

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE THE GOVERNOR,
GOULBURN CORRECTIONAL CENTRE,
GOULBURN & ANOR

RESPONDENTS

EX PARTE: DAVID HAROLD EASTMAN

APPLICANT

Re The Governor, Goulburn Correctional Centre; Ex parte Eastman
[1999] HCA 44
2 September 1999
S178/1998

ORDER

Application dismissed with costs.

Representation:

D F Jackson QC with R D Cavanagh and G R Kennett for the applicant
(instructed by John Forrest Boersig)

T A Game SC with S J Gageler for the second respondent (instructed by
Director of Public Prosecutions for the Australian Capital Territory)

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with M A Perry
and C J Horan intervening on behalf of the Attorney-General of the
Commonwealth (instructed by Australian Government Solicitor)

T I Pauling QC, Solicitor-General for the Northern Territory intervening on
behalf of the Attorneys-General of the Northern Territory and Australian
Capital Territory (instructed by the Solicitor for the Northern Territory and
Crown Solicitor for the Australian Capital Territory)

2.

B M Selway QC, Solicitor-General for the State of South Australia with J M Rusalen intervening on behalf of the Attorneys-General of the States of South Australia and Western Australia (instructed by Crown Solicitors for the States of South Australia and Western Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Re The Governor, Goulburn Correctional Centre; Ex parte Eastman

Constitutional law – Territories – Australian Capital Territory – Courts of territories – Supreme Court of Australian Capital Territory – Whether a court "created by the Parliament" – Whether s 72 applies to courts created by or pursuant to s 122.

Constitutional law – Territories – Australian Capital Territory – "Seat of government" – Source of legislative power for laws for the government of the territory – Whether s 52(i) or s 122.

Habeas corpus – Applicant sentenced to imprisonment for life following conviction for murder – Trial presided over by judge appointed otherwise than in accordance with s 72 of the Constitution – Whether applicant was duly convicted.

Words and phrases – "created by the Parliament" – "seat of government".

The Constitution, ss 1, 52(i), 61, 71, 72, 73, 75, 76, 77, 122, 125, 128.

Australian Capital Territory (Self-government) Act 1988 (Cth), ss 22, 23(1)(b), 28, 34, 36, 39(1), Pt VA.

ACT Supreme Court (Transfer) Act 1992 (Cth), ss 6, 7.

Judiciary Act 1903 (Cth), ss 30(a), 33(1)(f).

Seat of Government Acceptance Act 1909 (Cth), s 6.

Seat of Government (Administration) Act 1910 (Cth), s 4.

Supreme Court Act 1933 (ACT), ss 4A, 17.

Supreme Court (Amendment) Act (No 2) 1993 (ACT), ss 6, 11, 26, Sched 2.

1 GLEESON CJ, McHUGH AND CALLINAN JJ. Following a trial in the Supreme Court of the Australian Capital Territory (ACT), before Carruthers AJ and a jury, the applicant was convicted of murder. He was sentenced to imprisonment for life. He appealed unsuccessfully to the Full Court of the Federal Court¹. He has made an application for special leave to appeal to this Court. That application is the subject of separate proceedings, and is not presently relevant.

2 The applicant seeks a writ of habeas corpus addressed to the first respondent. In effect, he asks this Court to order his release from custody. The ground of the application is that he was not duly convicted. The basis of that assertion is the contention that Carruthers AJ was not validly appointed.

3 The argument that the appointment of Carruthers AJ was invalid turns upon the proposition that appointments to the Supreme Court of the ACT are governed by s 72 of the Constitution. If that proposition is correct, there are at least two grounds of invalidity. First, Carruthers AJ was not appointed by the Governor-in-Council, as required by s 72 (i). He was appointed by the Executive of the ACT. This is not a mere formality. Behind the legal question of the identity of the appointor, there is the practical question of the identity of those who advise in relation to the choice of appointee. It may be taken that the ACT Executive, in appointing Carruthers AJ, acted upon the advice of an ACT Minister or ACT Ministers, not upon the advice of Federal Ministers. The same, no doubt, applies generally to appointments made to the ACT Supreme Court in recent years, whether of acting or permanent judges. Thus, there is an issue as to who selects people for appointment as ACT judges. Secondly, Carruthers AJ was appointed, for a limited term, as an Acting Judge. This was permitted by a law enacted by the Legislative Assembly of the ACT². However, it is contrary to the tenure prescribed by s 72 of the Constitution. The law of the ACT was enacted upon the assumption that compliance with s 72 was unnecessary. It should be added that the remuneration of Carruthers AJ was not fixed by the Parliament, but pursuant to an ACT statute³. This, also, was upon the assumption that s 72 did not apply.

4 The understanding which presently governs the appointment of judges and magistrates throughout Australia's territories, internal and external, is that s 72 does not apply to appointments to territory courts. That understanding is based directly upon the authority of two unanimous decisions of this Court, one in 1965,

1 *Eastman v The Queen* (1997) 76 FCR 9.

2 *Supreme Court (Amendment) Act (No 2) 1993* (ACT), s 26.

3 *Supreme Court (Amendment) Act (No 2) 1993* (ACT), s 11.

*Spratt v Hermes*⁴, and one in 1971, *Capital TV and Appliances Pty Ltd v Falconer*⁵. Those decisions, in turn, were based upon a line of authority extending back to 1915⁶. The applicant challenges that line of authority, and submits that the two decisions directly in point should be overruled.

5 What is at stake is not only the lawfulness of the conviction and sentence in the instant case. The validity of the appointment, and the lawfulness of past decisions of, judicial officers in any territory who were appointed by a local Executive acting on the advice of local ministers, or who did not have the tenure required by s 72, is in question. Also at stake, for the present and the future, in respect of self-governing territories, is the question of who has the power to choose judicial officers, to define their terms of office, to fix their remuneration, and to deal with questions of their possible removal.

6 Underlying the arguments advanced on behalf of the applicant is a problem of interpretation of the Constitution which has vexed judges and commentators since the earliest days of Federation. It involves "a notoriously technical and difficult branch of Australian constitutional law"⁷. It concerns the relationship between various provisions of Ch III of the Constitution, and s 122, which confers upon the Parliament a general power to make laws for the government of territories (which includes a power to set up territory courts).

7 One of the reasons for the difficulty in giving the relevant provisions a meaning which achieves internal consistency, and at the same time accommodates the realities of government and administration with which the Constitution must deal, is the disparate nature of territories. Some (such as the ACT, the Northern Territory, and the Jervis Bay Territory) are internal. Others (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. The Northern Territory has already obtained a substantial measure of responsible government⁸. There is a view that the ACT, by

4 (1965) 114 CLR 226.

5 (1971) 125 CLR 591.

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

7 *Spratt v Hermes* (1965) 114 CLR 226 at 274 per Windeyer J.

8 Lumb, "The Northern Territory and Statehood", (1978) 52 *Australian Law Journal* 554. See also *Northern Territory v GPAO* (1999) 73 ALJR 470; 161 ALR 318.

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reason of certain provisions of the Constitution, can never become a State⁹. 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 populations¹⁰. 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.

- 8 Section 72 deals with the appointment of "the Justices of the High Court and of the other courts created by the Parliament", and prescribes their tenure of office. Until the Constitution was amended in 1977, such Justices had, in effect, life tenure, subject to a power of removal by the Governor-General on an address from both Houses of the (Federal) Parliament. Since 1977, the term of such an appointment expires when the Justice attains the age of 70. That, however, does not alter either the question or the answer. In 1915 the Court had to decide a case which, directly, raised a somewhat different issue as to the relationship between s 122 and other parts of the Constitution, but which had obvious implications for the question of the relationship between ss 72 and 122. The issue in *R v Bernasconi*¹¹ was whether s 80 of the Constitution, making trial by jury obligatory in certain cases, applied to a certain prosecution in the Territory of Papua. The Court answered the question in the negative, giving reasons which also clearly implied that the judicial officer of the Territory of Papua who dealt with the case was not a person who was required by s 72 to have life tenure. A suggestion, in 1915, that the magistrates and judges of all territories, internal or external, in whatever stage of development, were required to have life tenure, would have been regarded as startling by people who were familiar with the tenure of office of magistrates and judges in the various Australian States¹².

9 See the argument in *Spratt v Hermes* (1965) 114 CLR 226 at 232.

10 (1915) 19 CLR 629 at 638.

11 (1915) 19 CLR 629.

12 For a history of the New South Wales magistracy, including an account of their appointment and tenure, see Golder, *High and Responsible Office, A History of the New South Wales Magistracy* (1991). At the time of Federation, and until the *Local Courts Act* 1982 (NSW), stipendiary magistrates were members of the New South Wales Public Service. It was only after 1955 that new recruits to the magistracy were required to be legally qualified (Golder at 175).

9 In *Spratt v Hermes*¹³, the Court answered in the negative a question whether the provisions of s 72 of the Constitution applied to the appointment of a stipendiary magistrate of the ACT. There was no dissent. The Court was invited to overrule *R v Bernasconi*, but declined to do so. Barwick CJ said¹⁴ that "it is a decision of long standing upon the basis of which legislation has frequently been passed". The Chief Justice did not accept all of the reasoning in *R v Bernasconi*, some of which was wider than was necessary for the actual decision. In particular, he did not accept that Ch III of the Constitution was wholly inapplicable to territories¹⁵. However, he considered that, upon its true construction, s 72 did not apply to courts created by or pursuant to laws under s 122¹⁶. The section is not a limitation on the power to create courts of judicature which is included in the grant of legislative power contained in s 122. Such courts are not within the meaning of the expression "the other courts created by the Parliament" in s 72. That construction, which gives a negative answer, not to a wide question as to the relationship between Ch III and s 122, but to a particular question as to whether s 72 addresses the position of courts created pursuant to s 122, is open on the language, and produces a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of territories. It takes account of the consideration that, as the legislative background to the present case illustrates, at any given time some territories may enjoy self-government and some will not. Even if the applicant's argument were correct, whether a court in a self-governing territory satisfied the description of a court created by the Federal Parliament might depend upon whether the territory legislature had legislated concerning the territory's courts, and upon the form of such legislation. If that were the case, some territory courts would be affected by s 72, and not others.

10 The decision in *Spratt v Hermes* was unanimously affirmed and applied in *Capital TV and Appliances Pty Ltd v Falconer*¹⁷. What is of direct significance for the present case is that the judgments proceeded upon the basis that there was "no relevant ground of distinction between [the ACT] Court of Petty Sessions and the Supreme Court of the Australian Capital Territory"¹⁸.

13 (1965) 114 CLR 226.

14 (1965) 114 CLR 226 at 244.

15 (1965) 114 CLR 226 at 248.

16 (1965) 114 CLR 226 at 248.

17 (1971) 125 CLR 591.

18 (1971) 125 CLR 591 at 598.

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11 The amendment to s 72 in 1977 did not alter the meaning of s 122, or the relationship between the two sections. By removing the requirement of life tenure for Justices appointed pursuant to s 72, the amendment removed what had, until then, been one of the indications that territory courts were not within the purview of s 72. However, if territory courts were not courts created by the Parliament within the meaning of those words as they appeared in s 72 in 1915, and 1965, and 1971, then nothing occurred to change the meaning of those words in 1977. The force of that consideration cannot be evaded by a suggestion that there then arose an opportunity for a fresh insight into the meaning of the Constitution, unembarrassed by what would previously have been one of the practical consequences.

12 The invitation to overrule the decision in *Spratt v Hermes*, and to refuse to follow the holding in *Capital TV and Appliances Pty Ltd v Falconer* that it applies equally to the Supreme Court of the ACT, should be declined.

13 The applicant developed a further argument, based upon s 52 (i) of the Constitution. The ACT, it was submitted, is, or includes, the seat of government, and laws for the ACT, unlike other territories, are made under s 52 (i) and not s 122. A court set up to administer those laws, which are federal laws, is a court to which s 72 applies.

14 Section 52 (i) has to be read together with s 125. Whatever the precise meaning of the expression "seat of government", the prevailing, and correct, opinion is that the ACT and the seat of government are not synonymous terms¹⁹, that they are not co-extensive, and that the source of legislative power for such purposes as are presently relevant is s 122. In *Svikart v Stewart*²⁰, Mason CJ, Deane, Dawson and McHugh JJ said:

"Section 52 (i) provides for the exclusive power to make laws with respect to the seat of government as well as places acquired by the Commonwealth for public purposes. Under s 125, the seat of government is required to be within territory granted to or acquired by the Commonwealth. There is now a Territory, the Australian Capital Territory, within which the seat of government has been located, although its limits have not been precisely determined by the Parliament. The seat of government is, however, not co-extensive with the Territory in which it is located nor, under s 125, is it intended to be. The Parliament must rely upon s 122 for the power to make laws for the government of that Territory. That power is not made subject to

19 *Spratt v Hermes* (1965) 114 CLR 226 at 262 per Taylor J.

20 (1994) 181 CLR 548 at 561.

Gleeson CJ
McHugh J
Callinan J

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the Constitution as is the power to make laws with respect to the seat of government under s 52 (i). Moreover, the power to make laws with respect to the seat of government would seem to be concerned with its political or constitutional aspects, rather than with the government of the territory which it occupies."

15 There is no foundation for this alternative argument.

16 The application should be dismissed with costs.

17 GAUDRON J. The background to this application is set out in other judgments and need not be repeated. The central issue to be decided is whether the Supreme Court of the Australian Capital Territory ("the Supreme Court") is a court "created by the Parliament" for the purposes of s 72 of the Constitution.

18 It is not in issue that, if the Supreme Court is a court "created by the Parliament" for the purposes of s 72, the judge who presided over the applicant's trial was not appointed in accordance with that section²¹. And it is contended that, that being so, his conviction and the warrant pursuant to which he is presently held in custody are invalid. On the other hand, if it is not a court created by the Parliament for the purposes of s 72, it is accepted that neither that nor any other constitutional provision speaks to the appointment of its judges.

19 The first step in determining whether the Supreme Court is a court to which s 72 applies is to determine whether s 122 of the Constitution, which confers power on the Parliament to make laws "for the government of [a] territory", ultimately sustains its existence. If it does, it is convenient to proceed on the basis that the Supreme Court is a court created by the Parliament pursuant to s 122 notwithstanding that, in various respects, it is now subject to the legislative power of the Legislative Assembly of the Australian Capital Territory²² and appointments

21 Section 72 relevantly provides:

" The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;

...

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

...

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years."

22 Section 34 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth), as amended by s 7 of the *ACT Supreme Court (Transfer) Act* 1992 (Cth).

to it are made by the Executive of the Territory²³. On the basis that it is a court created by the Parliament under s 122, the second step is to consider the relationship between that section and Ch III of the Constitution, it being in Ch III that s 72 is found. If, on that analysis, s 72 does not apply to the Supreme Court, the application must be dismissed. So, too, it must be dismissed if the Supreme Court is now a creature of the body politic of the Australian Capital Territory and not a court created by the Parliament under s 122 for, in that event, s 72 can have no application to it.

Section 122 and the seat of government

20 Subject to a possible qualification later to be mentioned when considering the relationship between s 122 and Ch III of the Constitution, the power conferred by s 122 of the Constitution to make laws for the government of a territory extends, as a matter of ordinary language, to the creation of courts having jurisdiction with respect to matters arising under or involving the application of laws in their operation in the territory concerned²⁴. And as a matter of ordinary language, s 122 will sustain the existence of such courts if, for example, they are established by or made subject to the legislative power of a self-governing territory.

21 Notwithstanding the language of s 122, it was contended for the applicant that that provision does not authorise the creation of the Supreme Court or sustain its existence. In this respect, it was put that s 52 of the Constitution, not s 122, is the source of legislative power with respect to the Australian Capital Territory. Section 52 relevantly provides:

" The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) the seat of government of the Commonwealth".

22 There is, in my view, some difficulty in approaching s 52 as an independent source of legislative power as distinct from a constitutional provision directed to rendering exclusive to the Commonwealth specified powers which are found

23 Sections 4 and 4A of the *Supreme Court Act* 1933 (ACT).

24 See as to the creation of courts, *Spratt v Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ, 258-259 per Kitto J, 260, 264 per Taylor J, 266 per Menzies J, 280-281 per Owen J; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 601-602 per McTiernan J, 608-609 per Menzies J, 613-614 per Owen J, 619 per Walsh J, 626 per Gibbs J; *Gould v Brown* (1998) 193 CLR 346 at 401 per Gaudron J; *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 489 per Gaudron J; 161 ALR 318 at 344.

elsewhere in the Constitution²⁵. If, however, there is scope for it to operate as an independent grant of legislative power with respect to the seat of government, it is concerned, as was pointed out in *Svikart v Stewart*²⁶, with the "political or constitutional aspects" of that notion, rather than with the government of the territory in which it is located. In this respect, it should be noted that s 52(i) relevantly confers "power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the seat of government", not power to make laws for its government. It was also pointed out in *Svikart v Stewart* that "[t]he seat of government is ... not co-extensive with the Territory in which it is located nor, under s 125²⁷, is it intended to be [and, thus the] Parliament must rely upon s 122 for the power to make laws for the government of that Territory"²⁸.

