233 (1960) 106 CLR 186 at 196-197.

> the case of a State possessing a unitary system of government that means that the full powers of government are at its service in performance of its obligations under the Trusteeship Agreement. In the case of a federal system the powers which may be exercised must of course depend upon the constitution of the State but that is entirely an internal matter."

191 In *Spratt v Hermes*[234], Barwick CJ was wary of interpreting the Constitution as if Ch III were "inapplicable to territories", but concluded that "[t]he Commonwealth may create territorial courts without complying with the requirements of s 72"[235]. Kitto J said in that case[236]:

> "[T]he first five Chapters of the Constitution belong to a special universe of discourse, namely that of the creation and the working of a federation of States, with all the safeguards, inducements, checks and balances that had to be negotiated and carefully expressed in order to secure the assent of the peoples of the several Colonies, with their divers interests, sentiments, prejudices, ambitions and apprehensions, to unite in the federation. When Chap VI is reached, and it is found that s 122 gives the Parliament a general power to make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed under the authority of the Commonwealth or otherwise acquired by it, a change to a fundamentally different topic is perceived. The change is from provisions for the self-government of the new federal polity to a provision for the government by that polity of any community which comes under its authority while not being 'a part of the Commonwealth'."

Kitto J went on to say[237]:

> "[N]o provision of [Ch III] is to be interpreted as intending to reduce the generality of the power conferred by s 122 to make laws for *inter alia* the exercise of that judicial power which attaches to the Commonwealth, not in virtue of its character as the central polity of the federation and therefore in respect of the federated area, but in virtue of its responsibility for the entire (non-federal) government of a community made subject in all respects to its authority."

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234 (1965) 114 CLR 226.

235 (1965) 114 CLR 226 at 248.

236 (1965) 114 CLR 226 at 250.

237 (1965) 114 CLR 226 at 251.

192 Menzies J considered a submission that s 122 applied only to territories outside "the Federal System", and rejected it[238].

193 *Teori Tau v The Commonwealth*[239] was concerned with the acquisition of property within a territory and required the Court to decide whether such acquisition must be on just terms. The Court (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ) held that s 122 was not to be read as subject even to s 51(xxxi), one of the few express and guaranteed rights in the Constitution[240]:

> "Section 51 is concerned with what may be called federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States. Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power. The grant of legislative power by s 122 is plenary in quality and unlimited and unqualified in point of subject matter. In particular, it is not limited or qualified by s 51(xxxi) or, for that matter, by any other paragraph of that section.
>
> While the Constitution must be read as a whole and as a consequence, s 122 be subject to other appropriate provisions of it as, for example, s 116, we have no doubt whatever that the power to make laws providing for the acquisition of property in the territory of the Commonwealth is not limited to the making of laws which provide just terms of acquisition."

194 In this case it is unnecessary for me to form or state any view about the breadth of the proposition which I have just set out. For present purposes it is sufficient to note that this is another instance of the extensive operation accorded by the Court to s 122.

195 *Teori Tau v The Commonwealth* was considered in *Newcrest Mining (WA) Ltd v The Commonwealth*[241], which was concerned with mining leases over land in the Northern Territory. Commonwealth legislation purported to operate on the land contained within those leases. A majority of the Court (Toohey, Gaudron,

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238 (1965) 114 CLR 226 at 269-271.

239 (1969) 119 CLR 564.

240 (1969) 119 CLR 564 at 570.

241 (1997) 190 CLR 513.

Gummow and Kirby JJ) held[242] that s 51(xxxi) fettered the Commonwealth's legislative power generally, while three Justices of the majority (Gaudron, Gummow and Kirby JJ) would have overruled *Teori Tau v The Commonwealth* and found[243] that s 51(xxxi) fettered s 122 as well. Toohey J, however, thought "it would be a serious step to overrule a decision which has stood for nearly thirty years and which reflects an approach which may have been relied on in earlier years"[244]. His Honour was therefore unwilling to overrule it.

196 In *Capital Duplicators Pty Ltd v Australian Capital Territory*[245], the Court was asked whether Australian Capital Territory laws imposing fees for wholesale and retail licences, which were related to the value of goods sold, were an imposition of an "excise" within the meaning of s 90 of the Constitution. A majority of the Court (Brennan, Deane, Toohey and Gaudron JJ, Mason CJ, Dawson and McHugh JJ dissenting) held that they were, and effectively therefore that s 122 was to be read as subject to s 90 which confers exclusive power over excise and certain other imposts upon the Commonwealth.

197 Brennan, Deane and Toohey JJ said that one of the objectives of federation was "the creation of a free trade area embracing the geographical territory of the uniting Colonies, that is, the territory of the Colonies which became the Original States of the Commonwealth on its establishment on 1 January 1901"[246]. Their Honours pointed out[247] that the Australian Capital Territory was surrendered to, and accepted by, the Commonwealth. They said[248]:

> "It would be surprising if the surrender of part of a State to the Commonwealth and its acceptance by the Commonwealth pursuant to s 111, whilst leaving the territory as part of the Commonwealth, removed it from the operation of the constitutional provisions designed to create and maintain the free trade area."