23 In this context, it is appropriate to note that, by s 3(1) of the *Supreme Court Act* 1933 (ACT), the Supreme Court is established as the "Supreme Court of the Territory" and, by s 31, is given jurisdiction to "give effect to all claims for relief arising under the common law or the statute law of the Territory". The reference in those provisions to "the Territory" is clearly a reference to the Australian Capital Territory²⁹ in which the seat of government is located, not to the seat of government itself.

24 A law of the Parliament establishing or sustaining the existence of a court for the Australian Capital Territory with jurisdiction with respect to "claims ... arising under the common law or the statute law of the Territory" is a law pursuant to s 122 for the government of that Territory, not a law under s 52(i) with respect to the seat of government. Thus, on the assumption that the Supreme Court is a court created

25 See *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 110-111 per Kitto J; *Svikart v Stewart* (1994) 181 CLR 548 at 576-577 per Gaudron J.

26 (1994) 181 CLR 548 at 561 per Mason CJ, Deane, Dawson and McHugh JJ.

27 Section 125 relevantly provides:

" The seat of Government of the Commonwealth ... shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth".

28 (1994) 181 CLR 548 at 561 per Mason CJ, Deane, Dawson and McHugh JJ. See also *Spratt v Hermes* (1965) 114 CLR 226 at 262 per Taylor J, 273 per Windeyer J, 281-282 per Owen J; *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 114-115 per Menzies J, 124 per Windeyer J.

29 Note that this follows from the long title of the *Supreme Court Act* as "[a]n Act to establish a Supreme Court of the Australian Capital Territory". Moreover, by s 3(1) the Supreme Court is to be known as "the Supreme Court of the Australian Capital Territory".

by the Parliament pursuant to s 122, it is necessary to consider the relationship between that section and Ch III of the Constitution to ascertain whether it is also a court "created by the Parliament" for the purposes of s 72.

Courts created pursuant to or sustained by s 122 and Ch III of the Constitution

- 25 As a matter of ordinary language, the words "created by the Parliament" in s 72 are apt to include a court created by the Parliament pursuant to s 122. This notwithstanding, it was held by this Court in *Spratt v Hermes*³⁰, and later affirmed in *Capital TV and Appliances Pty Ltd v Falconer*³¹ that the words "created by the Parliament" do not refer to courts created under s 122. Those decisions and other decisions of this Court with respect to the relationship between s 122 and Ch III of the Constitution, in which s 72 is found, have not produced "a coherent body of doctrine"³². And as I pointed out in *Northern Territory of Australia v GPAO*, they have created as many problems as they have solved³³.
- 26 In particular, the decisions with respect to the relationship between s 122 and Ch III give rise to difficulties in connection with this Court's jurisdiction to entertain appeals from the decisions of courts created pursuant to s 122 if, as has been held, those courts are neither federal courts nor courts exercising federal jurisdiction³⁴. That is because s 73(ii) relevantly confers jurisdiction only with respect to appeals from "[another] federal court, or court exercising federal jurisdiction; or ... the Supreme Court of [a] State".
- 27 To some extent, the problems associated with this Court's jurisdiction to hear appeals from courts created or sustained by s 122 have been alleviated by decisions holding that the Parliament may, pursuant to that section, confer jurisdiction on

30 (1965) 114 CLR 226.

31 (1971) 125 CLR 591.

32 *Spratt v Hermes* (1965) 114 CLR 226 at 265 per Menzies J.

33 (1999) 73 ALJR 470 at 493; 161 ALR 318 at 349. See as to the nature of those problems, *Spratt v Hermes* (1965) 114 CLR 226 at 245-248 per Barwick CJ, 252-253, 257 per Kitto J, 265-267 per Menzies J, 274 per Windeyer J.

34 See *Spratt v Hermes* (1965) 114 CLR 226 at 242-243 per Barwick CJ, 250-251 per Kitto J, 263-264 per Taylor J, 266 per Menzies J, 274 per Windeyer J, 279-281 per Owen J; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 600 per Barwick CJ, 602 per McTiernan J, 609 per Menzies J, 609 per Windeyer J, 613-614 per Owen J, 623 per Walsh J, 626-627 per Gibbs J.

this Court to hear appeals from those courts³⁵. However, it is difficult to reconcile those decisions with the exclusive and exhaustive nature of the provisions of Ch III³⁶, its exclusive and exhaustive nature having been most recently confirmed in *Re Wakim; Ex parte McNally*³⁷. Given that difficulty and given, also, the critically important role assigned to the judicature by the Constitution, I would grant leave, if leave is necessary, to re-open *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer*.

- 28 As already indicated, the words "created by the Parliament" in s 72 of the Constitution are, as a matter of ordinary language, apt to include courts created pursuant to s 122. If those words are to be construed otherwise, it can only be by reason that either some provision of Ch III and/or s 122 indicates otherwise. So far as Ch III is concerned, the critical provision is s 71 which relevantly provides:

" The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction."

- 29 Section 71 is exhaustive as to the courts that may exercise the judicial power of the Commonwealth³⁸. It also impliedly confers power on the Parliament to create courts³⁹, but only "federal courts". It emerges clearly from Ch III of the

35 See *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 440-441 per Isaacs J, 446 per Higgins J, 448 per Rich J, 449 per Starke J; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, 327-328 per Webb J; *Spratt v Hermes* (1965) 114 CLR 226 at 239 per Barwick CJ, 256-257 per Kitto J, 279 per Owen J; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 604 per Menzies J, 612 per Windeyer J, 626 per Gibbs J; *Gould v Brown* (1998) 193 CLR 346 at 380 per Brennan CJ and Toohey J.

36 See *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 491 per Gaudron J; 161 ALR 318 at 346-347.

37 (1999) 73 ALJR 839; 163 ALR 270.

38 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

39 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269, 289 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Spratt v Hermes* (1965) 114 CLR 226 at 274 per Windeyer J; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 603 per Menzies J; *Gould v Brown* (1998) 193 CLR 346 at 377 per Brennan CJ and Toohey J, 401 per Gaudron J, 416 per McHugh J, 444 per (Footnote continues on next page)

Constitution that federal jurisdiction is co-extensive with the matters specified in ss 75 and 76 of the Constitution⁴⁰. However, there is no very precise indication of what is meant by "federal courts". For the applicant, it was contended that federal courts are courts created by the Parliament to exercise federal jurisdiction. However, that argument pays no attention to the adjective "federal" in s 71. To put the matter another way, the applicant's argument proceeds as if s 71 referred simply to "such other courts as the Parliament creates".

- 30 The word "federal" in s 71, in my view, serves to indicate that the courts which the Parliament may create pursuant to that section are not simply courts upon which the Parliament may confer federal jurisdiction, but courts upon which the Parliament may (although, it need not) confer jurisdiction to be exercised throughout the Commonwealth in all or any of the matters specified in ss 75 and 76 of the Constitution. Once it is appreciated that, in s 71, "federal" signifies courts of that kind, it is apparent that it does not include a court created pursuant to s 122 of the Constitution.

Gummow J, 490 per Kirby J; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 846 per Gleeson CJ, 851 per McHugh J; 163 ALR 270 at 280, 287.

40 The matters specified in s 75 are matters:

- "(i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

The matters specified in s 76 are matters:

- "(i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States."

31 The jurisdiction of a court created pursuant to s 122 of the Constitution is necessarily confined to matters arising under or involving the application of laws in their operation in a territory. That is because a law creating a court with jurisdiction in matters of that kind is a law for the government of the territory concerned. However, a law creating a court the jurisdiction of which is not confined to matters arising under or involving the application of laws in their operation in a territory is not a law for the government of that territory. And the same is true of a law sustaining the existence of a court the jurisdiction of which is not confined in the manner indicated.

32 As already mentioned, the statement that s 122 authorises the creation of courts having jurisdiction with respect to matters arising under or involving the application of laws in their operation in a territory is subject to a possible qualification. That possibility arises because, to take one example, those laws may include laws with respect to the matters referred to in s 51 of the Constitution. Even if, in its operation in a territory, a law under s 51 can be characterised as a law for the government of the territory concerned, it is, nonetheless, also a law under s 51 of the Constitution⁴¹. And a law of that kind properly answers the description of "[a law] made by the Parliament" for the purposes of s 76(ii) of the Constitution⁴². A matter arising under such a law is a matter within federal jurisdiction and one that invokes the judicial power of the Commonwealth which, by s 71, can only be exercised by the courts specified in that section, namely, federal courts and courts invested with federal jurisdiction.

33 For the reasons that I gave in *GPAO*⁴³, I see no reason why a court created pursuant to s 122 cannot be invested with federal jurisdiction and thus exercise jurisdiction in matters arising under a law made by Parliament under s 51 or in other matters that fall within federal jurisdiction. And the same is true of a court the existence of which is sustained by s 122. However, and as already pointed out, that is so only to the extent that the matter arises under or involves the application of a law in its operation in a territory because, if its jurisdiction were to extend

41 See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 565-567 per Gaudron J (with whom Toohey J agreed at 560), 582 per McHugh J, 601, 614 per Gummow J, 661-662 per Kirby J; *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 492 per Gaudron J; 161 ALR 318 at 348-349. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 176 per Deane and Toohey JJ, 222-223 per Gaudron J.

42 *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 490-491 per Gaudron J; 161 ALR 318 at 346.

43 *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 494; 161 ALR 318 at 351.

beyond that, the law under which the court was created or its existence was sustained would not be a law for the government of the territory concerned.

34 One other matter should be noted with respect to the vesting of federal jurisdiction in a court created under s 122 or the existence of which is sustained by a law under that section. If it is not necessary for a court of that kind to conform to the requirements of s 72 of the Constitution, a question could arise as to whether, in accordance with the principles recognised in *Kable v Director of Public Prosecutions (NSW)*⁴⁴, there is not some implicit requirement in Ch III with respect to the nature of the matters that may be dealt with by it and perhaps, also, with respect to the manner in which it is constituted before federal jurisdiction can be vested in it.

35 Once it is accepted, as in my view it must be, that a court created pursuant to s 122 may be invested with federal jurisdiction in matters arising under or involving the application of laws in their operation in a territory, there is room to doubt whether the words "the other courts created by the Parliament" bear their natural and ordinary meaning in s 72. That is because s 71 establishes a dichotomy between "other federal courts [that] the Parliament creates" and "other courts [that] it invests with federal jurisdiction". In that context, it is possible to read s 72, in so far as it is concerned with "other courts created by the Parliament", as referring to federal courts created by the Parliament pursuant to s 71, in contradistinction to those that may be invested with federal jurisdiction.

36 Were the question free of authority, I should think the preferable course would be to give the words of s 72 their natural and ordinary meaning so as to include courts created pursuant to s 122 of the Constitution⁴⁵. However, given that contextual considerations provide a basis for reading s 72 down so as to apply only to federal courts created pursuant to s 71 and given, also, that s 72 has twice been so interpreted by this Court and that the Parliament has acted on the Court's decisions in that regard, it should, in my view, continue to be read in that way.

37 There is a further consideration that confirms my view that, so far as they are concerned with the meaning of s 72, the decisions in *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer* should stand. It is that, even if s 72 were interpreted as applying to courts created under s 122, they would not be federal courts because, as already indicated, their jurisdiction is necessarily confined to matters arising under or involving the application of laws in their operation in a territory. Thus, to hold s 72 applicable to courts created under s 122 would not be

44 (1996) 189 CLR 51.

45 See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 109 per Gaudron J; *Gould v Brown* (1998) 193 CLR 346 at 402 per Gaudron J; *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 493 per Gaudron J; 161 ALR 318 at 350.

to resolve the difficulties associated with this Court's appellate jurisdiction. That difficulty is only resolved if, on proper analysis, courts created under s 122 exercise federal jurisdiction. And the same is true of courts which are the creatures of self-governing territories but the existence of which is sustained by a law under s 122.

38 It was held in *GPAO* that jurisdiction may be conferred on a federal court in a matter arising under a law enacted pursuant to s 122 of the Constitution. It follows from that decision that a matter of that kind is a matter arising under a law made by the Parliament for the purposes of s 76(ii) of the Constitution and, thus, a matter within federal jurisdiction. The same must be true when the same jurisdiction is conferred on a court created by or the existence of which is sustained by s 122. The consequence of that is that, in matters arising under a law enacted pursuant to s 122, s 73 of the Constitution allows for an appeal to this Court.

39 In *GPAO* I expressed the view that, in all matters, s 73(ii) allows for an appeal to this Court from a court created pursuant to s 122 because "the right or duty in question must ultimately depend for its enforcement on the law creating that court."⁴⁶ That statement was premised on the hypothesis that a court exercising jurisdiction in matters arising under or involving the application of laws in their operation in a territory is, necessarily, a court created by the Parliament. As appears from this case, in which it was argued that the Supreme Court was now properly to be seen as a creature of the body politic known as the Australian Capital Territory and not the creation of the Parliament, that hypothesis may be wrong.

40 Although it is not necessary to decide whether the Supreme Court is now the creature of the body politic known as the Australian Capital Territory, it may be observed that its existence is ultimately sustained by a law under s 122 of the Constitution and the rights and duties in issue in matters before it must ultimately depend for enforcement on the law by which that Court is sustained. Thus, in my view, those matters are matters arising under a law of the Commonwealth for the purposes of s 76(ii) of the Constitution and necessarily within federal jurisdiction with the consequence that, in all matters, s 73 allows for an appeal to this Court.

Conclusion

41 As s 72 does not apply to courts created under or whose existence is sustained by s 122 of the Constitution, the application for habeas corpus should be dismissed with costs.

46 (1999) 73 ALJR 470 at 494; 161 ALR 318 at 352.

GUMMOW AND HAYNE JJ

I INTRODUCTION

42 The applicant seeks from the Full Court of this Court an order absolute in the first instance for the issue of a writ of habeas corpus requiring his release from custody. The matter involves the interpretation of the Constitution and thus lies within the original jurisdiction conferred by s 30(a) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). In those circumstances, this Court is empowered by s 33(1)(f) of the Judiciary Act to direct the issue of a writ of habeas corpus.

43 The applicant was convicted in the Supreme Court of the Australian Capital Territory ("the Supreme Court") on a charge of murder. He was tried before Carruthers AJ and a jury. Provision for the offence of murder was made in s 18 of the *Crimes Act* 1900 (NSW). Section 18 adopts but modifies the common law⁴⁷. The section was rendered applicable in the Australian Capital Territory ("the Territory") by s 6 of the *Seat of Government Acceptance Act* 1909 (Cth) and s 4 of the *Seat of Government (Administration) Act* 1910 (Cth) ("the 1910 Administration Act").

44 Section 18 later was transmuted into an enactment subject to amendment or repeal by the Legislative Assembly for the Australian Capital Territory ("the Assembly"). This state of affairs was brought about by the operation of s 34 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) ("the Self-Government Act"), as amended by s 7 of the *ACT Supreme Court (Transfer) Act* 1992 (Cth) ("the Transfer Act"). There has been no such relevant amendment by the Assembly. Whatever may have been the situation had that been the case, in our opinion the criminal liability in respect of which the applicant was tried and convicted owed its existence to the laws made by the Parliament and identified above.

45 No question arises on this application as to whether the Supreme Court would be exercising federal jurisdiction in, for example, a prosecution of an offence against a law enacted by the Assembly. The issue in such a case would be whether there nevertheless was a matter "arising under" a law made by the Parliament, namely the Self-Government Act, which established the Assembly and endowed it with power to make the law in question.

46 On 3 April 1995, Carruthers AJ was appointed an acting judge of the Supreme Court for the period commencing on 1 May 1995 and ending at the expiration of 22 December 1995. His Honour's commission was stated as made

47 *Ryan v The Queen* (1967) 121 CLR 205 at 220, 225-226, 238-239; *Royall v The Queen* (1991) 172 CLR 378 at 410-411, 428-429, 454-455.

17.

by the Executive of the Territory pursuant to s 4A(1) of the *Supreme Court Act* 1933 (ACT) ("the Supreme Court Act"). Section 4A was introduced into the legislation by a law made by the Assembly, s 6 of the *Supreme Court (Amendment) Act (No 2)* 1993 (ACT) ("the Amendment Act"). It provides:

"(1) The Executive may, by commission, appoint persons to be acting Judges of the Court.

(2) An appointment under subsection (1) shall be for such period, not exceeding 12 months, as is specified in the commission.

(3) A person is not eligible to be appointed under subsection (1) unless he or she—

- (a) has been a Judge of a superior court of record of the Commonwealth, a State or a Territory; or
- (b) has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years."

47 Section 11 of the Amendment Act amended s 17 of the Supreme Court Act so that, so far as it pertained to Carruthers AJ, it stated:

"(2) An acting Judge shall be paid such remuneration and allowances as are prescribed by regulation.

(3) Subsection (2) does not apply to—

- (a) the remuneration of an acting Judge if there is a subsisting determination of the Commonwealth Remuneration Tribunal relating to the remuneration to be paid to the acting Judge; or
- (b) an allowance of a particular kind in respect of an acting Judge if there is a subsisting determination of the Commonwealth Remuneration Tribunal relating to an allowance of that kind to be paid to the acting Judge.

(3A) The remuneration and allowances to which a Judge is entitled accrue from day to day and are payable monthly.

(4) The public money of the Territory is appropriated to the extent necessary for payment to Judges of remuneration and allowances."

48 The applicant contends (i) that the Supreme Court is a "court created by the Parliament" within the meaning of s 72 of the Constitution and (ii) that the

appointment of Carruthers AJ for a term other than one expiring upon his attaining the age which was, at the time of such appointment, the maximum age for judges of that Court, namely the attainment of the age of 70 years⁴⁸, contravened s 72 of the Constitution. The consequence is said to be that the appointment of Carruthers AJ was not validly made and his Honour had no authority to preside over the applicant's trial or to record a conviction or to impose any sentence, so that his imprisonment is unlawful.

II THE JUDICIAL POWER OF THE COMMONWEALTH

- 49 It is appropriate to begin consideration of the issues which arise by looking to s 71 of the Constitution. This states:

"The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

Section 71 identifies those institutions in which the judicial power of the Commonwealth is vested. This section is the first provision in Ch III, which is headed "THE JUDICATURE" and must be read with s 1, the first provision in Ch I, headed "THE PARLIAMENT", and s 61, the first provision in Ch II, headed "THE EXECUTIVE GOVERNMENT". Each provision uses the term "vested" to identify that branch of government which is to receive and exercise, as the case may be, the legislative, executive or judicial power of the Commonwealth.

- 50 The term "the Commonwealth" in ss 1, 61 and 71 is used consistently to identify the body politic identified in the covering clauses to the Constitution⁴⁹. In his work *The Constitution of the Commonwealth of Australia*⁵⁰, Sir William Harrison Moore pointed out that the allotment of functions by the Constitution is not merely made between State and Commonwealth and continued:

"[I]t is also an allotment amongst the organs of the Commonwealth Government. The Constitution does not commit subjects to 'the

48 Supreme Court Act, s 4(4).

49 See *Sue v Hill* (1999) 73 ALJR 1016 at 1032-1033; 163 ALR 648 at 671.

50 2nd ed (1910) at 94. See also the observations by Dixon J in *R v Sharkey* (1949) 79 CLR 121 at 153.

Commonwealth' in general; it designates certain organs which are to exercise particular kinds of power over the subjects committed to them."

- 51 In *Spratt v Hermes*⁵¹, after observing that the Constitution brought into existence "but one Commonwealth which was, in turn, destined to become the nation", Barwick CJ continued:

"The difference in the quality and extent of the powers given to it introduced no duality in the Commonwealth itself. The undoubted fact that the Commonwealth emerged from a federal compact or that that compact is reflected in the limitations placed upon some of the powers of the Commonwealth or that the new political entity derived from a union of the peoples of the former colonies does not deny the essential unity and singleness of the Commonwealth."

- 52 From this textual analysis, it follows that the judicial power of the Commonwealth referred to in s 71 is not segmented in some fashion to reflect geographic divisions. In particular, and contrary to the views advanced in *Porter v The King; Ex parte Yee* by Isaacs J, the judicial power of the Commonwealth is not "that of the Commonwealth proper, which means the area included within the States"⁵².

- 53 Rather, the position is consistent with that established with respect to s 61. It is not to be supposed that the executive power of the Commonwealth vested by s 61 is limited in some geographical sense to "the Commonwealth proper". It was determined in *Johnson v Kent*⁵³ that the Commonwealth had power under

51 (1965) 114 CLR 226 at 247.

52 (1926) 37 CLR 432 at 441. Rich J (at 448) said he regarded the decision in *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 "as limited to the judicial power of the Commonwealth consisting of the States, in other words, the Commonwealth proper".

53 (1975) 132 CLR 164.

s 61 of the Constitution to erect the Black Mountain tower on Crown land in the Territory and that no statutory authority was required⁵⁴. Jacobs J said⁵⁵:

"[T]he executive power of the Commonwealth extends to the doing of acts upon its own lands within a territory surrendered by a State to the Commonwealth without any statutory authority other than the necessary appropriation of funds if those acts are of the kind which lie within the prerogative of the Crown."

Nor is it to be supposed that the legislative power of the Commonwealth, vested in the "Federal Parliament" by s 1, does not include the power to make laws for the government of a territory as specified in s 122⁵⁶.

54 It will be necessary later in these reasons further to consider the significance of this construction of s 71 for the issues which arise in this litigation.

55 The Crown, which is specified as an element in the Parliament identified in s 1 and in which the executive power is vested by s 61⁵⁷, had an anterior existence to that of the Commonwealth. However, the Parliament had to be summoned to meet not later than six months after the establishment of the Commonwealth, as provided by s 5. Further, whilst in a sense this Court was created by the Constitution, which then assumes its continued existence, and operation, the Court could have no life until, pursuant to s 72, the Governor-General in Council had made appointments of Justices and the Parliament had fixed their remuneration. It was for the Crown, acting pursuant to s 2, to appoint a Governor-General.

56 Thus, to a significant degree, the term "vested" is used in these provisions in a proleptic sense in anticipation of that which is to be done under, but not immediately by force of, the Constitution. To "create" a court is to endow an institution which answers that description with its legal existence by providing for its formation and constitution. It is another step to endow such a body with jurisdiction, that is to say authority, to determine justiciable controversies. Jurisdiction is conferred on this Court directly by s 75, and the Parliament is

54 See also the discussion by Brennan J of the phrase "the exclusive jurisdiction of the Commonwealth" in s 111 in his Honour's judgment in *Svikart v Stewart* (1994) 181 CLR 548 at 566.

55 (1975) 132 CLR 164 at 174.

56 *Lamshed v Lake* (1958) 99 CLR 132 at 141; *Spratt v Hermes* (1965) 114 CLR 226 at 247.

57 However, s 61 goes on to provide that the executive power "is exercisable by the Governor-General".

empowered by ss 76 and 77 to make laws conferring or investing federal jurisdiction. The Australian Industrial Relations Court is an example of a court created by the Parliament under ss 71 and 72, whose members retain their commissions, but which by laws supported by s 77 has received jurisdiction and then by subsequent legislation has been denied jurisdiction in respect of freshly instituted matters⁵⁸.

- 57 Section 71 does not, in terms, empower the creation of other federal courts by the Parliament but, read with s 72, it has been taken as conferring such authority as a matter of necessary implication⁵⁹. However, s 71 is not the sole source of authority for the Parliament to create courts, nor are ss 76 and 77 the sole authority to confer jurisdiction. It has long been accepted that the power conferred by s 122 to make laws for the government of territories includes power to create courts and to confer jurisdiction upon them. This illustrates the proposition expressed by Kitto J in *Spratt v Hermes* that s 122 empowers the Parliament to "make what provision it will for every aspect and every organ of territory government"⁶⁰. An early example was the constitution of a Supreme Court of the Northern Territory by the Supreme Court Ordinance 1911 (NT) made by the Governor-General in Council in pursuance of powers conferred by the *Northern Territory Acceptance Act* 1910 (Cth) and the *Northern Territory (Administration) Act* 1910 (Cth).

III THE APPLICANT'S CASE

- 58 The present dispute turns upon the question whether the Supreme Court, at the time that Carruthers AJ was appointed an acting member, answered the description of a court "created by the Parliament" within the meaning of s 72 of the Constitution. So far as material, s 72 states:

"The Justices of the High Court and of the other courts created by the Parliament—

- (i) Shall be appointed by the Governor-General in Council:
- (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session,

58 See *Victoria v Sutton* (1998) 72 ALJR 1386 at 1394-1395; 156 ALR 579 at 591.

59 See Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 104-105.

60 (1965) 114 CLR 226 at 251. See also *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 512; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 263-265.

praying for such removal on the ground of proved misbehaviour or incapacity:

- (iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

...

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court."

59 Carruthers AJ was not appointed by the Governor-General in Council. The Executive identified in his commission is that entity created by s 36 of the Self-Government Act. The members of the Executive are the Chief Minister of the Territory and such other Ministers thereof as are appointed by the Chief Minister (s 39(1)). Nor was the remuneration of Carruthers AJ fixed by the Parliament. It was provided for by a statute of the Territory, namely s 11 of the Amendment Act. Nor was Carruthers AJ appointed for a term expiring upon his attaining any particular age. It follows that, if the court to which Carruthers AJ was appointed answered the description of a court created by the Parliament, then, in various respects, there was a failure to comply with the requirements of s 72 of the Constitution.

60 The applicant submits that courts created by the Parliament in exercise of power conferred by s 122 of the Constitution are a subclass of "such other federal courts as the Parliament creates", within the meaning of s 71. The result is said to be that they should be treated as "other courts created by the Parliament" within the meaning of s 72.

61 However, the immediate concern of s 71 is with the vesting of the judicial power of the Commonwealth. The institutions to exercise that power are so identified as to fall into three classes. The first is this Court. Its original jurisdiction is provided for in ss 75 and 76, and its appellate jurisdiction by s 73. The identification of the second class looks ahead to other federal courts created by the Parliament and the third to the taking by the Parliament of the step of investing "other courts" with federal jurisdiction. Like s 71, s 73 speaks of courts exercising federal jurisdiction, not merely of State courts doing so.

62 Those "other courts" may be the State courts identified in s 77(iii). But this does not deny that (a) those "other courts" may include courts created by the Parliament in exercise of the power conferred by s 122 and not in exercise of the

power found by necessary implication as to federal courts in ss 71 and 72, or (b) a law based upon s 122 may confer jurisdiction identified in the nine heads in ss 75 and 76, as federal jurisdiction, in a court created by or pursuant to a law based upon s 122.

63 The preferable construction is that a court created by the Parliament for the government of a territory is not a federal court created under ss 71 and 72 but may answer the description of one of the "other courts" which are invested by laws made by the Parliament with federal jurisdiction within the meaning of s 71 and thus are recipients of the judicial power of the Commonwealth. The investment of federal jurisdiction in such a non-federal Territory court would be by a law supported not by s 77 but by s 122. Such a construction was considered by Gaudron J in *Northern Territory v GPAO*⁶¹. If that construction be accepted, it follows (contrary to the case for the applicant) that s 72 had no necessary operation with respect to a court created by the Parliament in exercise of its authority under s 122 of the Constitution. This would be so, even though the Parliament invested that court with federal jurisdiction.

64 This issue which the applicant raises respecting the phrase "other courts created by the Parliament" in s 72 has not been the subject of direct determination in earlier decisions of this Court dealing with other aspects of the interrelation between s 122 and Ch III. In *GPAO*, this Court determined that s 76(ii) of the Constitution, in conjunction with s 77(i), authorises the conferral by the Parliament of original jurisdiction on federal courts, in that case the Family Court of Australia, in matters arising under laws made by the Parliament in reliance upon s 122 of the Constitution and that the jurisdiction so conferred is federal jurisdiction. That decision does not determine the issue which arises here respecting the construction of s 72 of the Constitution.

65 Earlier, *R v Bernasconi*⁶² decided that an offence against a law made by Parliament in reliance upon s 122 is not an "offence against any law of the Commonwealth" within the meaning of s 80 of the Constitution. However that may be, in the present case the applicant was tried by jury.

66 *Capital TV and Appliances Pty Ltd v Falconer*⁶³ was an appeal purportedly brought directly to this Court from the Supreme Court which had dismissed an appeal against a conviction in the Court of Petty Sessions at Canberra. *Capital TV* determined that (i) no appeal lay to this Court under s 73 because the Supreme

61 (1999) 73 ALJR 470 at 493-494; 161 ALR 318 at 350-351.

62 (1915) 19 CLR 629.

63 (1971) 125 CLR 591.

Court, then created and constituted by the Supreme Court Act as a law of the Commonwealth, was neither (a) a federal court within the meaning of s 73 of the Constitution, nor (b) a court exercising federal jurisdiction within the meaning of s 73, and that (ii) a law of the Parliament supported by s 122 may confer a right of appeal to the High Court from territorial courts, whether or not the matter in issue otherwise be one of federal jurisdiction. The construction we have described as preferable would, as to proposition (i), accept that the Supreme Court may be a court exercising federal jurisdiction within s 73, although it is not a federal court, and it would require reconsideration of proposition (ii).

- 67 *Spratt v Hermes*⁶⁴ decided that (i) a court of petty sessions constituted under the Court of Petty Sessions Ordinance 1930 (ACT), promulgated under s 12 of the 1910 Administration Act and which had been given appropriate local jurisdiction, might enforce in relation to acts occurring within the Territory a law made by the Parliament under s 51 of the Constitution, such as the *Post and Telegraph Act* 1901 (Cth), which operates throughout the Commonwealth; (ii) this was so although the court was not one in which the judicial power of the Commonwealth was vested within the meaning of s 71 of the Constitution; and (iii) a law made by the Parliament in reliance upon s 122 may create or authorise the creation of a court having jurisdiction with respect to occurrences in or concerning the Territory without observance of the requirements of s 72 of the Constitution. The construction which we have outlined as preferable, would deny proposition (ii) but accept (i) and (iii).

IV THE SUPREME COURT

- 68 In Section III, we have indicated what we regard as the preferable construction of the constitutional provisions, including s 72. However, neither of the applicant's submissions outlined in Section I falls for determination unless Carruthers AJ was appointed to a court which then answered the description in s 72 of a court "created by the Parliament".

- 69 In *GPAO*⁶⁵, Gleeson CJ and Gummow J identified various other questions respecting the interrelation between s 122 and Ch III, as to which no issue arose in *GPAO*. The present issue as to the construction of s 72 presents a related but distinct question. In *Kruger v The Commonwealth*, Gaudron J observed that, whatever view be taken of the decisions in *Spratt v Hermes* and *Capital TV*, it may

64 (1965) 114 CLR 226.

65 (1999) 73 ALJR 470 at 486-487; 161 ALR 318 at 340-341.

be that different considerations apply to laws enacted by the legislature of a self-governing territory⁶⁶. The present case bears out the point.

70 *GPAO* manifests a disinclination to read down the statutory text in s 76(ii) "any laws made by the Parliament". It is also consistent with the rejection by Barwick CJ in *Spratt v Hermes* of the notion of a "single theme running throughout Ch III which requires it to be treated so much all of one piece that if any part of it relates only to federal matters, every part of it must likewise be restrained"⁶⁷.

71 In our view, at the time of the appointment of Carruthers AJ, the Supreme Court did not answer the description of a court created by the Parliament within the meaning of s 72 of the Constitution. We turn to endeavour to explain why this is so.

72 Section 7 of the Self-Government Act establishes the Territory as a body politic under the Crown. Section 22 confers upon the Assembly power to make laws for the peace, order and good government of the Territory. On and from 1 July 1992, that power was not restricted, as initially had been the case by reason of par (b) of s 23(1)⁶⁸. This restriction was removed by the Parliament with the enactment of s 6 of the Transfer Act. At the time of the commencement of the Self-Government Act, the Supreme Court was that institution established by the Supreme Court Act as a law of the Commonwealth. From 1 July 1992, the Supreme Court Act has been taken, by force of s 34(2) of the Self-Government Act⁶⁹, as an enactment which may be amended or repealed by the Assembly. The term "enactment" is used in the Self-Government Act in accordance with the definition in s 3 thereof as meaning a law made by the Assembly under the Self-Government Act or a law or part of a law that is an enactment by reason of the operation of s 34.

66 (1997) 190 CLR 1 at 109.

67 (1965) 114 CLR 226 at 245.

68 This read:

"Subject to this section, the Assembly has no power to make laws with respect to:

...

(b) the establishment of courts".

69 After the amendment of s 34 by s 7 of the Transfer Act.

73 Thereafter, the Assembly amended the Supreme Court Act in various respects⁷⁰. Significant changes were made by the Amendment Act. This inserted (by s 6) in the Supreme Court Act the provision in s 4A under which the Executive appointed Carruthers AJ and (by s 11) the amendment of s 17 to provide for the remuneration and allowances of acting judges. Schedule 2 to the Amendment Act further amended the Supreme Court Act to provide for the appointment by the Executive of resident judges to hold office until the attainment of 70 years. The tenure of such resident judges is further qualified by the provisions for removal in the *Judicial Commissions Act 1994* (ACT).