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242 (1997) 190 CLR 513 at 560 per Toohey J, 561 per Gaudron J, 597-598 per Gummow J, 652 per Kirby J.

243 (1997) 190 CLR 513 at 561 per Gaudron J, 597-598, 600 per Gummow J, 652 per Kirby J.

244 (1997) 190 CLR 513 at 560.

245 (1992) 177 CLR 248.

246 (1992) 177 CLR 248 at 274.

247 (1992) 177 CLR 248 at 275.

248 (1992) 177 CLR 248 at 276.

198 Their Honours then considered whether the Commonwealth could delegate its exclusive power with respect to excise, concluding that what had occurred there was not a delegation of authority, but a creation of a legislature with its own powers not subject to Commonwealth review. They did not doubt, however, that a relevant power existed[249]: "the [Commonwealth] Parliament must, if it wishes to override the [territory's] enactment, pass a new law to achieve that result". Gaudron J, the fourth Justice in the majority, was of the view that s 122 could not undermine the free-trade area created at federation[250]:

> "One constitutional consequence of the fact that the Internal Territories [ie the Northern and Australian Capital Territories] form part of the geographical area that is the Commonwealth of Australia is that s 122, as it relates to them, must yield to a constitutional provision which mandates a situation for the whole of the Commonwealth. Thus, for example, s 122 must yield to s 118 which requires that '[f]ull faith and credit ... be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.'"

199 The opinion of the dissenting judges in *Capital Duplicators* is not inconsistent with the notion of an unqualifiedly plenary power under s 122 as it had been held in previous cases. Mason CJ, Dawson and McHugh JJ said this[251]:

> "[T]he imposition by a territory legislature, pursuant to a grant of legislative power by the Parliament, of duties of excise in the territory is not prohibited by s 90. That is because the territory legislature, in imposing such duties, would be exercising legislative power which is referable to, derived from and part of the power of the Parliament which is made exclusive by s 90."

200 The last case to which reference should be made is the one particularly sought to be relied on by the plaintiffs, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[252]. It is true that there are statements in that case to the effect that the relations between the Commonwealth and persons in a territory are different from the relations between the Commonwealth and persons from a State[253]:

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249 (1992) 177 CLR 248 at 283.

250 (1992) 177 CLR 248 at 288.

251 (1992) 177 CLR 248 at 263.

252 (2005) 222 CLR 439.

253 (2005) 222 CLR 439 at 457 [30] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

> "The relations that may exist between Australia and the inhabitants of external territories are not necessarily identical with those that apply to the people united in a federal Commonwealth pursuant to covering cl 3 of the *Constitution*, the people of the Commonwealth referred to in covering cl 5, or the people referred to in s 24. For example, the *Constitution* does not require that the inhabitants of an external Territory should have the right to vote at federal elections."

201 It does not follow, however, that the territories power is in some way to be regarded as *necessarily* limited because of a difference between the history of a territory and its relations with Australia, and the history of the Colonies of Australia and their relations with the Imperial power and one another. The Commonwealth will inevitably generally enjoy much greater power with respect to territories than it does with respect to the States: as Kitto J observed in *Spratt v Hermes*[254], the first five Chapters of the Constitution provide for a federation of States, with various "safeguards, inducements, checks and balances", whereas s 122, in Ch VI, provides, not for the self-government of the federal polity, but for government *by* that polity. As was also said in *Ame*[255]:

> "The references in the *Constitution* to 'the people of [particular States]' or 'the people of the Commonwealth' serve a significant purpose in their various contexts, but they do not have the effect of binding Australia to any particular form of relationship with all inhabitants of all external territories acquired by the Commonwealth, whatever the form and circumstances of such acquisition."

202 *Ame*, in any event, is distinguishable from the present case in several respects. There was, both locally[256] and on the part of Australia, a clear constitutional and legislative intent that the former Territory enjoy full independence: s 4 of the *Papua New Guinea Independence Act* 1975 (Cth) provided that Australia "ceases to have any sovereignty, sovereign rights or

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254 (1965) 114 CLR 226 at 250-251.

255 (2005) 222 CLR 439 at 457 [30] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

256 See *Ame* (2005) 222 CLR 439 at 448 [9]-[10], 449-451 [13]-[14], where relevant provisions of the *Papua New Guinea Constitution* are considered.

rights of administration in respect of or appertaining to the whole or any part of Papua New Guinea"[257]. There is no similar provision, or anything even approaching it, in the case of Norfolk Island.

203 None of the cases can avail the plaintiffs.

Conclusion and orders

204 The questions reserved for the Full Court should be answered as follows:

1. Is s 3 of the *Norfolk Island Amendment* 2004 (Cth), insofar as it gives effect to:

   (a) cll 1, 3 and 4 in Pt 1 of Sched 1 to that Act; and

   (b) cl 5 in Pt 1 of Sched 1 to that Act to the extent that that clause inserts into the Act the following new provisions:

      (i) par 39A(1)(b);

      (ii) par 39A(2)(a);

      (iii) s 39C; and

      (iv) the definition of "Returning Officer" in s 39D,

   valid?

   Yes.

2. Who should pay the costs in respect of the special case?

   The plaintiffs.

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257 (2005) 222 CLR 439 at 447 [8] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.