74 The Transfer Act, a law made by the Parliament, not the Assembly, had as its long title "An Act relating to the transfer of responsibility for the Supreme Court of the Australian Capital Territory from the Commonwealth to the Territory, and for other purposes". This statute amended (by s 4) the definitions in the Self-Government Act by inserting a definition of "Supreme Court" as meaning "the Supreme Court of the Territory existing under the *Supreme Court Act 1933* of the Territory". Section 12 of the Transfer Act inserted s 29A in the *ACT Self-Government (Consequential Provisions) Act 1988* (Cth) to provide that persons holding office as Chief Justice, judge, additional judge or Master of the Supreme Court immediately before 1 July 1992 continued to hold office thereafter "as if he or she had been appointed under the *Supreme Court Act 1933* of the Territory".

75 The phrase in s 34(2) of the Self-Government Act that a law specified in Sched 2⁷¹ "shall be taken to be an enactment, and may be amended or repealed accordingly" was directed to the Assembly and had the substantive operation of conferring upon the Supreme Court Act the status of a law made by the Assembly. Other laws of the Commonwealth not included in Sched 2 did not, in the terms of the heading to that Schedule, "become enactments". They retain their character as laws of the Commonwealth and prevail by operation of s 28 of the Self-Government Act over inconsistent territorial legislation. Section 28 operates not as a denial of power otherwise conferred by the Self-Government Act upon the Assembly but as a denial to a law so made of effect "to the extent" of its inconsistency⁷².

76 Section 8 of the Transfer Act inserted Pt VA, headed "THE JUDICIARY" in the Self-Government Act. Part VA comprises ss 48A-48D. Section 48A specified

70 The provisions of the statute had been renumbered by the Transfer Act.

71 Which on and from 1 July 1992 included the Supreme Court Act.

72 *GPAO* (1999) 73 ALJR 470 at 481; 161 ALR 318 at 333.

the jurisdiction and powers of the Supreme Court⁷³. Section 48B provided that an enactment of the Assembly that changes the retirement age in relation to certain judicial offices in the Supreme Court would not affect the term of office of incumbents at the time of that enactment, without their consent. Section 48C stipulated that an enactment relating to the establishment of a judicial commission for the Territory must include certain provisions. Section 48D required the inclusion of certain protections in an enactment of the Assembly relating to the removal of persons occupying certain judicial offices.

77 We accept the submission put by the Attorneys-General of the Northern Territory and the Australian Capital Territory that the effect of Pt VA is to establish in advance legislative provisions which, by operation of s 28 of the Self-Government Act, would prevail over any inconsistent legislation enacted by the Assembly. Part VA is not determinative of the question whether, at the time of the appointment of Carruthers AJ, the Supreme Court did not answer the description of a court created by the Parliament.

78 At that time, the authority of the Assembly to amend or repeal the Supreme Court Act lay in its general grant of authority under s 22 of the Self-Government Act. That power was relevantly unconfined save for the requirements of s 48A as to the original and appellate jurisdiction of the Supreme Court and for the limitations imposed by ss 48B and 48D on changes to judicial retirement age and removal from office. It is implicit in s 48A that there must continue to be a Supreme Court, but that does not carry the consequence that the Supreme Court is created by the Parliament for the purposes of s 72 of the Constitution. Section 72 specifies criteria as to appointment, removal and remuneration. In all of these respects at the time of the appointment of Carruthers AJ, the enabling provisions were found in an enactment of the Territory.

73 It stated:

"(1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

(2) In addition, the Supreme Court may have such further jurisdiction as is conferred on it by any Act, enactment or Ordinance, or any law made under any Act, enactment or Ordinance.

(3) The Supreme Court is not bound to exercise any powers where it has concurrent jurisdiction with another court or tribunal."

- 79 In their joint judgment in *Capital Duplicators Pty Ltd v Australian Capital Territory*, Brennan, Deane and Toohey JJ observed⁷⁴, with the concurrence of Gaudron J⁷⁵:

"The [Assembly] has been erected to exercise not the Parliament's powers but its own, being powers of the same nature as those vested in the Parliament. The Governor-General's power to disallow an enactment under s 35 of the Self-Government Act does not alter the independent character of the legislative power which s 22 purports to confer on the [Assembly]. A similar power of disallowance was vested in the Queen in Council to disallow laws made by the Indian Legislature under the *Indian Councils Act* (s 21) yet the Privy Council in [*R v*] *Burah*⁷⁶, in the first of the historic cases defining the independent character of colonial legislatures, held that the Indian Legislature's powers were, within their prescribed limits, 'as large, and of the same nature, as those of Parliament itself'."

Their Honours went on to note that, in respect of imposition of a tax by the Assembly⁷⁷:

"[t]he Parliament has no power under the Self-Government Act to disallow any duty imposed by the [Assembly]; the Parliament must, if it wishes to override the enactment, pass a new law to achieve that result. It cannot repeal or amend the enactment."

- 80 In *Capital Duplicators*, all members of the Court agreed that an enactment of the Assembly imposing a duty of excise could not be characterised as an exercise of the "power of the Parliament" which was made "exclusive" by s 90 of the Constitution. The difference between the members of the Court was that those constituting the majority held "exclusive" to mean "exclusive of any State or Territory legislature", whilst the minority would have treated "exclusive" to mean simply "exclusive of the powers of the States". Hence, the later statement in *Svikart v Stewart* which explained *Capital Duplicators* in the following terms⁷⁸:

74 (1992) 177 CLR 248 at 282.

75 (1992) 177 CLR 248 at 284.

76 (1878) 3 App Cas 889 at 904. [The Privy Council emphasised that the Indian legislature was "not in any sense an agent or delegate of the Imperial Parliament".]

77 (1992) 177 CLR 248 at 283.

78 (1994) 181 CLR 548 at 562.

"The view was taken that a legislature created to confer self-government upon a Territory – in that case the Australian Capital Territory – must be regarded as a body separate from the Commonwealth Parliament, so that the exercise of its legislative power, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power."

- 81 Legislative provision for the creation of a court involves at least the specification of the method of appointment, remuneration and removal of the judges comprising that institution⁷⁹. Section 72 speaks, as counsel for the second respondent put it, "continuously in the present" in the sense that a reference to a court "created by the Parliament" is to a court constituted and sustained, at the time when a question arises as to an appointment, removal or receipt of remuneration, by an exercise of legislative power of the Parliament. Subject to any implications⁸⁰ or limitations arising from provisions of the Constitution other than s 72, and to the operation with respect to inconsistency of s 28 of the Self-Government Act, and to whatever may have been the position before 1 July 1992, by the time of the appointment of Carruthers AJ, the Supreme Court had been substantially reconstituted in relevant respects by enactments of the Assembly. These included the very provisions in pursuance of which Carruthers AJ was appointed and remunerated. The applicant's submissions to the contrary should not be accepted.

V SEAT OF GOVERNMENT

- 82 In the alternative to his submissions respecting the application to the Supreme Court of s 72 of the Constitution, the applicant contends that laws for the government of the Territory are made by the Parliament acting, not under s 122 of the Constitution, but under s 52(i). The result is said to be that the legislative power with respect to the Territory is "quintessentially federal in character". The result would be that, laws made under s 52(i) being clearly laws made by the Parliament for the purposes of s 76(ii), courts established to adjudicate matters arising under those laws must be established under ss 71 and 72. We would reject that submission in favour of what was said on the subject by Mason CJ, Deane, Dawson and McHugh JJ in *Svikart v Stewart*⁸¹.

79 See *R v Davison* (1954) 90 CLR 353 at 365; *Harris v Caladine* (1991) 172 CLR 84 at 116-117, 143-144, 163-164.

80 Including any implication which, with respect to "territory courts" may arise from the reasoning in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

81 (1994) 181 CLR 548 at 561.

VI CONCLUSION

- 83 The application for habeas corpus should be dismissed with costs. It is, in the circumstances, unnecessary to determine the issues, canvassed in oral argument, as to whether, in any event, habeas corpus would be the appropriate remedy.

84 KIRBY J. These proceedings involve a direct challenge to previous holdings of this Court. The holdings in question concern the relationship between the power conferred on the Federal Parliament by s 122 of the Constitution to make laws for the government of the Territories and the requirements of, and implications within, Ch III concerning the Judicature.

85 There are few constitutional problems in Australia more vexing than these. Few have led to answers so intellectually unsatisfying. Few have produced results more bizarre⁸². Few have given rise to so many judicial regrets about the lack of a coherent doctrine⁸³ and the consequent "disunity in the judicial system of Australia" which "arises from the separation of federal, State and territorial jurisdictions"⁸⁴.

86 Occasionally, judges⁸⁵ and writers knowledgeable about the Constitution⁸⁶ have contemplated wistfully a return to the simple words of that document unencumbered by the judicial elaboration which has taken this Court, and the nation, away from the text. Over the years this Court has attempted, to some extent, to return to the constitutional wording: rejecting, confining or doubting the initial decisions⁸⁷ which treated s 122 as if it were not subject at all to the restrictions expressed in other parts of the Constitution⁸⁸. Yet whenever an attempt has been made to persuade the Court to reconsider past holdings said to

82 Submissions for the Australian Capital Territory and the Northern Territory; cf Hopper, "Territories and Commonwealth Places: The Constitutional Position" (1999) 73 *Australian Law Journal* 181 at 201, 210.

83 *Spratt v Hermes* (1965) 114 CLR 226 at 265 per Menzies J; cf *Northern Territory v GPAO* (1999) 73 ALJR 470 at 521, par [257] per Hayne J; 161 ALR 318 at 388.

84 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 613 per Windeyer J.

85 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Falconer* (1971) 125 CLR 591 at 615 per Walsh J.

86 Renfree, *The Federal Judicial System of Australia*, (1984) at 712. See also "Notes and Comments", (1963) 36 *Australian Law Journal* 458.

87 Especially *R v Bernasconi* (1915) 19 CLR 629.

88 Howard, *Australian Federal Constitutional Law*, 3rd ed (1985) at 525-526.

be illogical, impractical and even of doubtful constitutional validity⁸⁹, the Court has usually drawn back. Sometimes it has seemed less convinced about the correctness of the decisions than about a need to avoid unsettling constitutional doctrine upon which the arrangements of government in Australia have been based⁹⁰.

- 87 The key to a proper approach to the present application is to be found in an observation of Windeyer J in *Victoria v The Commonwealth*⁹¹:

"I have never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the *Engineers' Case*⁹² as the correction of antecedent errors or as the uprooting of heresy. ... [I]n 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs."

Each generation of Australians reads the Constitution in the light of the meaning of its words and the requirements of its structure as understood from time to time⁹³. This is inherent in the giving of meaning to a constitution as an instrument of government. It is why a search for the subjective intentions of the framers may not fetter the present and the future to the distant past⁹⁴.

89 See eg *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 560 per Toohey J, 568 per Gaudron J, 613-614 per Gummow J, 652-658 my own reasons.

90 *Spratt* (1965) 114 CLR 226 at 257 per Kitto J, 265 per Menzies J.

91 (1971) 122 CLR 353 at 396.

92 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

93 *McGinty v Western Australia* (1996) 186 CLR 140 at 230 per McHugh J; cf *Ex Parte Professional Engineers' Association* (1959) 107 CLR 208 at 267-268 per Windeyer J; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 177 per Deane J; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 850 per McHugh J, 878 my own reasons; 163 ALR 270 at 285-286, 323-324; *Sue v Hill* (1999) 73 ALJR 1016 at 1027 per Gleeson CJ, Gummow and Hayne JJ, contrast 1076 per Callinan J; 163 ALR 648 at 662-663, contrast 730-731.

94 cf Posner, "The Problematics of Moral and Legal Theory", (1997) 111 *Harvard Law Review* 1637 at 1708; Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (1997) at 40, 44, 47.

88 When today we look at the Constitution, we see its language free of old impediments and problems⁹⁵. The question is posed: are we as free today, as the Court felt itself in the *Engineers Case*⁹⁶, to throw off the holdings of the past, not because they were wrong when made but because, read in a new light, the Constitution can now be seen to bear a different meaning⁹⁷? In my view we are. It is time to return to the language and purpose of the Constitution. The Territories are part of the Federation. Territory courts are federal courts. Their judges must have the security of tenure of federal judges.

The facts

89 In January 1989, Mr Colin Winchester, a senior police officer, was murdered in the Australian Capital Territory (ACT). The offence of murder was then provided for by s 18 of the *Crimes Act* 1900 (NSW) which had effect in the ACT by virtue of laws made by the Parliament⁹⁸. In December 1992, Mr David Harold Eastman (the applicant) was committed for trial on a charge of murdering Mr Winchester. In March 1993, the Director of Public Prosecutions of the ACT (the second respondent) signed an indictment, with a single count of murder, naming the applicant. It was filed in the Supreme Court of the ACT.

90 For the purpose of the trial, which began in May 1995, the Supreme Court was constituted by the Hon K J Carruthers and a jury. The former was not a permanent judge of the Supreme Court⁹⁹. He was a person who had been a judge of a superior court of record of a State, namely the Supreme Court of New South Wales. By a commission dated 3 April 1995, signed by the Deputy Chief Minister and Attorney-General for the ACT, he was appointed an acting judge of the

95 Such as the requirement of trial by jury of native peoples in the Territory of Papua considered in *Bernasconi* (1915) 19 CLR 629, or the effective provision of life tenure to magistrates in federal territories considered in *Spratt* (1965) 114 CLR 226 at a time when most magistrates were public servants and had no legal qualifications.

96 (1920) 28 CLR 129.

97 Mr R G Menzies, later Prime Minister, recounted how, when counsel in the *Engineers Case*, Starke J interrupted his argument based on the Court's past authority to declare that it was "a lot of nonsense". Menzies agreed but explained that he was obliged by the holdings of the Court to put it. He asked, and was given leave, to advance fresh arguments which eventually succeeded. See Menzies, *Central Power in the Australian Commonwealth*, (1967) at 38.

98 *Seat of Government Acceptance Act* 1909 (Cth), s 6; *Seat of Government (Administration) Act* 1910 (Cth), ss 3, 4.

99 *Australian Capital Territory Supreme Court Act* 1933 (Cth), s 7. See now *Supreme Court Act* 1933 (ACT), s 4(1).

Supreme Court of the ACT for the period from 1 May 1995 to 22 December 1995. Such appointment was purportedly made under the law of the Territory¹⁰⁰. The appointment was thus not for the term expiring on the appointee's attaining an age as contemplated by the provisions of the Australian Constitution governing the appointment of judges to other "courts created by the Parliament"¹⁰¹. Nor did the appointment purport to be made "by the Governor-General in Council" as required by the same provision¹⁰².

91 On 3 November 1995 the jury in the applicant's trial returned a verdict of guilty. The applicant was convicted. A determinate sentence was refused. Carruthers AJ sentenced him to life imprisonment¹⁰³. The applicant appealed from the conviction and sentence to the Federal Court of Australia¹⁰⁴. The Full Court of that Court dismissed his appeal¹⁰⁵. The applicant then applied to this Court for special leave to appeal on grounds related to his alleged unfitness to stand trial. That application has been referred to a Full Court of this Court¹⁰⁶. Directions were given that the application for special leave should be heard immediately after the hearing of the present application. That application was reserved to be argued before a Full Court¹⁰⁷, as indeed it was. It awaits determination.

92 In form, the present proceedings ask this Court, in the exercise of its original jurisdiction, to issue a writ of habeas corpus addressed to the first

100 *Supreme Court Act* 1933 (ACT), s 4A. The Act was renamed and the provisions renumbered pursuant to *Legislation (Republication) Act* 1996 (ACT).

101 Constitution, s 72.

102 Constitution, s 72(ii).

103 *Crimes Act* 1900 (ACT), s 12(2).

104 *Federal Court of Australia Act* 1976 (Cth), s 24(1)(b).

105 *Eastman v The Queen* (1997) 76 FCR 9.

106 By order of Gaudron J and myself on 12 February 1999.

107 Such order was made by me on 7 December 1998. See High Court Rules O 55 r 2.

respondent¹⁰⁸. Habeas corpus is not a writ named in the Constitution¹⁰⁹. It is provided for in a law made by the Parliament. It is sought here in a matter arising under the Constitution and involving its interpretation¹¹⁰. No issue was raised as to its availability if the grounds were established¹¹¹.

93 After the commencement of the proceedings, the applicant was moved from the Goulburn Correctional Centre to another place of detention in New South Wales. As agreed by the parties, nothing turns on this. The order of the Supreme Court, or of Carruthers AJ, purporting to certify to the conviction and sentence of the applicant was not exhibited. However, the warrant for removal of the applicant to the custody of the first respondent was included in this Court's papers. It is stated as being made pursuant to the *Removal of Prisoners (Australian Capital Territory) Act* 1968 (Cth). The warrant recites that the applicant had been "duly convicted" before the Supreme Court. It is that proposition which the applicant challenges.

94 The applicant contends that the Supreme Court is a "court created by the Parliament" within the meaning of s 72 of the Constitution; that the appointment of a person as a judge of that court for a term other than one expiring on his attainment of an age specified by law contravened s 72; that the appointment of the Hon K J Carruthers as an acting judge was not validly made; that the said "acting judge" had no authority to preside over his trial, to record a conviction of him or impose a sentence upon him; and that, accordingly, his imprisonment was unlawful, entitling him to immediate release. If the foregoing premises were established, the conviction which the Full Court of the Federal Court confirmed, would have no validity.

95 To make good his application, the applicant acknowledged that he would have to persuade this Court to overrule two unanimous holdings which stand in his path. To the extent that leave was required to permit him to argue the incorrectness of the holdings in those cases¹¹², the applicant sought that leave.

108 See *Judiciary Act* 1903 (Cth), s 33(1)(f); cf Renfree, *The Federal Judicial System of Australia*, (1984) at 332.

109 Constitution, s 75(v) names Mandamus, prohibition and injunction.

110 Constitution, s 76(i). See also s 76(ii).

111 cf *Re Superintendent of Goulburn Training Centre; Ex parte Pelle* (1983) 57 ALJR 679; 48 ALR 225; *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 68 ALJR 668; 123 ALR 478.

112 cf *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-440; *Northern Territory v* (Footnote continues on next page)

96 The first decision in the applicant's way is *Spratt v Hermes*¹¹³. That case decided that the appointment of a magistrate in the ACT was not governed by s 72 of the Constitution. A magistrate could therefore hear and determine a charge of an offence against the *Post and Telegraph Act* 1901 (Cth), although he had not been appointed in accordance with s 72 of the Constitution. Some of the Justices of this Court held that this conclusion followed from a construction of the phrase "the other courts created by the Parliament" in s 72. They concluded that these words referred only to "federal courts". They did not include "Territory courts", ie those created wholly under s 122 of the Constitution. The Court of Petty Sessions of the ACT, of which the magistrate was a member¹¹⁴ was such a "Territory court"¹¹⁵. Other Justices¹¹⁶ held that the administration of justice in the Territories, including the ACT, was not governed by Ch III at all. One Justice¹¹⁷ considered himself bound by authority to uphold the appointment of the magistrate, whilst rejecting the proposition that the Territories were outside "the Federal System"¹¹⁸.

97 The second decision¹¹⁹ which the applicant contested was an extension of the first. It arose out of a failed attempt to persuade this Court to reconsider the correctness of the decision in *Spratt*. This Court held that the Supreme Court of the ACT was not a federal court, nor a court exercising federal jurisdiction within the meaning of s 73 of the Constitution. Accordingly, no appeal lay as of right from that court to this Court. The only foundation for an appeal would thus be legislation affording the right. By inference, such legislation might be amended or repealed, leaving litigants in the Territories wholly outside the appellate judicial system of the Commonwealth. Cases in the Territories would be dependent for appellate supervision of Territory courts upon the limitations and vagaries of

Mengel (1995) 185 CLR 307 at 338; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 673.

113 (1965) 114 CLR 226.

114 (1965) 114 CLR 226 at 228. Jurisdiction was exercised under the Court of Petty Sessions Ordinance (No 2) 1930 (ACT).

115 (1965) 114 CLR 226 at 242-243 per Barwick CJ, 274 per Windeyer J, 280-281 per Owen J.

116 (1965) 114 CLR 226 at 250-251 per Kitto J, 263-264 per Taylor J.

117 (1965) 114 CLR 226 at 265 per Menzies J.

118 (1965) 114 CLR 226 at 269-270 per Menzies J.

119 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

legislation, as from time to time enacted, and grounded, ultimately, in s 122 of the Constitution, not Ch III.

- 98 During oral argument, the applicant conceded that his challenge also questioned opinions expressed in a third decision, *R v Bernasconi*¹²⁰. That decision held that s 80 of the Constitution (requiring that a trial on indictment of any offence against a law of the Commonwealth shall be by jury) had no application to a law made under s 122 of the Constitution for the government of the Territory of Papua. *Bernasconi*, although concerned with a specific issue not raised in the present applicant's trial (for it was had by jury) is the original font of the line of authority that "Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories"¹²¹. Ever since those words were written, Justices of this Court have been attempting to circumvent them or to confine their application. But they lie at the core of the idea of "disjoinder", from Ch III of the Constitution, of Territory courts and the Territory judicial power. *Spratt* and *Falconer* are simply two examples of special significance to the present proceedings¹²².

The issues

- 99 Many issues were argued by the parties and by the interveners¹²³ to support the second respondent. Although it is necessary to deal with large questions in responding to the applicant's arguments, it is desirable that the issues should be confined to those which must be answered in order to reach a conclusion disposing of these proceedings. In my view, such issues are:

1. Is the source of constitutional power to create the Supreme Court of the ACT found within s 52(i) of the Constitution or in s 122?
2. If the source is s 122, is any such court so created a "federal court" for the purposes of ss 71 and 72 of the Constitution so that its judges must be appointed by the Governor-General in Council and for a term expiring on the appointee's reaching a specified age, as required by s 72?

120 (1915) 19 CLR 629.

121 (1915) 19 CLR 629 at 635 per Griffith CJ.

122 cf *The Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545 (PC).

123 The Commonwealth, South Australia and Western Australia, the Northern Territory and the ACT.

3. If so, is it nonetheless available to the Territory legislature, acting pursuant to the measure of self-government afforded to it by the Parliament, to create a court outside the Judicature in Ch III and to provide for appointment to such a court of an acting judge appointed by the Executive of the ACT? Is the Supreme Court of the ACT such a court?
4. If the applicant appears otherwise to be entitled to relief on the answers to the foregoing, should relief be denied on the footing (a) that this Court will not reopen its past authority which stands in the way of conclusions favourable to the applicant; or (b) that a writ cannot, or should not, be granted in the circumstances because the order warranting the applicant's due conviction at his trial is ostensibly one of a superior court of record and one given by a de facto judicial office-holder, namely an acting judge of the Supreme Court of the ACT?

100 A number of issues, subordinate to those just stated, were raised. Some of them concerned the practical ramifications of a decision favourable to the applicant in the different constitutional settings of the Northern Territory and the external Territories when compared to that of the ACT. The potential seriousness of the implications of the decision for the judicial arrangements followed for many years in those Territories, including the ACT, cannot be doubted. Such implications are relevant to the question whether the Court's past authority should be reopened. Logically, that question stands at the threshold of reasoning to a conclusion in the matter. But because the arguments for reopening of past authority cannot be appreciated fully without canvassing the merits of the application, it is convenient to deal with them as issue 4(a). Neither the second respondent nor the Commonwealth sought to advance arguments based on issue 4(b). It was, however, addressed by some of the interveners¹²⁴. The applicant contested the entitlement of interveners to raise such issues. Because the arguments were developed it is proper that they be considered. But, it is not, in my view, proper to explore the options which might be available to the Commonwealth and the Territories to repair the practical consequences which would flow from the reopening of past authority and the establishment of a new constitutional principle concerning the relationship of s 122 and Ch III of the Constitution. Nor, in the approach which I favour, is it essential to explore the many other subordinate questions which were addressed during argument¹²⁵. It will be sufficient if the issues stated above are decided. They are large enough.

124 Submissions for South Australia and Western Australia.

125 Such as whether the *Removal of Prisoners (Territories) Act* 1923 (Cth) and (ACT) applies to warrants of the Supreme Court of the ACT as established as a Territory court and whether Quo Warranto or some remedy other than Habeas Corpus, would have been more appropriate to the enforcement of the applicant's rights.

History of the ACT and its Supreme Court

101 Before turning to the first issue, it is necessary to say something about the establishment of the ACT and the provision for its judicial arrangements. The idea of creating a Territory for the seat of government in Australia was borrowed from the precedent provided by the Constitution of the United States of America¹²⁶. Two provisions, relating to the seat of government of the Commonwealth were contained in the Australian Constitution. The first afforded the Parliament, subject to the Constitution, exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to "[t]he seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes"¹²⁷. The second (contained amongst miscellaneous provisions at the end of the Constitution) provided¹²⁸, relevantly, that "[t]he seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney."

102 The place eventually chosen for the seat of government was near a small settlement in New South Wales originally established by British immigrants in 1820 close to the town of Queanbeyan. An agreement of October 1909 between the Commonwealth and the State of New South Wales was given effect in legislation by which the Parliament of the State surrendered¹²⁹, and the Parliament of the Commonwealth accepted¹³⁰, the territory known initially as the Territory for the Seat of Government. By the latter Act all laws in force in the Territory immediately before the proclaimed day continued in force¹³¹ and jurisdiction in the Territory was conferred upon this Court¹³². By the *Seat of Government (Administration) Act* 1910 (Cth), provision was made¹³³ for inferior courts of New

126 Art I s 8 cl 17. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, (1997) at 286-287. As to the position in Canada (Ottawa), see McConnell, *Commentary on the British North America Act*, (1977) at 52-53.

127 Constitution, s 52(i).

128 Constitution, s 125.

129 *Seat of Government Surrender Act* 1909 (NSW), s 6.

130 *Seat of Government Acceptance Act* 1909 (Cth), s 6.

131 s 6.

132 s 8; cf *Falconer* (1971) 125 CLR 591 at 617 per Walsh J.

133 s 11.

South Wales to have and exercise jurisdiction in the Territory. These arrangements were changed with the passage of amendments to the *Judiciary Act* 1903 (Cth) in 1927¹³⁴. They continued the jurisdiction of this Court and of its Justices. However, there were difficulties in these arrangements and Dixon J drew attention to them in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*¹³⁵.

103 In response to these difficulties, and doubtless out of recognition of the growth of the Canberra community and of the business of this Court, the Parliament enacted the *Australian Capital Territory Supreme Court Act* 1933 (Cth). As originally created, that Court envisaged the appointment of a Chief Justice and the other judges by the Governor-General¹³⁶. To be eligible for appointment, the judges were required to possess the then stated constitutional qualifications for federal judges. This position was maintained until after the decision in *Falconer*¹³⁷. In consequence of this Court's holding in that case, that the tenure of office of federal judges was inapplicable to judges of the Supreme Court of a Territory, the legislation was amended. As amended, it provided that a judge was to hold office until he attained the age of 70 years¹³⁸. A cognate measure was enacted to amend the *Northern Territory Supreme Court Act* 1971 (Cth) in like manner.

104 Not long after these statutory changes were made, the electors of the Commonwealth approved the amendment of s 72 of the Constitution. The constitutional alteration abolished the requirement which this Court had inferred from the language of the Constitution, that the judges of this Court and other federal courts must enjoy life tenure¹³⁹. It fixed as a maximum age for those appointed to this Court, or any court created by the Parliament, 70 years¹⁴⁰. For a

134 s 30B.

135 (1929) 42 CLR 582 by reference to *R v Bernasconi* (1915) 19 CLR 629; *Porter v The King*; *Ex parte Yee* (1926) 37 CLR 432; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

136 s 7.

137 (1971) 125 CLR 591.

138 *Australian Capital Territory Supreme Court Act (No 2)* 1971 (Cth), s 6; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1971, 1732 at 1733.

139 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434; cf *Falconer* (1971) 125 CLR 591 at 611 per Windeyer J.

140 *Constitution Alteration (Retirement of Judges)* 1977 (No 83 of 1977).

time, then, the requirements for appointees as judges of the Supreme Court of the ACT coincided once again with the constitutional prescription. They were made to a court created by the Parliament, by a commission signifying appointment by the Governor-General in Council and prescribing a term of service expiring, as the Constitution now permits, upon the judge's attaining the age of 70 years.

105 So the law stood at the time the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) ("the Self-Government Act") was enacted. That Act afforded a measure of self-government to the ACT¹⁴¹. The Self-Government Act originally omitted detailed provisions concerning the judiciary of the Territory. But it did provide¹⁴² that certain specified laws¹⁴³, including the *Australian Capital Territory Supreme Court Act* 1933 (Cth) should be taken as an "enactment". This was a word used in the Self-Government Act to mean, ordinarily, a law made by the Legislative Assembly for the ACT ("the Assembly") established by s 8 of that Act¹⁴⁴. Yet for four years the Supreme Court of the ACT remained the court as created by the 1933 Act. This Court was informed that all but one of the resident judges of the Supreme Court of the ACT presently in office, including the Chief Justice, hold commissions dating from the period before 1992.

106 Further steps were taken with respect to self-government in the ACT as from 1 July 1992. The *ACT Supreme Court (Transfer) Act* 1992 (Cth) ("the Transfer Act") was enacted by the Parliament. It inserted into the Self-Government Act a new Pt VA ("The Judiciary"). The first provision of this Part, s 48A(1), provides that the Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory. By s 48A(2) it is envisaged that the Supreme Court may have further jurisdiction as conferred "by any Act, enactment or Ordinance, or any law made under any Act, enactment or Ordinance". Provision is then made, by s 48B, for the retirement age of judges and of the Master of the Supreme Court. Relevantly, any change to the Act might not affect the term of office of a person appointed before the commencement of the

141 cf Self-government and Public Finance in the Australian Capital Territory: Report from the Joint Committee on the Australian Capital Territory December 1974 (1975). No question as to the validity of the self-government legislation was argued in this application; cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 121 per Evatt J; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248.

142 s 34(2). By s 34(3) that sub-section did not apply to the *Australian Capital Territory Supreme Court Act* 1933 (Cth) until after 1 July 1992 or until regulations were earlier made. In the event the regulations were not earlier made. The section was amended by the *ACT Supreme Court (Transfer) Act* 1992 (Cth), s 7.

143 Self-Government Act, Sched 2.

144 Self-Government Act, s 3.

enactment without that person's consent in writing¹⁴⁵. Provision is made for removal of a judicial officer from office by the Executive of the ACT in writing¹⁴⁶ and following procedures different from those required by s 72 of the Constitution¹⁴⁷. By a further provision of the Transfer Act, there was inserted in the *ACT Self-Government (Consequential Provisions) Act* 1988 (Cth) a section designed to protect the holders of judicial office in the Supreme Court of the ACT immediately before 1 July 1992. Such persons are to hold their office on terms and conditions no less favourable than those applicable to a judge of the Federal Court of Australia. The foregoing provisions of a law of the Parliament are entrenched, in effect, as conditions for the transfer of legislative responsibility for the Supreme Court of the ACT to the Assembly.

107 In pursuance of that transfer and of a machinery enactment¹⁴⁸, the Office of Parliamentary Counsel for the ACT reissued a "consolidation" enactment of the ACT, the short title of which is *Supreme Court Act* 1933 (ACT). It comprises a republication, with renumbering of the sections of the former *Australian Capital Territory Supreme Court Act* 1933 (Cth)¹⁴⁹. In 1993 the latter Act was, in turn, amended by the Assembly by the addition of the section permitting the Executive of the ACT to appoint acting judges of the Supreme Court¹⁵⁰.

108 Because of the terms of s 72 of the Constitution, no acting judges may be appointed to any federal court¹⁵¹. No acting judges were contemplated in the former legislation as it governed the Supreme Court of the ACT. This was so

145 Self-Government Act, s 48B(2).

146 Self-Government Act, s 48D(b).

147 The procedures involve investigation by a new Judicial Commission for the Australian Capital Territory envisaged in s 48C of the Self-Government Act and a decision of the Legislative Assembly of the ACT in place of the action of the Governor-General on an address from both Houses of Parliament in the same session provided by s 72(ii) of the Constitution.

148 *Legislation (Republication) Act* 1996 (ACT).

149 Thus the former s 6 of the federal Act of 1933 is renumbered as s 3. The former s 7 providing for the appointment of a Chief Justice and Judges by the Governor-General is renumbered s 4 of the ACT enactment and provides for appointment by the Executive of the ACT.

150 *Supreme Court (Amendment) Act (No 2)* 1993 (ACT), s 6.

151 Constitution, s 72 requires that appointment be to a specified age of the appointee not for a specified period of office.

notwithstanding the decision of this Court in *Falconer*¹⁵² removing any constitutional link between Territory and federal courts. On the other hand, in the Northern Territory legislation had long permitted the appointment of acting judges. Many such judges have held office in that Territory, presumably in reliance upon the statements in *Bernasconi*, *Spratt* and *Falconer* and the theory that "Territory courts" fell wholly outside the constraints of Ch III of the Constitution¹⁵³.

- 109 The new provision of the *Supreme Court Act* 1933 (ACT) limited the appointment as an acting judge for a period not exceeding twelve months, as specified in the appointee's commission¹⁵⁴. According to information provided to this Court, three such acting appointments have been made. They were those of Crispin AJ (before his permanent appointment), Hogan AJ (formerly Master of the Supreme Court) and Carruthers AJ. The last appointment was specifically for the purpose of securing a judge, additional to the Court's normal establishment, to preside over the applicant's trial. Different views may be held about the desirability of the appointment of acting judges having regard to the effect which such appointments may have, or be seen to have, upon the independence of the judiciary concerned. In some jurisdictions, such as in Canada, challenges to such appointments have been made by reference to general constitutional standards¹⁵⁵. The present application was not argued by reference to general considerations but strictly on the requirements of the Australian Constitution. In particular, it was not argued that acting appointments of the kind provided for in, and made under, the *Supreme Court Act* 1933 (ACT) as it now appears, would render that Court (either generally or in a particular case) an unsuitable receptacle for the conferral by the Parliament of federal jurisdiction¹⁵⁶. In many State courts in recent years, including the Supreme Courts, acting judges have been appointed. Such State courts are not subject to the express limitations stated in s 72 of the Australian Constitution. Whether any other constitutional difficulty is presented by such acting appointments is a question which does not arise on this application.

152 (1971) 125 CLR 591.

153 See now *Supreme Court Act* (NT), s 32(2)(b).

154 *Supreme Court Act* 1933 (ACT), s 4A(2) inserted by *Supreme Court (Amendment) Act* (No 2) 1993 (ACT), s 6.

155 *Valente v The Queen* [1985] 2 SCR 673; Reference re Territorial Court Act (Northwest Territories) [1997] NWTR 377.

156 See by analogy *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. Nor did the application raise any question as to whether the principles enunciated in *Kable* have application, as such, to a "Territory court". See Hopper, "Territories and Commonwealth Places: The Constitutional Position", (1999) 73 *Australian Law Journal* 181 at 201.

110 For the Territories, looking at exceptional judicial needs that can occasionally arise with major implications for their limited resources (such as the very long trial of the applicant) the appointment of acting judges would doubtless be seen as analogous to the facility regularly employed in many of the Australian States but with added practical justifications deriving from the circumstances of the Territories. However, the Territories are not, constitutionally speaking, States. Indeed, according to an opinion expressed in this Court, the ACT may never become a State¹⁵⁷. Accordingly, the question is not whether the appointment of Carruthers AJ for the applicant's trial was desirable or justifiable. It is, and is only, whether it was constitutionally permissible. For the second respondent and the intervening States and Territories the appointment was lawful as a measure permitted to a Territory legislature enjoying a high degree of self-government granted to it by the Parliament under s 122 of the Constitution. For the applicant, it was not permissible because, try as it might, the Territory could not escape its constitutional character. This bound it to the limitations imposed by Ch III of the Constitution which govern the federal judiciary and which forbid the appointment of acting judges.

The source of power: s 52(i) or s 122?

111 The significance of the first issue is this: If the true constitutional foundation for the government of the Territory in question in these proceedings is not s 122 of the Constitution (as has been held and commonly believed or assumed) but s 52(i), there could be no doubt that the only judiciary which could exercise jurisdiction in the Territory would be one established under, and conforming to, Ch III. So much was conceded for the second respondent. So much appears from the structure of the Constitution. Section 52(i) appears in Ch I amongst the grants of legislative power. There is an express statement in s 52, as in s 51, that the grant of power made there is "subject to this Constitution". That phrase can only mean subject to other chapters of the Constitution, including Ch III.

112 The question concerning the source of power was argued in *Spratt*. This Court there decided, unanimously, that a law for the government of the ACT, such as that creating a Court of Petty Sessions for the Territory, was made under s 122 and not under s 52(i) of the Constitution¹⁵⁸. However, adherents to the contrary view have included such distinguished jurists as Dixon J¹⁵⁹. Obviously, the

¹⁵⁷ *Capital Duplicators* (1992) 177 CLR 248 at 273.

¹⁵⁸ (1965) 114 CLR 226 at 241 per Barwick CJ, 257-259 per Kitto J, 262-264 per Taylor J, 271 per Menzies J, 273 per Windeyer J, 281-282 per Owen J.

¹⁵⁹ See *Laristan* (1929) 42 CLR 582 at 585; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 83; cf Ewens, "Where is the Seat of Government?", (1951) 25 *Australian Law Journal* 538.

question is not beyond argument. Therefore, despite *Spratt* and its affirmation in *Falconer*¹⁶⁰ and still more recent authority of the Court¹⁶¹, it is necessary, in responding to the present application, to re-examine the question as a matter of principle. This must be done by reference to the constitutional text.

113 It can certainly be said, with Fox J in *Golden-Brown v Hunt*¹⁶², that "[t]he relationship between s 52(i) and ... s 122 has not yet been worked out"¹⁶³. Clearly, the provisions of s 52(i) must be given a meaning and an operation appropriate to a grant of legislative power appearing in a constitution. Moreover, the grant in question exists amidst other powers considered sufficiently important to confer "exclusive power" upon the Parliament. As well, whatever were the original understandings of the adjacent grant of power to make laws with respect to "all places acquired by the Commonwealth for public purposes", the more recent decisions about that portion of s 52(i) have emphasised the operation of that subsection as a large grant of power¹⁶⁴. The context does not, therefore, suggest that s 52(i) is an ephemeral, narrow or insignificant grant of power. Quite the contrary.

114 The fact that a large purpose was envisaged for s 52(i) may also seem in keeping with the original intention of providing for it. This grew out of the decision to create a "seat of government". Necessarily, this would require the creation of a territory, but one peculiar and special, as s 125 of the Constitution envisaged. Against the foreign precedents which gave birth to the idea, and the provisions of ss 52(i) and 125, it is perhaps unsurprising that early opinions favoured the view that, so far as lawmaking for the government of the territory set aside for the seat of government was concerned, it was to be sourced to the specific grant of constitutional power (s 52(i)) and not to the general (s 122)¹⁶⁵. This may also explain why those who drafted and enacted the original legislation of the Parliament dealing with the affairs of that territory (including its judicial affairs)

160 (1971) 125 CLR 591.

161 See eg *Svikart v Stewart* (1994) 181 CLR 548.

162 (1972) 19 FLR 438 at 443.

163 This was approved in *Capital Duplicators* (1992) 177 CLR 248 at 273.

164 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 638, 669-670, 673; cf Hopper, "Territories and Commonwealth Places: The Constitutional Position", (1999) 73 *Australian Law Journal* 181 at 204-206, 208-209.

165 *Opinions of Attorneys-General of the Commonwealth of Australia* (1981), vol I, 429-430; cf Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 982 and opinion of R R Garran, 19 January 1905 in *Opinions of Attorneys-General of the Commonwealth of Australia* (1981), vol 1, 243 at 247.

did so in terms of legislation bearing express reference to the seat of government¹⁶⁶. The adoption, twenty years later, of the name "Australian Capital Territory" for the territory chosen for the seat of government, could not alter the constitutional character of that territory.

115 To the argument that s 125 of the Constitution envisaged that the seat of government would be "within territory", contemplating a larger geographical district requiring governance, proponents of this view responded that s 52(i), together with the implied incidental power, would afford the Federal Parliament more than adequate legislative powers to make laws for the internal administration of the seat of government and that part of its territory which fell outside the seat of government as such. The word "within" in s 125 could be construed to mean "wholly within". The recognition of a separate and distinctive basis for legislative power with respect to this territory would reflect the particular concern of the whole Commonwealth with the seat of government of the federation. It would be consistent with the inclusion of s 122 in Ch VI of the Constitution ("New States"). Section 122 territories, like the analogous territories contemplated in the United States Constitution, were those that were on the path to statehood. But this was something impossible or extremely difficult to envisage in the case of the ACT given its special character and purpose¹⁶⁷.

116 To the argument that such a view would disqualify those resident in the ACT from representation in the Houses of the Federal Parliament (only permitted in the exercise of the powers granted by s 122) the answer was given that this was indeed the purpose of the Constitution. Its object was to place the territory for the seat of government above the controversies of federal politics. It would be a haven of neutrality. That was undoubtedly the original view taken in the case of the District of Columbia in the United States. It was not until 1961, by the twenty-third amendment to the United States Constitution, that the residents of that District obtained the right to vote in presidential elections. According to this argument, a similar amendment would be required to provide validly for the representation in the Federal Parliament of representatives for the ACT whose previous participation, by inference, was invalid because wrongly based on s 122¹⁶⁸.

166 *Seat of Government Acceptance Act* 1909 (Cth); *Seat of Government (Administration) Act* 1910 (Cth).

167 *Capital Duplicators* (1992) 177 CLR 248 at 273. I do not stay to explore the possibility of statehood for the ACT from which the seat of government, as such, was excised.

168 *Western Australia v The Commonwealth* (1975) 134 CLR 201; *Queensland v The Commonwealth* (1977) 139 CLR 585.

117 In addition to the foregoing arguments, the applicant relied upon dicta of this Court which drew a distinction between the States and Commonwealth, on the one hand, and the Territories on the other. The Territories were somehow outside the federal system constituted by the Commonwealth and the States. So far as that system was concerned, other territories might be mere dependencies of the Commonwealth. But the territory for the seat of government was an integral part of the federal system. Indeed, it was the centre of that system. It was thus properly governed by the Parliament of the Commonwealth under the exclusive powers afforded to it for that purpose by the Constitution. It was thus also subject to the federal Judicature¹⁶⁹.

118 For a time, I found the arguments in favour of identifying the source of lawmaking for the ACT as s 52(i) rather than s 122 persuasive. Having created a special seat of government (and necessarily provided for a territory within which it would be found) some form of judicial power would be essential. At least it would be so for those matters relevant specifically to the seat of government as such. Once this premise was accepted, the need to provide for a judiciary for the seat of government within Ch III seemed compelling. However, for a number of reasons, I have concluded that, on this issue, the Court should adhere to its established authority. My reasons are as follows.

The source of legislative power is s 122

119 First, the word "within" in s 125 is difficult to reconcile with an exact identity between the "seat of government" and the "territory" within which it is to exist. That preposition indicates a differentiation between the one and the other. It is only with respect to the former that the Parliament of the Commonwealth enjoys exclusive legislative powers under s 52(i). So far as the ACT is concerned, it attracts, as every other Territory does, undistinguished in variety, the plenary powers of s 122. The fact that the section appears in a chapter titled "New States" is scarcely of much moment. It is hardly imaginable that the tiny island territories of the Commonwealth could contemplate statehood or, for that matter, that the Jervis Bay territory (now disjoined from the ACT)¹⁷⁰ could be regarded as a candidate for separate statehood under the Constitution with all that that involves.

169 cf *Laristan* (1929) 42 CLR 582 at 584; *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 550; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 83; cf Ewens, "Where is the Seat of Government?", (1951) 25 *Australian Law Journal* 532 at 538.

170 For the early history of the Jervis Bay Territory, see Renfree, *The Federal Judicial System of Australia*, (1984) at 748. The Territory has now been excised from the ACT. See *ACT Self-Government (Consequential Provisions) Act* 1988 (Cth), s 32 (Footnote continues on next page)

120 Secondly, as was pointed out in *Svikart v Stewart*¹⁷¹, the power to make laws with respect to the seat of government seems to be concerned with the political and constitutional aspects proper to such a concept rather than the government of the territory in which the seat of government exists. Thus, the making of a law with respect to health or education or most aspects of the criminal law in the ACT would appear unconnected with the seat of government *as such*. Given the assumption that the seat of government is not coterminous with the territory in which it is found, it is necessary then to have resort to the plenary power granted in respect of territories for this purpose. At least that appears a more natural reading of the two provisions than endeavouring to squeeze the multitude of laws necessary for the government of the ACT as a Territory into the concept of the incidental implications within the grant of power with respect to the seat of government.

121 Thirdly, the foregoing conclusion is reinforced by the fact that the grant of power made by s 122 is to make laws for the government of any territory "surrendered by any State to and accepted by the Commonwealth". By s 125 that is precisely the way in which the Constitution envisaged that the territory, now known as the ACT, was to be acquired by the Commonwealth. The settled doctrine as explained by Windeyer J in *Spratt*¹⁷² should therefore be maintained. The power in s 52(i) is not redundant although, according to Windeyer J, it was "perhaps an unnecessary provision" being borrowed from the United States precedent¹⁷³. The provision of s 52(i) affords an additional source of legislative power specific to the capital of the federation, *qua* capital and seat of government¹⁷⁴. A clear majority of the Justices of this Court over the years, and most of the commentators who have written on the topic¹⁷⁵ have favoured the view that the constitutional source of the legislative power of the Federal Parliament to provide for the laws for the government of the ACT lies in s 122 and not in s 52(i). That view has not occasioned the controversy which has surrounded the alleged disjoinder of the Territory courts from the federal Judicature.

and Sched 5 repealing and amending *Jervis Bay Territory Acceptance Act* 1915 (Cth); cf generally *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608-609.

171 (1994) 181 CLR 548 at 572-573.

172 (1965) 114 CLR 226 at 278. See also at 241 per Barwick CJ.

173 (1965) 114 CLR 226 at 273.

174 (1965) 114 CLR 226 at 278. See also at 258 per Kitto J.

175 "Correspondence", (1973) 47 *Australian Law Journal* 344-345; Ewens, "Where is the Seat of Government?", (1951) 25 *Australian Law Journal* 532 at 535.

- 122 To the extent that it is necessary for the applicant to have leave to have this Court overrule the previous decisions on this point (a necessity that I doubt¹⁷⁶) I would grant such leave as the point is important and clearly arguable. However, in so far as those decisions stand for the proposition that s 122 is the source of legislative power to make laws for the government of the ACT, *Spratt*, *Svikart* and other decisions which have so held or assumed the law to be, should be reaffirmed. I would decide the first issue against the applicant.

Section 122 and Ch III of the Constitution

- 123 Section 122 empowers the Parliament to "make laws for the government of any territory". According to our ordinary understanding of "government" it includes the traditional tripartite division of governmental power: legislative, executive and judicial. Therefore, on the face of things, s 122 empowers the Parliament to make laws for the judiciary of a Territory.
- 124 Whereas the general grants of legislative power in ss 51 and 52 in Ch I of the Constitution are expressed to be "subject to this Constitution" and "with respect to" specified heads of power, there is no express limitation stated within s 122. The grant is made "for" the government of any territory. This appears to recognise what the necessities would otherwise suggest - a full and ample power to govern the territories as a dependency of the Commonwealth which was to enjoy entire governmental power over them. Doubtless in the early years of this century, imperial notions apt to the governance of dependent colonial territories having no immediate prospect of self-government coloured the views of readers concerning the nature of the constitutional power granted by s 122. Reflections of this view can be found in the reasons written in *Bernasconi*¹⁷⁷. Those reflections, which had the effect of substantially disjoining the government of the territories from the rest of the Constitution, including Ch III, remain with us long after imperial notions have otherwise been expelled from our constitutional thinking¹⁷⁸. The applicant challenges them as incompatible with the Constitution, read with today's eyes.
- 125 Apart from the large sweep of the language in s 122 itself, there are, it must be conceded, aspects of the text of Ch III which, as the cases point out, favour the view that a judiciary created for the territories under s 122 is unrestrained by the requirements for the Judicature envisaged in the provisions of Ch III. There is no express mention anywhere in Ch III of the Territories or of Territory courts or the

¹⁷⁶ *Ha v New South Wales* (1996) 70 ALJR 611 at 614; cf *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 per Deane J (diss).

¹⁷⁷ (1915) 19 CLR 629.

¹⁷⁸ *Sue v Hill* (1999) 73 ALJR 1016 at 1028, 1032-1034, 1036, 1049-1050; 163 ALR 648 at 665, 671-673, 675, 694-695.

judicial power of the Territories. At first glance, this might reinforce the separation of the Territories and the treatment of their courts within the four corners of s 122. On this view, such courts would be linked to the nation's court system only by legislative enactment, itself resting on s 122¹⁷⁹. The view that a Territory judiciary could be established outside the federal Judicature was not one peculiar to the Australian federation. It found support in court decisions of the United States where a like problem had presented¹⁸⁰. Of course, care must be taken in borrowing the opinions of overseas courts, given the peculiarities of different constitutional arrangements and the differing circumstances to which they must be applied¹⁸¹.

126 The functional importance of the Judicature provided for in Ch III, as the means of upholding the constitutional balance between the Commonwealth and the States, afforded a further reason which convinced many judges for a long time that the Territories were outside the protections afforded by the Constitution. Those protections include the appointment, tenure, remuneration and removal of federal judges. Reinforcement for the view that Territories were constitutionally disadvantaged, and that Australians living within them were deprived of rights otherwise enjoyed by fellow citizens under the Constitution, receives some support from the lack of a constitutionally guaranteed provision for their representation in the Federal Parliament¹⁸². In such a context, the exclusion of the courts of several Territories from the protections offered by Ch III might not seem so offensive.

127 The notion that persons within the Territories could similarly fall outside the protections of s 72 was intellectually justified by the view that the Judicature provided in Ch III was, constitutionally speaking, only needed to hold the balance between the Commonwealth and the States. The Territories, in their variety, and most of them being "outside" continental Australia, could be left to differing forms of Commonwealth rule. Such rule was sure to be benign because answerable to

179 *Mitchell v Barker* (1918) 24 CLR 365; *Mainka v Custodian of Expropriated Property* (1924) 34 CLR 297; *Porter v The King*; *Ex parte Yee* (1926) 37 CLR 432; *Edie Creek Pty Ltd v Symes* (1929) 43 CLR 53; *Spratt* (1965) 114 CLR 226; cf Renfree, *Federal Judicial System of Australia*, (1984) at 296; *Falconer* (1971) 125 CLR 591. See also "Recent Cases", (1971) 45 *Australian Law Journal* 366-368, 631-633.

180 *American Insurance Co v Canter* 26 US 511 (1828); *Ex parte Bakelite Corporation* 279 US 438 (1929); cf *O'Donoghue v United States* 289 US 516 (1933); *Palmore v United States* 411 US 389 (1973); *Spratt* (1965) 114 CLR 226 at 278.

181 In Art I s 8 cl 9 of the United States Constitution there is an express power to "constitute Tribunals inferior to the Supreme Court". That power is general as the subject matter and has been used to establish a range of legislative courts on a national basis as well as territory courts and courts for the District of Columbia; cf *Dynes v Hoover* 61 US 65 (1857).

182 Constitution, ss 7, 24, 25 and 26.

the Federal Parliament. If more constitutional protections were desired, the hope for them would lie in progression to statehood. The structure of the Constitution, its division into chapters and the treatment of s 122 in the separate Ch VI was therefore seen as reinforcing the impression that s 122 was divorced from Ch III which was addressed to the "federal" controversies as such. It could be expected that they would arise out of the provisions of Chs I and II as between the Commonwealth and the States. In *Northern Territory v GPAO*¹⁸³, McHugh and Callinan JJ listed the reasons for adhering to the view that "s 122 is not affected by the operation of Ch III". Their Honours' list was offered in the context of elucidation of the meaning of "federal jurisdiction". But most of the arguments mentioned are also relevant to the present applicant's contention that the past authority of this Court on that relationship is wrong and that, contrary to the past holdings, a Territory court is a federal court for the purpose of Ch III.

- 128 The Commonwealth supported the maintenance of the old doctrine, not only for reasons of authority but based on a proper analysis of the constitutional text. It cited the well known proposition of the Privy Council in the *Boilermakers' Case*¹⁸⁴:

"The legislative power in respect of the Territories is a disparate and non-federal matter."

- 129 The Commonwealth acknowledged that Ch III of the Constitution had some limited operation in relation to the Territories. Thus, even in *Spratt*, Barwick CJ could not accept that Ch III was totally divorced from territorial operation. For example, he suggested that this Court could entertain actions between residents of different States in relation to acts in a Territory and could grant the writs provided by s 75(v) of the Constitution to an officer of the Commonwealth located in a Territory¹⁸⁵. Yet although such application of Ch III to the Territories appeared to challenge the theory that they were "disparate and non-federal", the Commonwealth (supported by the second respondent and other interveners) urged the Court, rereading the Constitution, to come to the same conclusions as the Court

183 (1999) 73 ALJR 470 at 500-501, par [170]; 161 ALR 318 at 360-361. See also *Spratt* (1965) 114 CLR 226 at 242; *Falconer* (1971) 125 CLR 591 at 610; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 42.

184 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545 (PC); cf *Gould v Brown* (1998) 193 CLR 346 at 493-494, par [308]. For criticism see *Kruger v The Commonwealth* (1997) 190 CLR 1 at 170-171; *Northern Territory v GPAO* (1999) 73 ALJR 470 at 485-487, 491-493, 521; 161 ALR 318 at 338-340, 347-350, 388.

185 (1965) 114 CLR 226 at 241.

had done in the past, without necessarily embracing all of the reasons given in the earlier cases. Regrettably, I cannot do so.

The Constitution must be read as a whole

130 The first basic flaw in the logic of past authority lies in the view that because s 122 is found in Ch VI of the Constitution, it is somehow cut free of the requirements of Ch III. The practical reasons which led judges of earlier generations to come to this conclusion can be understood. But as a matter of construction of the Constitution, the view is not supportable. Recognition of the difficulties inherent in this view goes back to early days as judges were required to face the consequences of the logic of *Bernasconi*.

131 In *Lamshed v Lake*¹⁸⁶, Dixon CJ insisted that s 122 must be read within the entire constitutional document. He remarked that he had always found it hard to see why s 122 should be disjoined from the rest of the Constitution. On the contrary, he suggested, the Constitution must be read as a coherent instrument for the government of the Australian federation and not as two Constitutions - one for the federation and the other for its territories. To similar effect was his opinion in *Australian National Airways Pty Ltd v The Commonwealth*¹⁸⁷. In *Spratt*¹⁸⁸, Windeyer J also believed that the Constitution should be read as a whole for a nation and its people, the Commonwealth of Australia. Even Barwick CJ in *Spratt* accepted that it was an error to "compartmentalise" the Constitution merely because "for drafting convenience" the document had been divided into chapters. Occasional assistance could be derived from the division and structure of the instrument. But such considerations could not justify disjoining one part from the rest of the Constitution¹⁸⁹. More recent remarks by other members of this Court are along the same lines¹⁹⁰.

132 Once disjoinder of the kind espoused in *Bernasconi* is abandoned as impossible to sustain in the Australian constitutional context and an interrelationship between Ch III and s 122 is contemplated, the only firm basis for

186 (1958) 99 CLR 132 at 145; cf Zines et al, *Sawyer's Australian Constitutional Cases*, 4th ed (1982) at 688-689; Nicholson, "The Concept of 'One Australia' in Constitutional Law and the Place of Territories", (1997) 25 *Federal Law Review* 281.

187 (1945) 71 CLR 29 at 85.

188 (1965) 114 CLR 226 at 278.

189 (1965) 114 CLR 226 at 246.

190 See eg *Capital Duplicators* (1992) 177 CLR 248 at 273; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 566-568 per Gaudron J, 593-613 per Gummow J, 642-661 of my own reasons.

expressing the new relationship between the Chapter and the section lies in an analysis of the language of the provisions of Ch III and a full understanding of the purposes which those provisions were designed to achieve. Complete disjoinder, to the extent that it was implied in *Bernasconi* and expressed by the Privy Council in the *Boilermakers' Case*, should be overruled. This conclusion requires a re-expression of the interaction between the several provisions. The absence of the words "subject to this Constitution" in s 122 (as they appear in ss 51 and 52) is immaterial¹⁹¹. The section would, in any case, have to be read in that way. The constitution must be viewed as a unity. Disjoinder is incompatible both with its language and purpose¹⁹².

The textual requirements of Ch III

133 When the language of the provisions in Ch III is examined and their purposes considered, there are numerous indications, express and implied, that the judiciary of each Territory must be created in a way that conforms to that Chapter and, hence, that, *prima facie*, Territory courts must be "federal courts" as the Chapter provides.

134 First, Ch III is apparently dealing with the entirety of the judicial arrangements of the Australian nation. On its face, the Chapter provides for all the judicial arrangements made by the Commonwealth including with respect to the Territories. Why "the judicial power of the Commonwealth" in respect of the Territories should be regarded as entirely disjoined or divorced from that provided for in s 71 of the Constitution is completely unexplained. As provided in that section, the judicial power is to be vested only in the three categories of courts mentioned - this Court, federal courts created by the Parliament and other courts invested with federal jurisdiction. The last includes a reference to the investing of State courts with federal jurisdiction, the novel invention of the Australian Constitution¹⁹³. If "federal" in s 71, as an adjective qualifying "courts", means no more than a court created by the Parliament (an expression used in s 72), it might be suggested that the word is redundant in s 71. But this is not so if the reference to "other courts" in that section is taken to refer to the State courts invested with federal jurisdiction under s 77(iii). Then an entirely logical national hierarchy of courts emerges. It is made up of this Court, federal courts, State Supreme Courts and any other courts invested with federal jurisdiction.

191 *Newcrest* (1997) 190 CLR 513 at 653.

192 cf Hopper, "Territories and Commonwealth Places: The Constitutional Position", (1999) 73 *Australian Law Journal* 181 at 210-211.

193 Constitution, s 77(iii).

135 It is unnecessary for the Constitution to provide expressly for appointments to, tenure and remuneration in, and removal from, office as a State judge. Such matters were at federation, and still are, provided for in the State Constitutions saved by s 106 of the Australian Constitution and other State laws. But it is necessary to provide, as s 72 does, for such terms of appointment, tenure, remuneration and removal in the case of Justices of the High Court and of courts created by the Federal Parliament. A court is no less "federal" nor any less a "court created by the Parliament", if it is a court for a Territory established by an Act of the Federal Parliament¹⁹⁴, as the Supreme Court of the ACT unarguably was in 1933, and continued to be, until the Transfer Act and possibly thereafter. Accordingly, simply in terms of the language of s 72, unless Territory courts are indeed disjoined as "non-federal", the requirements of the Constitution are irresistible. Any judge of such a court (in the Constitution called Justices) created by the Parliament, must be appointed as s 72 requires, ie by the Governor-General in Council and (since the constitutional amendment in 1977) for a term lasting to the minimum age as specified by law.

136 Secondly, there is a clear indication in the terms of s 73 that this is the scheme of the Constitution. That section provides for the appellate jurisdiction of this Court. The manifest objective of that section is to uphold the appellate superintendence of this Court over all Australian courts, federal and State¹⁹⁵. That objective is clearly stated in the text of s 73. This limits the exceptions and regulations which would prevent this Court from hearing and determining appeals from a Supreme Court of a State, such as would, in 1901, have lain from such courts to the Privy Council. In s 74, there is also the indication of this Court's particular functions in constitutional matters. In s 77 reference is made to the power of the Parliament to define the jurisdiction of any federal court other than this Court and the extent to which such jurisdiction should be exclusive of that which belongs to or is invested in the courts of the States. To contemplate the possibility that Territory courts, obviously essential for the government of a Territory however small, would be beyond the constitutionally guaranteed superintendence of this Court is completely unacceptable. Even if it were tolerable to those who looked at the Constitution in earlier decades, it is completely intolerable today. In particular, it could not be the purpose of the Constitution with respect to the judiciary of Territories such as the ACT and the Northern Territory, with significant populations of electors of the Commonwealth, well established court systems and a high measure of self-government.

194 *Gould v Brown* (1998) 193 CLR 346 at 402-403 per Gaudron J; cf *Northern Territory v GPAO* (1999) 73 ALJR 470 at 493, par [126] per Gaudron J; 161 ALR 318 at 350; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 174-176 per Gummow J.

195 And over the Inter-State Commission (s 73(iii)), reference to which appears to be a dead letter.

137 The offence of contemplating the abandonment of those courts, and more particularly of the litigants within them, at the doorstep of the integrated judicial system of the Commonwealth of Australia, which comes together in this Court as s 73 of the Constitution provides, is not made more acceptable by the existence of legislation which permits appeals from Territory courts. Such legislation could be repealed or circumscribed to an intolerable extent. Yet on the theory accepted by the past authority of this Court, supported by the second respondent and the interveners, there is nothing whatever in the Constitution to prevent the deletion of the courts of the Territories, and all of them, from a constitutionally protected right of appeal to this Court. The conceded operation of s 75(v) of the Constitution within the Territories is of small comfort. Such writs lie only against officers of the Commonwealth. They leave untouched most cases, civil or criminal, as the facts of this case illustrate. Their scope, however important, is circumscribed. The relief which they provide is limited.

138 Unlike the Territories external to Australia, the two mainland Territories were constituted from lands within or belonging to States at the time of federation: the ACT from the State of New South Wales, as s 125 contemplated; the Northern Territory from the Northern Territory of South Australia, as s 6 of the *Commonwealth of Australia Constitution Act 1900* (Imp) contemplated¹⁹⁶. At federation, the persons in what later became those two Territories had established rights of appeal to this Court from the judgments of the Supreme Courts of New South Wales and South Australia. It is most unlikely that the Constitution's purpose was to deprive them of such important rights. In so far as the Constitution divests them of rights to elect members of both Houses of Parliament, at least until the Parliament allowed them representation, the Constitution provides a further reason for a construction of Ch III which would uphold for them the protections of the rule of law. This is what s 73 ensures throughout Australia, for all States and Territories: big and small, mainland and island, populous and sparsely inhabited. The section should be construed with that purpose in mind and to avoid alternative, offensive possibilities¹⁹⁷. The provision of self-government to some of the Territories cannot alter this. That provision is itself made under federal law. There is no express reference to it in the Constitution. A Territory remains for constitutional purposes a s 122 Territory. No legislative enactment can alter that constitutional fact.

196 63 & 64 Vict c 12 s 6; cf *Capital Duplicators* (1992) 177 CLR 248 at 279-286; *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1453, 1462-1463; 156 ALR 721 at 738, 751.

197 *Capital Duplicators* (1992) 177 CLR 248 at 286; cf *Spratt* (1965) 114 CLR 226 at 277 per Windeyer J; *Attorney-General (NSW) v Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527 at 533.

139 The alteration of s 128 of the Constitution in 1977 to include the electors resident in the Territories within the constitutional alteration provisions recognises and reinforces their part in the federal Commonwealth. It renders absurd the suggestion that the Territories within which they live are somehow outside the Australian "federal" system and the courts of the Territories disjoined from other federal courts and from a *constitutional* relationship with this Court. If the constitutional realities of Australia's relationship with the United Kingdom can be acknowledged¹⁹⁸ in face of textual difficulties, is it so difficult to accept the constitutional realities of Australia's internal arrangements for the States and Territories which together make up the Commonwealth?

140 The contrary arguments which have found favour in the past, including with some Justices although in dissent in the recent past¹⁹⁹, are affected, in my respectful view, by an erroneous assumption that the meaning of the Constitution is governed by what the framers would have held it to mean. I fundamentally disagree. This is not the case. Today, it is necessary to reconsider the constitutional text in a context inescapably affected by the development of the internal Territories, their full inclusion in the representative democracy of the Commonwealth of Australia²⁰⁰ and their full participation in Australia's national life. Viewed in this light, the notion that it would be constitutionally possible to cut them out of the integrated appellate judicial arrangements of the Commonwealth is so obviously incompatible with the text and purpose of the Constitution that a construction of Ch III which could have that result must be rejected in favour of one which prevents it from happening.

141 Thirdly, the decision of this Court in *Re Wakim*²⁰¹, overruling *Gould v Brown*²⁰², rests upon the fundamental premise that it is not possible for the Federal Parliament (or any other legislature within the Commonwealth) to enlarge the original jurisdiction of this Court or of a federal court beyond the matters expressly

198 *Sue v Hill* (1999) 73 ALJR 1016 at 1028, 1049; 163 ALR 648 at 665, 693-694.

199 *Northern Territory v GPAO* (1999) 73 ALJR 470 at 500-501 per McHugh and Callinan JJ; 161 ALR 318 at 360-361.

200 *Constitution Alteration (Referendums)* 1977 (No 84 of 1977); cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 246 per McHugh J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *Newcrest* (1997) 190 CLR 513 at 653.

201 (1999) 73 ALJR 839; 163 ALR 270.

202 *Gould v Brown* (1998) 193 CLR 346.

provided in ss 75, 76, 77 and 78 of the Australian Constitution²⁰³. Accepting that premise, it cannot logically be open to the Federal Parliament (still less to any other legislature within the Commonwealth, including a State or Territory legislature) to expand the appellate jurisdiction of this Court beyond the appeals expressly provided for in s 73. If the principle operates upon provisions in one part of Ch III, it must surely operate throughout the Chapter. Different views have been stated in the past about that principle²⁰⁴. But it must now be taken as settled for the purposes of the present proceedings by *Re Wakim*. Yet on the theory of the second respondent and the interveners, a Territory court is neither a "federal court" nor a State court. Unless in the particular case it is "a court exercising federal jurisdiction", there is no constitutionally guaranteed appeal from the judgments of a Territory court to this Court. Thus, on the face of things, a Territory court, exercising purely territorial jurisdiction (if that be assumed) would give rise to no judgment which could be the subject of an appeal to this Court or any other federal court, including the Federal Court of Australia. If, on the other hand, every part of the jurisdiction of the Territory court is deemed "federal jurisdiction" a question immediately arises. If the "jurisdiction" is "federal" for the purposes of s 73(ii) why is the "court" not "federal" for the purposes of s 73(ii)?

142 The only way that these illogical and foolish results can be avoided is to view the appeals provided for from courts enumerated in s 73(ii) as an exhaustive list of the courts within the applicable Australian court hierarchy including, once established, a Supreme Court of a Territory. As this is the construction which the purpose of s 73 seems to advance and as it preserves to the people of the Commonwealth, wherever they reside, including in the Territories, the fundamental constitutional protection of the rule of law, it is the construction which I favour.

143 Fourthly, this view of the meaning of "federal court" in s 73 is in no way diminished when regard is had to the subject matters of jurisdiction upon which the Parliament may make laws defining the jurisdiction of any federal court. Thus, issues may arise, and often do, in the Territories with respect to all of the matters mentioned in ss 75 and 76²⁰⁵. So far as the general jurisdiction of Territory courts

203 Applying *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

204 *Gould v Brown* (1998) 193 CLR 346 at 379-385 per Brennan CJ and Toohey J, 491-496 my own reasons; *Re Wakim* (1999) 73 ALJR 839 at 884-888; 163 ALR 270 at 333-337.

205 A recent case involving a decision in Admiralty jurisdiction exercised in the Northern Territory is *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181.

as federal courts is concerned, it will arise "under" laws made by the Parliament in reliance upon s 122 (and in exceptional cases s 52(i)). Only this view reconciles the integration of ss 122 and 125 with Ch III in a way conformable with the text of those sections. Each of them refers to the Commonwealth and States. They are exactly the same polities referred to in the provisions of Ch III. The notion that they are somehow divorced from each other is contradicted by the text. The unnecessary disjoinder between them should be ended. They should, at last, be reconciled.

Creation of the Territory court

144 The second respondent (supported by the interveners) submitted that, whatever might have been the position of the Supreme Court of the ACT as a "federal court" within s 72 of the Constitution prior to 1992, after the Transfer Act, and consequential amendments to the Self-Government Act, it was thereafter a Territory court created by the Territory legislature. Upon this argument, it no longer had to comply with the requirements of Ch III. It was in a situation more akin to that of a State Supreme Court. This submission called in aid the observations of this Court in *Capital Duplicators*²⁰⁶ describing the "new legislative power" of the Assembly as separate and distinct from the exercise of the legislative power of the Federal Parliament²⁰⁷. Thus, "[t]he Legislative Assembly of the Australian Capital Territory has been erected to exercise not the Parliament's powers but its own"²⁰⁸ including (it was submitted) a power to create a separate Territory court.

145 I entirely agree that the legislative power conferred by the Self-Government Act in respect of the ACT is most ample²⁰⁹. It could not be described as plenary given the entrenchment by the Parliament of certain limitations upon the power²¹⁰, the reservation of a general power to the Governor-General to disallow enactments of the Territory legislature²¹¹, the continuing functions of the Governor-General in

206 (1992) 177 CLR 248.

207 (1992) 177 CLR 248 at 263-264 per Mason CJ, Dawson and McHugh JJ, 281-282 per Brennan, Deane and Toohey JJ, 284 per Gaudron J.

208 (1992) 177 CLR 248 at 282.

209 cf *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279.

210 Self-Government Act, s 34; cf *Northern Territory v GPAO* (1999) 73 ALJR 470 at 480; 161 ALR 232 at 247.

211 Self-Government Act, s 35.

the Territory²¹² notwithstanding its new status²¹³ and the power of the Federal Parliament (occasionally exercised) to override any law operating in a Territory²¹⁴. Moreover, because the grant of legislative power to the Territory Assembly is made under s 122 of the Constitution, it cannot enlarge the power which it is within the province of the Federal Parliament to grant. Thus it cannot override the requirements of Ch III. These requirements continue to govern the courts of the Territory, whichever legislature actually calls those courts into existence.

146 The applicant argued that, notwithstanding the Transfer Act and the legislative fiction which it worked in conjunction with the Self-Government Act to convert the Act of the Parliament of 1933 into an enactment of the ACT legislature, the Supreme Court of the ACT remained a court "created by the Parliament"²¹⁵. The federal Act creating it has never been repealed. The old Court was never abolished. All that the Self-Government Act and the Transfer Act did was to assign future responsibility for the extant Court. This was done by virtue of, and under, federal legislation.

147 I accept this argument. It is therefore unnecessary for me to consider the applicant's alternative submission. This was that, in the context of the Constitution, the expression "as the Parliament creates"²¹⁶ and "created by the Parliament"²¹⁷ includes all courts which ultimately derive their legislative authority from the Federal Parliament. There is some support for this notion in Dixon CJ's opinion that, in such matters, the Parliament may act "mediately or immediately"²¹⁸. The better view, in the case of the Supreme Court of the ACT, is that the Federal Parliament acted "immediately" to create the Court in 1933 and has done nothing since to abolish its creation.

212 Self-Government Act, s 72 (Royal prerogative of mercy) and s 74 (regulation-making power).

213 Self-Government Act, s 7: "The Australian Capital Territory is established as a body politic under the Crown by the name of the Australian Capital Territory."

214 See eg *Euthanasia Laws Act* 1997 (Cth); cf *Northern Territory v GPAO* (1999) 73 ALJR 470 at 480; 161 ALR 318 at 331; cf Hopper, "Territories and Commonwealth Places: The Constitutional Position", (1999) 73 *Australian Law Journal* 181 at 203.

215 Constitution, s 72.

216 Constitution, s 71.

217 Constitution, s 72.

218 *Lamshed v Lake* (1958) 99 CLR 132 at 142.

148 This conclusion has the practical advantage of confirming the constitutional validity of the Court. It confines attention to the validity of the appointments to the Court, so created, of judges not appointed by the Governor-General in Council nor for the term provided by s 72 of the Constitution. To the complaint that this opinion robs those elected to the Assembly to represent the people of the ACT, of the ultimate say in the choice and removal of judges of the courts of the territory, there are several answers. No other construction of the constitutional text defends the participation of those courts in the constitutionally guaranteed and integrated judicial system of Australia for which s 73 provides. The protection of all appointees to judicial office under the Commonwealth is a matter upon which the Constitution has spoken. It is an important matter. No devolution of self-government by federal law, however otherwise extensive, can derogate from it for the simple reason that legislative self-government may not breach express constitutional requirements. In practice, it could be assumed that conventions would develop by which the Governor-General in Council would take closely into account the advice of the Executive of the ACT, just as would be done in respect of other functions assigned to the Governor-General by the Self-Government Act. Although many, perhaps most, legislative matters concerning the courts and the judiciary of the ACT may be regulated by enactments of the Territory Assembly, the central constitutional guarantees in s 72 of the Australian Constitution must be observed. These are not matters which the Federal Parliament can devolve to a Territory legislature. They reside in the Constitution itself.

Past authority should be overruled

149 In the past, several Justices of this Court have expressed their disquiet about the state of authority concerning the relationship between s 122 and Ch III of the Constitution. Usually, they have contented themselves with dissociation from the "sweeping generalisation"²¹⁹ of Griffith CJ in *Bernasconi*. However, they have declined a more radical review of the Court's authority out of an apparent concern for the disruption that this might cause²²⁰. Instead, they have preferred to embrace the illogicalities of the Court's holdings as a "workable anomaly"²²¹. In this application neither the parties nor the interveners sought to defend the total disjoinder of Ch III from the Territories. Essentially, whilst offering defences of some of the opinions of the past, they rested their resistance to overruling on the basis that it would destroy the continuity of constitutional doctrine, disrupt the reliance on unanimous opinions of the Court which have stood for at least thirty years and occasion great uncertainty and inconvenience in respect of judicial

219 *Spratt* (1965) 114 CLR 226 at 275 per Windeyer J.

220 *Spratt* (1965) 114 CLR 226 at 257 per Kitto J.

221 *Spratt* (1965) 114 CLR 226 at 277 per Windeyer J.

orders made by Territory judges, of which the conviction and sentence of the applicant was but one vivid illustration²²².

150 I accept the force of these submissions. I respect the opinions of those who have gone before who have considered that, whatever the difficulties, the Court should not contemplate departure from past holdings²²³. Because of the status of the Supreme Court of the ACT as a court created by the Parliament, the problem presented for the orders of that Court would appear to be confined, in the view which I take, to orders made by that Court since 1992 by three acting judges and one permanent judge, not appointed as s 72 of the Constitution requires. The orders of other Territory courts would be affected. The status of the Supreme Court of the Northern Territory is said to be different from that of the Supreme Court of the ACT. Acting judges have been a feature of that Territory for most of this century. It is necessary to face up to these serious consequences just as it was when the Court approached its decision in *Re Wakim*. Ameliorative steps could doubtless be taken to overcome some of the difficulties²²⁴. It would be inappropriate, in the circumstances, for me to explore these. But I do not doubt that the consequences of responding to the applicant's request that the Court should overrule *Spratt* and *Falconer* would be substantial. They demand an attitude of modesty about one's opinions and caution in giving effect to them.

151 It will usually be inferred that the Constitution is intended to operate without undue inconvenience to the people who are governed by it²²⁵. Disturbing past authority of this Court usually causes inconvenience. But that inconvenience would result not from the Constitution itself but from a seriously mistaken interpretation which has endured, in part at least, because of a concern about the disruption which correction would cause. The logic of adhering forever to an erroneous construction of the Constitution on that ground would require that future generations always close their eyes, even to important mistakes of construction which they perceive, because their predecessors either did not see them or saw matters in a different light, being conditioned by different experiences and circumstances. Although *Spratt* and *Falconer* are unanimous opinions of this Court, they rest, ultimately, on the shaky foundation of *Bernasconi*, variously expressed and undermined by the many misgivings stated in this Court since it was

222 See comment of Hopper, "Territories and Commonwealth Places: The Constitutional Position", (1999) 73 *Australian Law Journal* 181 at 210.

223 *Spratt* (1965) 114 CLR 226 at 257 per Kitto J.

224 cf *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243-244 per Stephen J, 248 per Mason J.

225 *Abebe v The Commonwealth* (1999) 73 ALJR 584 at 595 per Gleeson CJ and McHugh J, 624-625 my own reasons; 162 ALR 1 at 15, 55; *Re Wakim* (1999) 73 ALJR 839 at 878; 163 ALR 270 at 324.

decided. So illogical is present authority – and so potentially serious in disjoining territory courts from a constitutionally protected relationship with the integrated Australian judiciary – that in my view this Court should approach the matter as one of principle rather than authority²²⁶.

152 From time to time, this Court has felt obliged to depart from past authority, despite the great importance of old doctrines²²⁷, despite the consequence of abolishing, in one case, what for fifty years had been considered a federal court²²⁸; despite the overthrow of doctrine which many judges had laboured to refine²²⁹; despite extremely significant legal, economic, political and other consequences which flow from the decision²³⁰; and despite the acknowledged utility of the legislation declared invalid²³¹. This is such a case.

153 Those opposing that course appealed to the fact that s 72 of the Constitution had been taken to the Australian electorate in 1977 after the decisions in *Spratt* and *Falconer*. It was submitted that the amendments then adopted amounted to an endorsement by the electors of the view of Territory courts which this Court had taken in those decisions. This argument has no merit whatever. The analogous fiction has long been discarded in the context of ordinary legislation²³². It carries even less persuasive force where the electors are involved in the lawmaking process. Their reasoning is completely unfathomable. If anything, the amendments of the Constitution, made in 1977, give rise to contrary implications. With the approval of the electors, s 72 was amended to remove the practical consideration which in *Spratt* clearly concerned the Court, viz if the Court of Petty Sessions of the ACT was a "federal court", its magistrate was a justice of such a court and was therefore entitled to life tenure under Ch III. Furthermore, as I have already suggested, the amendment of s 128 of the Constitution in 1977²³³ recognised steps which had been taken legislatively over previous decades to

226 cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 556.

227 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

228 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 (PC).

229 *Cole v Whitfield* (1988) 165 CLR 360 concerning s 92 of the Constitution.

230 *Ha v New South Wales* (1997) 189 CLR 465 concerning s 90 of the Constitution.

231 *Re Wakim* (1999) 73 ALJR 839; 163 ALR 270.

232 *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Flaherty v Girgis* (1987) 162 CLR 574 at 594; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329, 351.

233 *Constitution Alteration (Referendums)* 1977.

incorporate the electors of the Commonwealth resident in the internal Territories into the representative democracy of the nation. If any inferences spring from the 1977 referendums, they point away from the early notions that territories were in a state of "tutelage"²³⁴ to the Commonwealth. Now they are incorporated in its democracy. They participate in its referendums. And they cannot be denied the appellate right which s 73 protects and the judicial standards which s 72 requires.

- 154 The spectre of ghastly consequences is not infrequently paraded at the Bar table of this Court, doubtless in the hope that its appearance will "frighten" the Justices "into submission"²³⁵ so that they will leave demonstrated error alone. But judges of ultimate constitutional and appellate courts do not enjoy the luxury of escape from "apocalyptic scenarios about life after" the rejection of earlier doctrine shown by analysis to be insupportable²³⁶. In a society such as ours, the outcomes are rarely as dire as predicted. Usually the law sensibly aids the necessary repairs. To the extent that it is necessary, the applicant should have the leave he sought to re-argue past authority. *Spratt, Falconer* and, to the extent required, *Bernasconi*, should be overruled.

The de facto officers' doctrine is inapplicable

- 155 Neither the second respondent nor the Commonwealth nor counsel intervening for the ACT sought to argue that, if the foregoing conclusions were reached, the orders purportedly made by the Hon K J Carruthers could be sustained by the de facto officers' doctrine²³⁷. However, a submission for the Attorneys-General of South Australia and Western Australia referred the Court to recent decisions overseas²³⁸. It is therefore proper to make brief reference to the point.

234 *R v Bernasconi* (1915) 19 CLR 629 at 637-638 per Isaacs J.

235 *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 326 per Lord Lowry.

236 cf *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1174-1175 per Stevenson J.

237 *R v Cawthorne; Ex parte Public Service Association of SA* (1977) 17 SASR 321 at 331; *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 520; *Balmain Association Inc v Planning Administrator* (1991) 25 NSWLR 615 at 639-640; Dixon, "De Facto Officers" in *Jesting Pilate*, 2nd ed (1997), 229 at 236 (originally published (1938) 1 *Res Judicatae* 285); cf Campbell, "De Facto Officers", (1994) 2 *Australian Journal of Administrative Law* 5 at 7. See also Pannam, "Unconstitutional Statutes and De Facto Officers", (1966) 2 *Federal Law Review* 37.

238 Reference re Language Rights under the Manitoba Act 1870 (1985) 19 DLR (4th) 1; *Bilodeau v Attorney-General of Manitoba* (1986) 27 DLR (4th) 39.

- 156 In the United States, it has been held that the de facto officers' doctrine may not be invoked to preclude a challenge to a decision of a person who purported to act as a federal judge although not appointed in accordance with Art III of the

Constitution²³⁹. But in that country²⁴⁰ and in other countries of our legal tradition²⁴¹ a distinction has been drawn between the validity of the acts de facto of a person invalidly appointed to a valid office and the acts of a person appointed to an office which itself has no validity.

157 In the present case, the appointment of the Hon K J Carruthers was in the latter class. By the foregoing analysis, the Assembly was not competent to enact a provision creating the office of an acting judge of the Supreme Court²⁴². Accordingly, even assuming that the rules devised by the common law for the protection of the public against the great inconvenience of the later discovery of the invalidity of official acts could protect the acts of a person "appointed" as a "judge" otherwise than as s 72 of the Constitution requires, that question is not reached in this case. It is preferable (if not necessary) that an opinion on that point be withheld until it is necessary for decision. In my view, no comfort could be found for this case in the de facto officers' doctrine.

Conclusion and orders

158 To invalidate the orders of the Hon K J Carruthers convicting and sentencing the applicant, it is enough that it be shown that he acted in the exercise of an office of acting judge of the Supreme Court of the ACT which office was invalid as contrary to s 72 of the Australian Constitution. As the applicant's removal into New South Wales and present detention in that State depends for its validity on such orders and sentence, it necessarily follows that they are unlawful. Unless he is detained under some other law, pursuant to the order of a court validly made, the applicant must, in my opinion, be released.

159 At the hearing it was agreed that the name of the first respondent should be changed to substitute the name of the Governor of the custodial institution in which the applicant was held at the time of publication of the Court's decision. The record should be amended to delete the name of the first respondent as now appearing and to substitute the name or description of the applicant's present custodian. The rule

239 See eg *Glidden Co v Zdanok* 370 US 530 at 536 (1962); *United States v Woodley* 751 F 2d 1008 (1985); *Northern Pipeline Co v Marathon Pipe Line Co* 458 US 50 (1982); *Freytag v Commissioner of Inland Revenue* 501 US 868 at 879 (1991) and *Ryder v United States* 515 US 177 (1995).

240 cf *Buckley v Valeo* 424 US 1 (1976).

241 cf *In Re Aldridge* (1893) 15 NZLR 361 at 372-373.

242 As the *Supreme Court Act* 1933 (ACT), s 4A purported to do and as the commission issued to the Hon K J Carruthers purported to give effect.

nisi for the writ of habeas corpus should be made absolute with costs²⁴³. Unless otherwise lawfully detained, the applicant must be discharged immediately from custody without the issue of a writ of habeas corpus²⁴⁴.

243 cf *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 72.

244 cf *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 140.